THE

ONTARIO REPORTS,

VOLUME X.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO,

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

EDITOR:

JAMES F. SMITH, Q. C.

REPORTERS:

QUEEN'S BENCH DIVISION.....S. J. VANKOUGHNET.
CHANCERY DIVISION.....A. H. F. LEFROY, GEO. A. BOOMER,
COMMON PLEAS DIVISION.....GEORGE F. HARMAN,

BARRISTERS-AT-LAW.

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JUDGES

OF THE

HIGH COURT OF JUSTICE,

DURING THE PERIOD OF THESE REPORTS.

QUEEN'S BENCH DIVISION:

HON. ADAM WILSON, C. J.
" JOHN DOUGLAS ARMOUR, J.
" JOHN O'CONNOR, J.

CHANCERY DIVISION:

HON. JOHN ALEXANDER BOYD, C.
" WILLIAM PROUDFOOT, J.
" THOMAS FERGUSON, J.

COMMON PLEAS DIVISION:

HON. MATTHEW CROOKS CAMERON, C. J.
" THOMAS GALT, J.
" JOHN E. ROSE, J.

Attorney-General:

THE HON. OLIVER MOWAT.

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OF THE

CASES REPORTED IN THIS VOLUME.

A TABLE

OF THE

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ERRATA.

Page 1, headnote, for *Sibert* v. *Gonard*, read *Gibert* v. *Gonard*.
" 84, line 3 from bottom, for "principle" read "principal."
" 473, line 23, for "original" read "reciprocal."
" " " 28, for "thereupon" read "therefore."
" 521, headnote, line 8 should read "out of his trust."
" 745, first line of headnote, for "disputed" read "undisputed."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

JACK v. JACK.

MORGAN'S CASE.

Debtor and creditor—Following moneys fraudulently obtained—Mortgagor and mortgagee—Mortgage to secure note—Innocent receiver of moneys fraudulently obtained—Payment of mortgage out of moneys fraudulently obtained by a third party.

W. J., a cattle dealer, gave a mortgage to D. J. to secure him against liability on a certain promissory note. Subsequently by falsely representing to M. that he had purchased certain sheep for him, W. J. obtained from M. $4,000. W. J. sent to D. J. $1,000 of this money to meet the note, D. J. being ignorant of the source from which it came. D. J. paid the note to the bank where it was under discount, and it was given up to him. Afterwards M. becoming aware of the fraud, and that D. J. had received $1,000 of the money, sued D. J. to recover the same, and the action was compromised by D. J. paying to M. $750, M. giving D. J. a bond conditioned to repay the same if D. J. failed to recover it in proceedings on the mortgage.

D. J. accordingly now brought this action on the mortgage for payment or foreclosure against W. J. Certain execution creditors of W. J. intervening by petition and claiming that nothing remained due on the mortgage, and M. also intervening by petition and claiming that he was entitled to the benefit of the mortgage to the amount of $750 and interest:

Held that as against D. J. and the mortgaged land the note must be considered satisfied, and therefore the mortgage had been discharged so as to give priority to the execution creditors.

There was no theft of the money. It was given to W. J. with intent to change the possession and the property so far as M. was concerned. The relation which arose between W. J. and M. was not higher than that of debtor and creditor. So long as the money remained with W. J. unapplied it might have been traced and recalled, but when it passed from his hands to those of D. J. who received it for value and without notice of any fraud, all claim or equity of M. to follow the money ceased.

Sibert v. *Gonard*, 33 W. R. 302, distinguished.

THIS was a petition presented by one Edward Baker Morgan, in a certain suit of David Jack against William Jack, defendant by original writ, and John Irvine and Samuel Irwin, made parties in the Master's office.

The circumstances under which the petition came to be presented fully appeared from the allegations contained in it, which were briefly as follows:

That the defendant, William Jack, procured the plaintiff, David Jack, to endorse a promissory note for him for the sum of $1000, which note was dated the 3rd day of May, 1883, payable three months after date, and which note was discounted by the said William Jack in the Dominion Bank at Lindsay: that in order to secure the payment of the said note and thereby indemnify the plaintiff against loss on account of his endorsation, the defendant, William Jack, executed to the plaintiff a certain mortgage on real estate, for the forclosure of which this action was instituted: that the proviso in the said mortgage was as follows: "Provided this mortgage to be void on payment by the said mortgagor of the said promissory note or any renewals of the same and saving harmless the said mortgagee from all loss, costs, charges, damages, or expenses in respect to the said note or renewals, and shall pay, or cause to be paid, the said promissory note so as aforesaid endorsed by the said mortgagee; and shall pay, or cause to be paid, all and every other note or notes which may hereafter be endorsed by the said mortgagee for the accommodation of the said mortgagor by way of renewal of the said note and all interest in respect thereof or otherwise, then these pre-

sents shall cease and be utterly void:" (a) that after the making of the said note and mortgage and while the said note was under discount, namely on or about the 3rd day of July, 1883, the defendant William Jack, by falsely and fraudulently representing to the petitioner that he had bought for him certain car loads of sheep, induced him to give him (William Jack) the sum of $4000, which sum the petitioner gave to him, relying upon the said false and fraudulent representations: that the said representations were false and fraudulent to the knowledge of the said William Jack, and were made by him for the purpose of obtaining the said money from the petitioner, with the intention of applying the same to his own use and absconding therewith: that shortly after obtaining the said money the said William Jack absconded from Ontario and went to Chicago, in the United States of America, where he then was, taking with him a considerable portion of said money, but before leaving he handed to the plaintiff, David Jack, who was his brother, the sum of $1000, part of the petitioner's money, and requested the plaintiff to use the same for the purpose of taking up the note above mentioned

(a) This mortgage, so far as it need be set out here, ran as follows:

"This Indenture, made in duplicate the 20th day of November, 1882, in pursuance of the Act respecting short forms of mortgages, between William Jack, of &c., cattle dealer, hereinafter called the mortgagor, of the first part; Martha Jack, his wife, of the second part; and David Jack, of &c., hereinafter called the mortgagor, of the third part. Whereas the mortgagee has endorsed the promissory note of the said mortgagor for the sum of $1000 of lawful money of Canada; and whereas the said mortgagor has agreed to execute these presents for the purpose of indemnifying and saving harmless the mortgagee from the payment of the said promissory note, or any part thereof, or any note or notes hereafter to be endorsed by the said mortgagee for the accommodation of the said mortgagor by way of renewal of the said recited note, or any interest to accrue thereunder or otherwise howsoever, Witnesseth that in consideration of the premises and of the sum of one dollar of lawful money of Canada, now paid by the said mortgagee to the said mortgagor (the receipt whereof is hereby acknowledged), the said mortgagor doth grant and mortgage unto the said mortgagee, his heirs and assigns forever, all and singular those certain parcels or tracts of land and premises" [describing them; then followed the proviso for redemption as above set out, and the usual statutory covenants].

when the same became due: that when the note became due the plaintiff used the money for the purpose of taking up the note and paid the same to the bank, and received from the bank the said note: that the petitioner, having learnt that the money received by the plaintiff from the said defendant, William Jack, was his money, brought an action against the plaintiff herein to recover back the money, but the said action was compromised before the trial upon the terms that the plaintiff should pay or secure to the petitioner the sum of $750, upon the understanding that the plaintiff should take proceedings to foreclose or realize upon the mortgage in question in this suit, and that the said sum of $750 should be returned to the plaintiff by the petitioner in case the plaintiff was unsuccessful in foreclosing or realizing upon the said mortgage: that the petitioner gave to the plaintiff a bond for the return of the said sum upon the terms above mentioned: that the petitioner was the substantial and beneficial plaintiff in this action: that the defendants John Irvine and Samuel Irwin were judgment creditors of the defendant William Jack, and were made parties to this suit in the Master's office, they having issued executions against the lands of the said defendant William Jack, and placed the same in the hands of the sheriff of the county in which the lands mentioned in the said mortgage were situate: that the usual foreclosure judgment with a reference to the Master at Whitby was entered in this action, on April 30th, 1884, and after having been made parties in the Master's office, the said John Irvine and Samuel Irwin presented a petition to this Court praying that it might be declared and adjudged that there was nothing due to the plaintiff on his mortgage, on the ground, in effect, that the mortgage was given only to indemnify the plaintiff against his liability as indorser of the note above referred to, and that the said liability had been discharged by the payment of the said note: that on September 3rd, 1884, an order was made by this Court declaring that the said defendants John Irvine and Samuel Irwin were entitled, on the reference in the Master's office,

to inquire into the state of accounts between the plaintiff and the defendant William Jack, and to give evidence that the said mortgage was fully paid and satisfied: that upon the reference before the said Master the said defendants John Irvine and Samuel Irwin contended that nothing was due upon the said mortgage on account of the payment of the said note, but the Master, by his certificate, dated the 24th day of October, 1884, certified that for the reasons and upon the findings set out in his written judgment, he found that there was due to the plaintiff upon his mortgage the sum of $750 and interest from the 22nd day of March, 1884: that in his written judgment the said Master found that the money with which the said note was taken up was the money of your petitioner Morgan, and he assumed that your said petitioner was the beneficial plaintiff in this action, and that the plaintiff David Jack was a trustee for your petitioner Morgan: (*b*) that an appeal

(*b*) The following was the judgment of the Local Master at Whitby, Mr. Geo. H. Dartnell.

I have carefully considered the evidence in this matter and the arguments of counsel, and have examined the cases cited by them as well as several cases not quoted to me.

Mr. Watson's† argument against the plaintiff's right to recover may be classed under three heads:

1st. There was an absolute sale by W. Jack to Morgan, that the money paid by Morgan to Jack became the property of Jack and so being his money which paid the note in the Dominion Bank, the plaintiff's mortgage is discharged.

2nd. That even if the moneys were Morgan's and impressed with a trust that the property in question is not sufficiently "ear-marked" so that it can be followed and made available for Morgan's benefit.

3rd. That in any case the note being paid and W. Jack relieved from any liability on it the object for which the mortgage was given is accomplished and any lien on the property is gone.

As to the first point, W. Jack either stole Morgan's money or obtained it by false pretences or fraudulently misappropriated it in breach of trust.

I cannot find on the evidence that there was a purchase and sale so that the property in this money passed to W. Jack.

In the two first instances no title in the money would pass from him even to persons innocent of how he obtained it, and in the third it is clear law that so long as the proceeds can be traced, the original trust is im-

† Mr. Watson appeared as counsel for the execution creditors.

having been taken from the said certificate by the defendants John Irvine and Samuel Irwin, upon the said appeal being heard before Boyd, C., the latter gave judgment

pressed upon all funds or property acquired therewith, and even where the original funds or property become mixed with others; and this doctrine of equity ceases to be applicable when it becomes impossible further to trace the funds.

In this view it may be that Morgan could follow the $1,000 in the hands of the Dominion Bank.

I am constrained to find that the note was paid off with Morgan's funds in breach of trust at the very least. I cannot find that D. Jack knew that the funds were Morgan's, nor do I think that it affects the principle. The effect of the payment of the note was to relieve W. Jack's property of the incubus of a $1,000 mortgage. What is the difference between this and a purchase by W. Jack of this property with the trust funds? None as I think, and the property becomes impressed with the trust. The contestants are W. Jack's execution creditors, and their rights are no higher than his. He is anxious to repair as far as he can the wrong he has done to Morgan and could have conveyed to him the property in question but for the execution held by the contestants. Have they any higher equities than Morgan or D. Jack? Is it just or equitable that this property should become available for them because W. Jack makes it so available by using stolen money for that purpose?

Morgan had pursued his money in D. Jack's hands, and the latter in good faith compromised the action. If D. Jack was liable to Morgan (and I think that the authorities shew that he was) then I think he has a right to hold this mortgage as an indemnity; on the other hand, if Morgan is the one entitled then he is a beneficial plaintiff and D. Jack is a trustee for him.

I express no opinion as to whether the important questions raised before me are properly raised in the present form of action. Perhaps Morgan should be a party. Beyond a doubt he is under the facts a beneficial plaintiff, liable to repay to D. Jack the moneys received from him. As at present advised, I think I shall simply report that there is due to the plaintiff the sum of $750 and interest from the date of the settlement in *Morgan* v. *Jack*. I may report that he is a trustee for Morgan, but I see no use in reporting any special circumstances. The suit is a mortgage suit only, and there is no further directions. The opinion of the Court can only be obtained by appeal from my report. These views may be modified in this regard when we come to settle the form of my report. It seems to me that the plaintiff having used Morgan's funds to relieve himself from his liability to the Dominion Bank that the former is entitled to be subrogated to his position.

See *Culhane* v. *Stewart*, 6 O. R. 97, and the cases there cited, particularly *Taylor* v. *Plummer*, 3 M. & S. 562; *Harris* v. *Truman*, L. R. 7 Q. B. D. 340, and 9 Q. B. D. 264; *Re Hallet*, L. R. 13 Ch. D. 696.

holding that this case had not been properly presented to the Master, and that he could not properly decide upon it under the reference before him, inasmuch as the petitioner Morgan's right as beneficial plaintiff to have the benefit of the mortgage security should be asserted upon proper pleadings, adapted to present his contention in the proper shape for adjudication: that the appeal was thereupon ordered by the Chancellor to stand over to allow such steps to be taken by way of petition in this action for the purpose of properly presenting your petitioner's contention in the premises: (*d*) and that this petition was presented pursuant to the leave so granted.

(*d*) The following was the judgment of the Chancellor referred to:

November 19th, 1884. BOYD, C.—Putting the transaction in the strongest way against the mortgagor and the execution creditors, when Morgan's money was applied to pay the note endorsed by the mortgagee and held by the bank, it was equivalent to a purchase of that note, to be held in trust for Morgan. I do not know what the form of the note is or whether there is yet a liability on it as against the mortgagee at the suit of Morgan. If there is any such liability, the condition of the mortgage has not been satisfied, and it would be to that extent an outstanding security in the hands of the plaintiff. If there is no such liability then there is nothing due upon the mortgage, and the execution creditors would come in as first in priority.

It may be (in another aspect of the case) as between the original holders (the bank) and the endorser (the mortgagee) that the note has been satisfied and discharged by the payment made, if so, the mortgage would be satisfied likewise. If Morgan has a right to follow his money and recover it from the bank, I do not know whether the bank could fall back upon the mortgagee for indemnity. If they could he would be entitled to the security of his mortgage. If they could not, the mortgage would be at an end. These questions it is impossible to determine upon the record as at present framed, and justice cannot be done in the premises without having these points ascertained. What, for example, is Morgan's attitude? Does he claim to be a purchaser of the note and to have it held in trust for him by the plaintiff, or does he claim that he can follow his money into the hands of the bank? *Primâ facie* the mortgage is satisfied, because the plaintiff has not been called upon to make good the note, and he has it, in fact, in his hands as taken up by the money he received from his brother, the source of which was unknown to him. The first thing for the plaintiff to prove on the present pleadings and reference is that all his liability on the note is not at an end, and I see no evidence on this point. The note itself is not even in evidence. In the Master's written reasons for judgment I perceive that he deals with

And the petitioner submitted, that inasmuch as the mortgage was given as security for the payment of the note, and as his money was used to take up the note the note was never discharged or satisfied, but he was entitled thereto, and to the benefit of the security in question in this suit which was given by the maker of the note to secure the payment thereof: that as the said moneys were used by the defendant William Jack to relieve his property from the charge of the mortgage, he, the petitioner, was entitled to follow the said moneys, and to claim the benefit of the mortgage: that inasmuch as the plaintiff repaid to him, the petitioner, the sum of $750 on the terms above mentioned, he, the petitioner, was entitled to have the plaintiff hold the mortgage for his benefit as a security for the said $750: and he therefore prayed that it might be declared that he was entitled to the benefit of the mortgage in question herein, to the extent of $750 and interest

the case as if the note was paid, though with Morgan's money, and he says the effect of the payment of the note was to relieve W. Jack's property of the mortgage. If so, the plaintiff (the mortgagee) cannot recover upon that mortgage, because his liability upon the note has ceased If Morgan seeks to have the benefit of that security, the right must be asserted not under the ordinary mortgage judgment but upon special pleadings adapted to present his controversy in proper shape for adjudication.

So far as Morgan's claim upon W. Jack is concerned, it is only of a debtor and creditor character, and it is not entitled to be preferred to the lien of the execution creditors upon Jack's land. These execution creditors take, of course, subject to the plaintiff's mortgage and to whatever is due thereon. Morgan may have an equity to stand in the shoes of the plaintiff, not on account of any application of the principle of following trust funds or ear-marked moneys, but rather through his right to be subrogated to the remedies of the mortgagee, that is to say he may have a right to get the benefit of the security given by the maker to the endorser to the extent to which that endorser is liable on the note: *Smith* v. *Fralick*, 5 Gr. 612. But the case in this aspect has not been properly presented to the Master, and he has not decided upon it, nor could he properly do so under the present reference. This appeal should stand over for a month to allow the plaintiff or Morgan to take such steps by way of petition in this action as they may be advised, and failing this the appeal should be allowed with costs. If a petition is filed all costs will be reserved.

as certified by the Master, and that the plaintiff was a trustee for him, and that he might have such further and other relief as the nature of the case might require.

The petition was heard on February 11th, 1885, before Boyd, C.

In accordance with the petition the evidence showed the facts, shortly stated, to be that W. Jack obtained from Morgan $4000 by a trick or fraud. He handed $1000 of it to David Jack, who was not aware of the fraud, and who received it for the purpose of taking up the note. Then W. Jack absconded. D. Jack took the money to the bank, and received back the note and kept it. Morgan followed W. Jack and ascertained about the $1000. He then brought action against D. Jack to recover the $1000, and it was compromised by payment of $750 to Morgan; and a bond was taken from Morgan that in case David Jack failed to recover the amount from the lands, it was to be repaid by Morgan.

Lash, Q.C., for the plaintiff and the petitioner Morgan. Morgan never ceased to be the real owner of the money. Property in it never passed out of him. Treating the case as one between Morgan and David and William Jack, the execution creditors have no higher rights than Morgan. The mortgage was taken to secure payment of the specific note. It was on trust as security for payment of the note. Morgan's money going to pay the note gave him the right to hold it, and to get the benefit of the security on the land: *Merchants Bank of Canada* v. *Hancock*, 6 O. R. 285; *Hamilton Provident and Loan Society* v. *Gilbert*, *ib.* 435; *The Merchants Express Co.* v. *Morton*, 15 Gr. 274; *Forristal* v. *McDonald*, 9 S. C. R. 12. The money was obtained by a false pretence, and it amounted to a crime. It was larceny under the statute, if not at Common Law. There was a false pretence of a fact, *i. e.*, that he had bought a quantity of sheep and wanted to pay for them.

On the subject of subrogation of a creditor, see *Brandt* on Suretyship, p. 380.

Watson, for the execution creditors. The case has not been carried beyond what was before your Lordship at the time of your former judgment. It was then held that the relation was one of debtor and creditor only. Morgan took no steps to follow the money into the hands of the bank. He sued D. Jack to recover the money, but made no claim to the note or the mortgage. He took D. Jack as his debtor, and so took the matter out of the hands of the Court. What there was in this case was just a payment in advance by Morgan to W. Jack for certain sheep. The property in the money, therefore, passed to W. Jack: *Culhane* v. *Stuart*, 6 O. R. 97. The recital in the mortgage shows it was to indemnify the mortgagee for payment of the note. The note is paid, and in effect the mortgage was discharged. David Jack is wholly released from the note, and has possession of it. See *Brandt* on Suretyship, p. 385, s. 285; *Constant* v. *Mattison*, 22 Ill. 546; *Havens* v. *Foudry*, 4 Met. (Ky.) 246; *Baylies* on Sureties, p. 370-1.

Lash, in reply. The condition and proviso in the mortgage goes beyond mere indemnity, and provides that the note should be paid. The plaintiff has in effect paid $750 on account of the note. The money was obtained from Morgan on statements which were false, not on any agreement.

March 4th, 1885. BOYD, C.—This matter comes before me again, Morgan having actively intervened, but no substantial change has been made in the aspect of the case and no new material facts have been introduced. It appears that the note is in the hands of David Jack, the plaintiff, and I must regard it as having been paid as against him and the land in question. The money wherewith it was paid was originally derived from the petitioner (Morgan), under such circumstances as probably would render W. Jack, the defendant who obtained it, liable criminally for false pretences. But there was no theft of

the money. It was given to the defendant with intent to change the possession and the property so far as Morgan was concerned. So long as the money remained with the defendant unapplied it might have been traced and recalled, but when it passed from his hands to those of the plaintiff, who received it for value and without notice of any fraud, it appears to me that all claim or equity of the petitioner to follow that money ceased. As I thought before so I still think, that the relationship between Morgan and W. Jack, *quoad* this money was then nothing more or higher than that of debtor and creditor. (See the language of Christian, L.J., cited in *Kirkpatrick* v. *Stephenson*, 3 O. R. at p. 368).

My conclusion is, that the note was paid by the transaction in evidence, and the mortgage discharged so as to give priority to the execution creditor. The appeal is allowed, with costs, and the petition will therefore be dismissed, with costs.

Since I wrote the foregoing Mr. Lash has handed in a reference to the case of *Gibert* v. *Gonard*, 33 W. R. 302, where money had been lent for a specific purpose and had not been so applied. It was held that so much of it as could be traced into the bank where it had been deposited by the bailee was recoverable from his trustee in bankruptcy. That case, though treated as one of novelty, is not dissimilar from that in our own Court of *Gamble* v. *Lee*, 25 Gr. 326, which I did not lose sight of in considering what my judgment should be in this case. Both are cases of an ear-marked fund remaining in the possession of the person who occupied a fiduciary or *quasi* fiduciary position with reference thereto, and which the plaintiff was allowed to pursue because the fund had not been applied as he had designated. But the applicability of these cases, as I think, ceases when the fund passes to another for value, and who takes, as here, without notice. It strikes me that the principle of law recognized now as well settled in *Moyce* v. *Newington*, 4 Q. B. D. 32, is applicable to this case rather than the principles referred

to in *Gibert* v. *Gonard*. Cockburn, C. J., says, in *Moyce* v. *Newington*: "Though a seller is induced to sell by the fraud of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet, till he does some act to avoid it, the property remains in the buyer, and if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller." That appears to be the relative position of the plaintiff and Morgan *quoad* this money. As between the defendant, Jack, and the plaintiff, the latter was not a volunteer in the receiving of this money. He took it for the purpose of paying the note on which he was liable and as to which the defendant was to indemnify him, and it was so applied. Even if paid directly by the defendant to the bank, the same doctrine would apply to prevent Morgan from following his money into the hands of the bank. They would be holders of that money without notice, having received it in payment of the promissory note in question. I cannot see my way to any other conclusion than that this note is paid, and, if so, the mortgage is satisfied. I have found the case to be a very puzzling one, and though Morgan is in every sense a meritorious claimant and should be helped if possible, I cannot see my way to do it at the expense of the execution creditors.

A. H. F. L.

This case has been carried to the Court of Appeal.

[CHANCERY DIVISION.]

FERGUSON V. WINSOR.

Rectifying deed—Mutual mistake—Parol evidence—Corroborative evidence—Parties—Registry law—Uncertified plan—R. S. O. ch. 111, sec. 82, subs. 2.

A. F. sen., in January, 1877, conveyed to A. F. jun. a part of lot 7, and A. F. jun., in 1879, conveyed the same to H. B. In October, 1877, A. F. sen. executed a deed purporting to convey to J. S. all lot 7, without excepting any portion, J. S. giving a mortgage back to secure the purchase money. In 1878 A. F. sen. died, having devised to M. F. all his lands not previously conveyed by him. In 1882 M. F. conveyed all lands so devised to him to the plaintiff. In April, 1881, J. S. failing to pay the mortgage debt, the executors of A. F. sen. sold the property comprised in the mortgage deed to T. G., and in 1884 T. G. conveyed the same to the defendant.

It appeared that in the original conveyance to J. S., and in all the subsequent transactions depending thereupon, without deceit or fraud on either side, but from accident and ignorance, there had been the same mutuality of mistake between the parties dealing with each other, not as to what piece of land was sold and purchased, nor as to what was intended to be conveyed, but in designating the land as the whole of lot 7 instead of only the part thereof intended to be conveyed and dealt with.

Held, that there should be a declaration that the defendant was entitled to that portion of lot 7 only which was intended to be conveyed and dealt with, and no more; and that the plaintiff was entitled to the residue of the said lot excepting that part conveyed to H. B.

Held, also, that it was not necessary or right that the executors of A. F. sen. should be parties to the action, which was brought for the rectification of the deeds to J. S. and the subsequent deeds depending thereon.

Held, also, that though a plan not certified as required by the registry law, R. S. O. ch. 111, sec. 82, subs. 2, had, although deposited in the registry office, no effect under the registry law, yet in a deed reference might be made to it, as it might to any other document in the registry office or elsewhere, for the description or designation of a lot.

Held, also, that the rule that the Court will not interfere to rectify an instrument upon parol evidence, on the ground of mutual mistake, when the defendant denies that there was such mutual mistake, only applies where the defendant so denying was a party to the instrument in question.

THIS was an action for the rectification of certain deeds under the circumstances mentioned in the judgment.

The action was tried at L'Orignal, on April 8th, 1885, before O'Connor, J.

W. Mosgrove, for the plaintiff.

O'Gara and *G. McLaurin*, for the defendant.

The arguments adduced and the authorities cited by counsel, sufficiently appear in the judgment.

July 13th, 1885. O'CONNOR, J.—In the year 1857, Amable Foubert, being seized in fee simple, and possessed of lot number one, in the first concession (old survey) of the township of Cumberland, in the county of Russell, subdivided and laid out a portion thereof as village lots. Only two rows of lots were laid out. They fronted on two parallel streets, and abutted on each other. A plan of the village plot shewing the lots and the position of the plot relative to adjoining parts of lot number 14, was made by a Provincial Land Surveyor. The following rough sketch shews the lots laid out, and their dimensions, as they appear on the plan: *(See plan on next page.)*

This plan is not certified or in any way identified by the signature or name of the owner; but is certified by the surveyor as follows:

"Plan of part of the village of Foubertville, being part of lot No. 14, concession 1, old survey, of the township of Cumberland, county of Russell. Scale one chain to an inch."

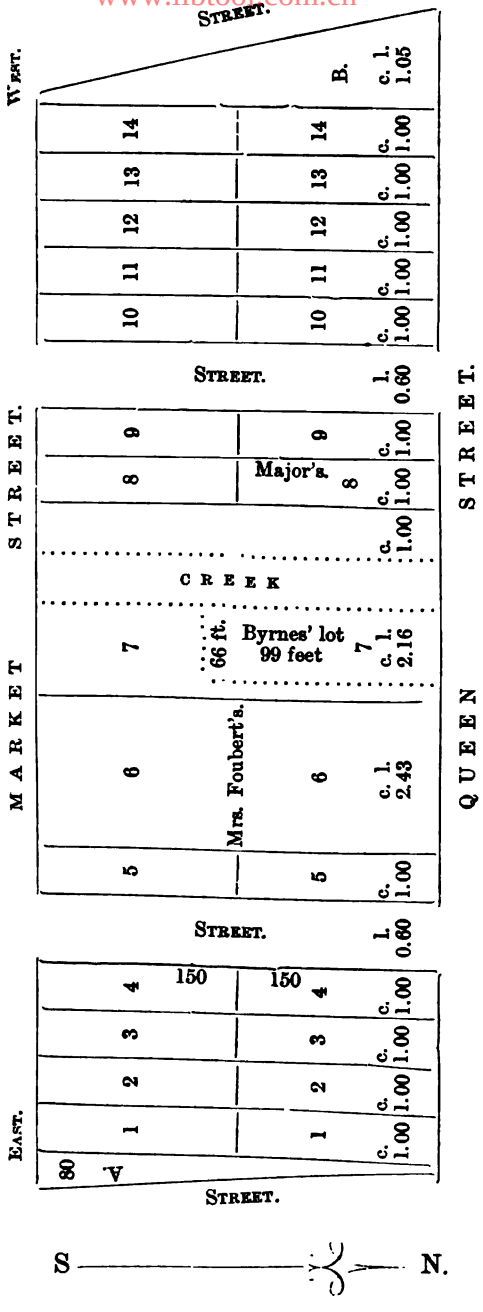
"Ottawa 11th May, 1857.

(Signed) "WM. MCCONNELL, P. L. Surveyor."

It was, in that state, registered in the registry office for the county of Russell on May 15, 1857.

Amable Foubert died in November, 1878, having before then made his will with several codicils, whereby he devised to his son Michael Foubert, the north half of the west half of the east half of said lot No. 14 in the first concession of the township of Cumberland; and also the westerly half of the easterly third of the easterly quarter of said lot No. 14, in all thirty acres more or less, in fee, as stated in the second paragraph of the plaintiff's claim.

The said Amable Foubert, deceased, in his life time, by deed of conveyance bearing date the 13th day of January, 1877, for a nominal consideration of one dollar, conveyed to another son, Amable Foubert, the younger, part of lot No.



7 on the south side of Queen street in the said village of Foubertville, particularly described by metes and bounds as follows: "Commencing at a point in the south boundary line of said Queen street, distant from the north east angle of lot No. 8 in the said village, sixty-six feet; thence south parallel to the boundary line between lots No. 7 and 8 and always at the distance of sixty-six feet from the eastern boundary line of said lot No. 8, a distance of ninety-nine feet; thence east parallel to the southern boundary line of said Queen street, and always at the distance of ninety-nine feet from said Queen street, a distance of sixty-six feet; thence north parallel to the boundary line between lots No. 6 and 7 on said Queen street, and always at the distance of one hundred and thirty-two feet from the boundary line between said lots No. 7 and 8, a distance of ninety-nine feet; thence west along the southern boundary line of said Queen street, and parallel to the Northern boundary line of said Queen street, and always at the distance of ninety-nine feet from the southern boundary line of said lot No. 7, a distance of sixty-six feet to the place of beginning. This deed was registered in the said registry office on the 19th day of the same month of January in book No. 6, for the township of Cumberland.

Amable Foubert, the younger, by deed of conveyance bearing date the 31st day of December, 1879, for the consideration therein expressed of $120, conveyed the last mentioned parcel of land in fee to one Henry Byrnes, as part of lot No. 7, on the south side of Queen street, in the said village of Foubertville, and by the same particular description, and metes and bounds as stated in the next prior deed; but it is not stated to be part of lot No. 14 in the first concession of the township, though stated to be in the township of Cumberland.

This deed also was registered in the same registry office, and in book No. 9 for the township of Cumberland, on the 2nd of June, 1882. But Byrnes had gone into possession of the land immediately on the execution of the deed to him, and made improvements, and he is still in possession

There is some evidence that Amable Foubert, the younger, had been in possession before that, and had made some improvements thereon, and fenced it.

On the 4th of October, 1877, the said Amable Foubert, the elder, since deceased, by deed of that date purported to convey to one James Stevenson, in fee, for the consideration in the deed expressed, of $300, those certain parcels of land, &c. "in the village of Foubertville in the township of Cumberland," &c., "and better known and described as follows, that is to say, village lot No. 7 on the south side of Queen Street, and village lot No. 7 on the north side of Market street of said village of Foubertville, and being part of lot No. 14, first concession O. S. of the township of Cumberland, aforesaid, Ottawa front as per plan of said village registered in the registry office of the county of Russell, aforesaid." This deed was also registered in the same office and book as the next preceding one, on the 11th of October, 1877.

Stevenson paid only part of the purchase money, and gave a mortgage on the same parcel of land by the same description to secure payment to Foubert of the balance, $151.25; which mortgage was registered with the deed of conveyance. Stevenson was in possession at the time, made fences on the place, and worked it until it was sold under the mortgage as will appear hereafter.

The difficulty which ultimately has given rise to this action recurs to, and is founded upon, the deed of the 4th of October, 1877, from Amable Foubert, deceased, to Stevenson. The deed purports to convey the whole of the two lots numbered seven—one of them fronting on Queen street, the other on Market street. But the plaintiff alleges that only parts of those lots were sold and intended to be conveyed. A creek, which is indicated on the sketch, *supra*, by a line of dots, runs through both lots seven, so that a line drawn from a point on the south side of Queen street at a distance of sixty-six feet from the south-east angle of lot No. 8 through the creek forms a parallelogram of one chain, or sixty-six feet in width through from Queen street

to Market street, between No. 8 and the creek, that is, between No. 8 on the west and the creek on the east side. This parallelogram, the plaintiff says, is the land which Stevenson purchased and which was intended to be conveyed, and that the whole of lots 7, as designated on the plan were inserted in the deed by mistake: that the mistake was mutual, and made without fraud, and that all parties concerned were ignorant of the mistake and conducted themselves with reference to the property, and used it as if the deed of conveyance was according to the intention and contract of the parties. The error in the deed was discovered by accident about a year before this action was commenced. Several questions have been raised by the parties, but this alleged mistake is the principal one.

The plaintiff claims that under two deeds of conveyance dated the 21st day of July, 1882 (one made apparently to correct some supposed error in the other), Michael Foubert conveyed to the plaintiff in fee all the parcels of land devised to him by the will of his father, the said Amable Foubert deceased, and which parcels so devised are described above. These parcels, or one of them includes the village plot called Foubertville, so that by virtue of such conveyance the plaintiff owns all the lots in the said village except such as had been sold or conveyed by the said Amable Foubert, the testator, in his lifetime.

The consideration money paid by the plaintiff to Michael Foubert was the sum of $1200.

The defendant alleges title in himself to the whole of the two lots No. 7, as laid down on the plan of 1857; and also to a strip about a chain wide (or a little more) from Queen street to Market street along the east side of the lots No. 7, which it is said the old man Foubert reserved and used for a road from the front part to the rear part of his farm, through the village which divided his farm in two parts, and which reservation for a road ought to have been shown, but was not shown, on the plan of the village; instead of which lots No. 7 appear on the plan to abut on the westerly boundary of lot No. 6. But this is clearly a mistake,

for by actual measurement made on the ground by Mr. Lough, a surveyor, about a week before the trial, the land for such a road is there, as he showed by a plan of his own which he produced at the trial, and which was filed: and the lots which the defendant has enclosed as lots No. 7 have a frontage on Queen street and on Market street severally of three chains and fourteen links, instead of two chains and sixteen links as appears by the original and registered plan. The fact of this error is also established by other evidence, and especially by the fact that Stevenson measured and enclosed one chain wide eastward from lot No. 8; and Byrnes, another chain wide eastward from Stevenson's enclosure, and yet there is a space, one chain and fourteen links to lot No. 6.

This point of the case will appear more fully on a review of the evidence.

The defendant was acquainted with the place for many years, and owned other lots in the village; and when Michael Foubert, who was in his employment, wanted to sell his property, the defendant who was on friendly terms with the plaintiff and her husband, Dr. Ferguson, called on her several times, urging her strongly to purchase this property from Michael, that is, the land devised to Michael Foubert by the will; he represented it as a most desirable bargain at $1,200, and amongst the inducements he pointed out was the fact that she would have this piece of land between the creek and Mrs. Foubert's, that is, between the creek and No. 6. The plaintiff swears to this positively, and she is corroborated therein by her husband, Dr. Ferguson, who further swears that the defendant pointed that out to him on the ground. The plaintiff was, to some extent at least, persuaded by the defendant, to entertain the proposal, and enter into the transaction.

In the year 1881, after the death of old Mr. Foubert, Stevenson having failed to pay the mortgage money due on the mortgage which he had given, the executors of old Mr. Foubert, advertized the property comprised therein for sale under the mortgage, and was sold to Thomas

Gordon and John Shirkey, carriage-makers, and copartners in business, and on the 18th of April, 1881, a deed of conveyance in fee was executed to them by the executors, in consideration of $160; the property being described as it was in the mortgage, and in the deed from Foubert to Stevenson.

Gordon and Shirkey went into possession of the same strip of land, extending from lot No. 8 to the creek, of which Stevenson had been in possession before, and made valuable improvements thereon. On the 24th of December, 1881, John Shirkey released all his right to and interest in the said lots to the said Thomas Gordon; and on the 1st of February, 1884, the said Gordon by deed conveyed to the defendant for the consideration of $3,500, the same description of the property being continued.

A short time before the sale to the defendant, Gordon applied to John Tytler, a farmer in the adjoining township of Clarence, who was agent for the Canada Permanent Loan Society, for a loan on mortgage on this property, and Tytler having inspected and valued the property sent the application and an abstract of title from the registry office to the agents of the company at Toronto, but the application was refused on account of difficulty about the title. Tytler informed Gordon of the refusal, but without, it seems, stating or knowing the cause of refusal. Then Gordon sold and conveyed to the defendant. In a short time afterwards Tytler received the abstract and papers back from the office of the company, at Toronto, and then discovered that the difficulty arose from the fact that when he made the valuation of the property he was told Gordon's property was composed of No. 7, and he drew out the application for a mortgage on No. 7, whereas the plan and abstract showed lots of which a part had been sold and conveyed to Byrnes, which Tytler did not know, as he did not know that No. 7 as shown on the plan extended eastward across the creek. Tytler then told both Gordon and the defendant of the misunderstanding.

Immediately after obtaining this information, the defendant took his deed to Ottawa and consulted a lawyer thereon, and on his return asserted title to the land eastward of the creek, and drove the plaintiff's servants from work thereon.

Having selected the most important parts of the evidence bearing on the main questions at issue, I will let the witnesses speak for themselves.

[The learned Judge then repeated certain portions of the evidence at length, and proceeded as follows:]

There is, I think, the highest degree of probability, hardly the chance of a shade of doubt, that Gordon sold and the defendant bought the strip of land, being two ordinary village lots, extending from Queen street to Market street, and bounded on the west by No. 8, owned and occupied by Major, and on the east by the creek, and that that piece of land was known as and called lot No. 7, fronting on each of the streets: and there is, in my mind as little doubt, no doubt in fact, that the deed from Gordon to the defendant was intended to convey that piece of property, and no more. Their minds were in perfect accord on that subject.

I am equally well convinced that the defendant knew nothing of the error respecting No. 7 on the plan, until after the conveyance to him, and he was in occupation when he was informed by Tytler.

I therefore conclude, upon the whole evidence, that there was a mutual mistake, without deceit or fraud on either side, between Amable Foubert and Stevenson, not as to what piece of land was sold and purchased, nor as to what was intended to to be conveyed, but in designating the land conveyed as No. 7 according to the plan, instead of part of No. 7, between the creek and No. 8. Griser who prepared the deed has explained how the error occurred; and it was by accident and ignorance.

It is to be remembered, too, that Foubert was an illiterate old man who had to trust to others to transact such business for him; and he probably thought that accuracy

respecting the number was of no importance as he and Stevenson understood each other, and both knew the piece of land they were dealing about. The same error and mutuality of mistake pervaded the succeeding transactions, the sale and conveyance by the executors to Gordon and Shirkey, and the sale and conveyance from Gordon to the defendant; and on the other hand I am equally clear that the plaintiff thought that she was buying from Michael Foubert, and that he conveyed to her all the land between No. 6 Mrs. Foubert's lot, on the east side to the creek on the west side, except the piece which was owned by Byrnes. No doubt Michael thought the same, and the defendant, I feel convinced, thought so, and so represented to the plaintiff, as an argument to persuade her to enter into the transaction.

These are the conclusions to which my mind is led by the facts; and I do not see how any judicial mind can be led to conclusions materially different.

Such being the case, it appears to me to be disposed of by *Arner* v. *McKenna*, 9 Gr. 226; *Wigle* v. *Setterington*, 19 Gr. 512; *Dominion Loan and Savings Society* v. *Darling*, 27 Gr. 68; *Story's* Equity Juris. secs. 154-157; *White* v. *White*, 15 Eq. 247; *De La Touche's* Settlement, 19 Eq. 599; *Kerr* on Fraud and Mistake, 1st ed., pp. 349-350, notes (*g*), (*h*), and (*i*), on p. 350, and cases cited; *Harris* v. *Pepperell*, 5 Eq. 1; *Pollock* on Contracts, 3rd ed., pp. 484, 485; *In re Boutter, Ex parte National Provincial Bank of England*, 4 Ch. D. 241; *Taylor's* Equity Juris. pp. 46-48, secs. 111, 112, 113; *Brown* v. *Lamphear*, 35 Verm. 252; *Murray* v. *Parker*, 19 Beav. 305, 308, per Sir John Romilly, M.R.; *Ramsbottom* v. *Gosden*, 1 V. & B. 165; *Clowes* v. *Higginson*, *ibid.* 524.

Counsel for the defendant urged several matters, besides strongly contesting the main point, against the plaintiff's claim. I do not think it necessary to deal with all of them, but will notice those which I think deserve special attention. One of the objections was that the executors of the late Amable Foubert ought to be parties to this suit.

I do not see why they should be parties, or what object could be gained by making them parties. I think rather that they ought not to be parties, and could not properly be made so.

It was further objected that the plan was not such as is required by the Registry Law, R. S. O. ch. 111, sec. 82, sub-sec. 2. It is quite true that the plan was not certified according to the requirements of the Registry Law of the time, and that the error has not since been rectified, and therefore the registrar could not treat, nor has he treated it as sufficient to authorize the registration of deeds affecting village lots merely as such. Hence the deeds affecting village lot No. 7 were registered, and deeds affecting the other village lots conveyed, so far as disclosed by the evidence, were registered as parts of lot 14 in the first concession of the township of Cumberland, and not in a separate register book for village lots. The registry, or filing of the plan in the registry office, had no effect, I apprehend, under the registry laws.

But reference might be made to it there, as it might to that or any other document there or elsewhere, in a deed for the description or designation of a lot called a village lot, being part of a township lot, even if not stated in the deed to be part of a township lot, provided reference was made in the deed to that particular plan or other document for the description, and even popular understanding may be referred to for the same purpose, when it is capable of proof: *Dougall* v. *The Sandwich and Windsor Plank and Gravel Road Co.*, 12 U. C. R. 59. As to reputation of this kind, *McMurray* v. *Spicer*, 5 Eq. 527 at p. 537.

It is also said the evidence adduced in this case upon which rectification of the deed is asked is only parol, and that the Court will not interfere upon such evidence, when the defendant, as he does here, denies that there was a mutual or any mistake or error. For the rule so laid down there is respectable authority. But that expression of the rule, though often used in the books, is not strictly accurate. The denial must be by a party to the instrument:

Pollock on Contracts, 3rd ed., p. 486. Here the party who alone could deny effectively—Stevenson—admits the mistake. The defendant, not being a party to, or present at the making of the agreement, knows nothing about it, and his denial is valueless.

However, the rule expressed in either form is not necessary to a decision of this case. Here the parol evidence is corroborated by facts of an undoubted and unequivocal character, such as the explanation given by the person who prepared the deed, the acts of the grantee, who measured his lot, went into visible possession, and cultivated the land according to the true understanding and contract between him and the grantor then living, the like conduct and user of the place, the particular measurement of the lot with a view to the erection of valuable permanent improvements, and the erection of those improvements by Gordon and Shirkey, the sale by Gordon in that way, and the transfer of the actual possession in the same state by Gordon to the defendant; the representations made by the defendant to the plaintiff to induce her to purchase, and finally the general understanding respecting the lot 7 in the neighbourhood regarded in connection with the fact that old Mr. Foubert prior to the conveyance to Stevenson, but after the bargain was made with him, conveyed to his son Amable a part of lot 7 next to the creek east of it; and the old man's continued user of the rest of lot 7, to the time of his death, lift the case completely out of the rule, and are abundant evidence in corroboration of the parol evidence of a case for the interference of the Court.

It appears at first, unaccountable that the road which old Mr. Foubert reserved for private use between lots 6 and 7, was not laid down or in any way designated on the village plan; but Dr. Ferguson's evidence affords a clue to the solution of that enigma. He says that it was reserved as a private road to the farm; *that is why it was not shewn on the map.*

I infer from this that it was probably considered that if it was shown on the map or plan it would be regarded as dedicated to the public, and become a public instead of a private road.

But the defendant has taken possession not only of all lot 7, except Byrnes's part, but of this private road also.

It was also urged that the defendant was a purchaser for value without notice, a stranger to the transaction between old Mr. Foubert and Stevenson; and that the plaintiff is a volunteer, and therefore not entitled to the relief sought as against the defendant under the circumstances. But the plaintiff is, on the contrary, a purchaser for value; and, as shown, she became a purchaser largely, if not wholly, persuaded thereto by the defendant, and upon his representation that she would by the purchase acquire all lot No. 7 between the creek and No. 6—Mrs. Foubert's lot—except Byrnes's piece, about which there was no question.

In this latter regard the defendant's claim and conduct are tainted with bad faith, amounting to fraud. Upon the facts, and looking at the circumstances, I am constrained to hold that he had notice and complete knowledge of the facts; that he knew he was purchasing, and as a fact purchased, only the land between No. 8 and the creek; that his attempting to take advantage of the error in his deed and in the prior deeds, on subsequent and merely accidental discovery of the error, to grasp land which does not justly or at all, belong to him, was unconscientious, dishonest, and, indeed, fraudulent. Michael Foubert took the property by devise in his father's will, and the plaintiff purchased from him for a valuable consideration. The whole objection or the essential part thereof is settled by *Murray* v. *Parker*, 19 Beav. 305, and by other authorities.

It will be declared that the defendant is entitled to that part of lot No. 7 fronting on Queen street towards the north, and on Market street towards the south, bounded on the east side thereof by a line to be drawn commencing at a point on the south side of Queen street at the distance

of 66 feet, or one chain, eastward from the north-east angle of lot No. 8; thence southward, always at a distance of 66 feet, or one chain, from the eastern boundery of said lot No. 8, to the said Market street; the said parcel of land so bounded being a parallelogram having a frontage on Queen street and on Market street respectively of 66 feet, or one chain; and that the said defendant is entitled to no more or other part of said lot No. 7. That the plaintiff is entitled to the remainder or residue of said lot No. 7, save and except the part thereof heretofore conveyed to and owned by Henry Byrnes; and that the same, with that exception, be vested in the plaintiff by an order of this Court; and that the defendant be ordered to deliver up to the plaintiff, or her agent, possession of the land so vested in her.

Considering the nature of the defendant's statement of defence, and his conduct in the whole matter, and all the circumstances as shown by the evidence, I think I cannot do otherwise than allow the plaintiff her costs of this suit against the defendant.

A. H. F. L.

This case has been carried by way of appeal to the Divisional Court.

[QUEEN'S BENCH DIVISION.]

RE FENTON ET AL. V. THE CORPORATION OF THE COUNTY OF SIMCOE.

Municipal law—Incorporation of village—46 Vic. ch. 18, sec. 9 (O.)—Census—By-law—Illegality—Matters not appearing on face of by-law—Power to quash—Estoppel—Laches.

On an application to quash a by-law incorporating a portion of township territory as a village,

Held, that the power of the Court to quash an illegal by-law is not limited to cases where illegality appears upon the face of the by-law, but extends to cases where the illegality shewn is entirely extraneous.

Enquiry may in every case be had upon affidavits as to the existence of the facts constituting the statutory conditions precedent to the passing of the by-law, and as to any illegality in the manner of its being passed.

The applicants in this case had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law, or had any part in the taking of the census objected to:

Held, that the applicants were not estopped from moving to quash the by-law.

Semble, that the by-law incorporating the village was not necessarily illegal by reason of the mere fact that the census was in reality taken before the by-law authorizing the enumeration of the people had been passed by the county council.

But where the census was shewn to be wholly unreliable, and untrue in fact, effect was given to this objection.

Semble, that although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by shewing laches of the applicant, though in this case no such laches existed.

September, 29, 1885. *Aylesworth* moved to quash by-law No. 379 of the county of Simcoe, separating the village of Beeton, in the township of Tecumseth, in the said county, from the corporation of the said township and forming it into a separate corporation under the style and title of the village of Beeton, upon the grounds:

1. That by-law No. 379 was passed without there being any previous census of the unincorporated village with its immediate neighbourhood taken under the direction of the county council, the pretended census of the said village and neighbourhood alleged to have been taken prior to the passing of by-law No. 379 having been taken (so far as it

was ever taken) without any previous direction of the county council, and before the passing of by-law No. 376 appointing a census enumerator for the said village.

2. That the census returns upon which by-law No. 379 was passed were inaccurate, false, and entirely unreliable, and did not truthfully show the actual number of inhabitants then in fact residing in the said village and the immediate neighbourhood.

3. The village and neighbourhood incorporated by by-law No. 379 did not, at the time the by-law was passed, contain and had not since contained over 750 inhabitants, or nearly so many as 750 inhabitants.

4. The boundaries of the village as declared by by-law No. 379 were not the same as the boundaries of the unincorporated village with its immediate neighbourhood, described by metes and bounds in by-law No. 376, and the territory described in by-law No. 376, the inhabitants of which were supposed to have been counted by the census enumerator, was a larger territory than that afterwards incorporated by by-law No. 379.

McCarthy, Q.C., and *Pepler*, contra.

The arguments and cases cited appear in the judgment.

October 13, 1885. WILSON, C. J.—The objections may be stated as follow:

1. That a census was not taken under the authority of the council, nor was an enumerator appointed to take that census before by-law No. 379 incorporating the village was passed by the county council.

2. That within the limits described in that by-law there were not at the time when the by-law was passed more than 750 inhabitants.

3. That the census has by by-law 376 been directed to be taken for a different area than was incorporated by by-law 379.

[The learned Chief Justice first referred to the difference in the two by-laws as to the boundaries of the village and neighbourhood, set out in the 4th objection, and then proceeded:]

As to the objection that the census was not taken under the authority of the county council, and that the by-law authorizing it was not passed until after the census had been taken, the Municipal Act, 1883, sec. 9, enacts that "when the census returns of an unincorporated village with its immediate neighbourhood taken under the direction of the county council in which the village and its neighbourhood are situate show that the same contain over 750 inhabitants, and when the residences of such inhabitants are sufficiently near to form an incorporated village, then, on petition by not less than 100 resident freeholders and householders of the village and neighbourhood, of whom not fewer than one-half shall be freeholders, the council of the county shall by by-law erect the village and neighbourhood into an incorporated village, apart from the township in which the same is situate, by a name and with boundaries to be respectively declared in the by-law."

[The learned Chief Justice here set out the evidence of several of the deponents in the affidavits filed, and continued:]

In my opinion, the census, if it may be called a census, was very improperly taken, according to the account given of it by Mr. Atkins himself, the one who took the census and one of the deponents, and the whole of the proceedings to procure the incorporation were hurried through in a very irregular way. A public meeting was held on the 9th of June to consider about the incorporation of the village; a census was to be taken, and Atkins was recommended to be the enumerator. At that meeting Atkins said there were twenty or thirty in the room and about the place, and of that number more than half would be freeholders.

Nothing more was done until Monday the 16th of June, when Atkins began to number the inhabitants, and he finished it on Wednesday, the 18th, before ten o'clock in the morning, and he then took the train to Barrie and arrived there about noon.

The by-law 376 appointing Atkins enumerator was passed by the council that morning before Atkins got to

Barrie, but it is not likely to have been drawn up and perfected even on that day.

The memorandum of names, as I understand, which was taken on the 18th, was transcribed by Atkins when he got to Barrie at noon, and the names added on that day were about fifty; and the affidavit of correctness was then made by him; and in the afternoon of the same day the by-law 379 incorporating the village was passed.

I am not prepared to say the by-law incorporating the village should be quashed because the by-law for taking the census and appointing the enumerator was not passed before the census was taken, or, in other words, because the census was not taken "under the direction of the county council."

If, for instance, it was quite certain the locality contained at least 900 inhabitants, and of that number 400 were electors, and that the rolls shewed, say, 200 children attending the public school, and that every member of the county council was convinced that, besides the electors and school children, there were non-electors and women making up the full number of 900; and if, on an application for incorporation by such a locality, the by-law passed for that purpose recited the locality contained 900 inhabitants, and that such recital was well known to be true and was true I do not think the by-law so passed would be quashed, although no census had been taken.

This village has been created. It is now a distinct body from the remainder of the township, and it is a component part of the county council, having a distinct representation in that body. It has also a separate school board. The township has not taxed the locality because it has now separate taxing powers, and if the body be abolished there may be a difficulty in the township taxing the locality. The county council has equalized and settled its rolls for county purposes, and if the body be abolished it may unsettle these rolls and it may not be possible to make them right. The school also in the village may be deprived of its means of support, and much

confusion will necessarily arise from all these causes. These are reasons why I should not interfere without the greatest necessity for so doing, such as gross fraud or other malpractice, which might compel the Court to enforce its powers by quashing the by-law of incorporation, rather than suffer so grave a wrong to continue in defiance of the law.

In this case, however, there has been irregularity of a serious kind, and a determination apparently to hurry proceedings for incorporation without the assent of the inhabitants to be affected by it.

The taking of what has been called the census was taken, from the scrutiny I have made, in the most reckless manner. Atkins, the enumerator, admits that twenty-two of the number returned by him should be deducted. I have disallowed forty-four, independently of one of those returned, still to be considered; and while Atkins claims the names of ten others should be added to his return, I have, if I could so count them, rejected eight, and have two remaining for consideration.

The return then stands thus: 781 returned, rejected 66, reducing the number to 715; and that number can not be varied more than to the extent of two, to increase the list, if I were to add the two names still standing for consideration, as those who were not, but should have been, counted in the census.

Under these circumstances the census upon which the by-law of incorporation is founded cannot be relied upon, and the requirements of the statute that the census shall be taken under the direction of the county council, and necessarily by by-law, cannot be allowed to stand. The proceedings as to the taking of the census, and the appointment of an enumerator by by-law to take it, when the county council had the return of the census already taken, but taken without authority, lying before them, was quite an unwarrantable proceeding.

I am obliged to give effect to this objection when I find that not only is there the irregularity in the proceedings

complained of, but that the proceedings themselves are untrue, and are wilfully so, and are directly in defiance of the provisions of the Act, and that the requisite number of resident inhabitants of the village is far below the essential number of at least 751.

I come now to the principal objection. Do the census returns shew, or is it shewn that the by-law of incorporation was passed upon there being in fact at the time over 750 inhabitants in the locality which was incorporated?

It will not be necessary to consider the enumeration, if it be the case, as it was argued, that I cannot entertain the objection because it is not a defect apparent upon the face of the by-law itself. I shall therefore examine that question before making what I may call a scrutiny.

The 12 Vic. ch. 81, sec. 155, gave power to the Court to quash a municipal by-law on production of a copy of the same duly certified and sworn to, "if it should appear to the Court that such by-law is on the whole or in part illegal," &c.; but "if it shall appear to the Court that such by-law is legal," &c., then "to award costs for or against the corporation."

By the Act of 1866, ch. 51, secs. 198, 205, the like language is maintained; that is, the by-law, order, or resolution may be quashed in whole, or in part *for illegality*, and in case it be *illegal* in whole, or in part, and such *illegality* gives any person a right of action, such action shall not be brought for a month, &c.; and the like language is continued in the 46 Vic. ch. 18, secs. 334, 340, (O).

In *Lafferty* v. *The Municipal Corporation of Wentworth and Halton*, 8 U. C. R. 232, the motion was to quash a by-law for changing a road. The Chief Justice said: "Taking the 155th clause of the 12 Vic. ch. 81, by itself, I should be inclined to think that the Legislature intended this Court should only quash a by-law for some illegality appearing on the face of it; but taking it in connection with the 192nd clause I consider that we must pronounce any by-law to be *illegal*, and quash it as such, which has been made in such a manner as it is enacted by that clause it shall not be lawful for any municipal corporation to make a by-law."

That section was negatively expressed as follows: "It shall not be lawful for any such municipal corporation to make any by-law for * * altering * * any public highway * * until they shall have caused at least one calendar month's notice to have been given by written or printed notices, put up in the six most public places in the immediate neighbourhood of such highway," &c., and that had not been done.

The Chief Justice continued:

"So also as to the other objection founded on the eleventh head of the 41st clause—that this road has been laid out through an orchard—that is an objection which would not appear on the face of the by-law itself; but I consider that upon its being proved to us *aliunde* that a by-law has been passed in disregard of this provision, we have authority to quash it as illegal, being made in express opposition to the statute which confers the power of making by-laws."

That enactment as to opening, &c., highways, concluded as follows: "Provided always, nevertheless, that no such widened * * highway * * shall be laid out so as to run through * * any orchard * * without the consent in writing of the owner thereof."

Part of the head note in *Hill* v. *The Municipal Corporation of Walsingham*, 9 U. C. R. 310 is, "*Semble*: It is doubtful whether the Court has authority under 12 Vic. ch. 81, sec. 155, to quash a by-law for an irregularity in the manner of its being passed, though they might hold it void if relied upon in support of something done under it; and if they should entertain a motion to quash a by-law on account of an irregularity in passing it, it would rather be under the principles of the common law."

The irregularity in that case was that the by-law was passed at a special meeting of the council called by a private member of it, and not by the reeve as section 25 required.

In *Grierson* v. *The Municipality of Ontario*, 9 U.C.R. at p. 628, the Chief Justice said: "However, what we have to consider is, whether the by-law is on the face of it, in

the whole or in part, illegal." Then, at p. 629, the Chief Justice further said: "These exceptions turn upon something extrinsic of and behind the by-law, and I consider, as I have already stated on a former occasion, that if we should assume a control over by-laws upon such grounds as are relied upon in this exception, it would not be properly under the 155 section of the 12 Vic. ch. 81, but under our common law jurisdiction in such cases; and looking at the affidavits filed, I do not think that we should be exercising a sound discretion in setting aside a by-law for a purpose of such magnitude," (the erection of a court house and gaol in the county of Ontario), "and at the risk of producing much public inconvenience, upon an allegation of an error in amount which in its result must be so insignificant."

Burns, J., at p. 632, said: "I am of opinion that the true construction to give to the power vested in the Court to quash by-laws is, that, unless the by-law be illegal on the face of it, it rests discretionary with the Court, upon extraneous matters, to say whether this is such a manifest illegality that it would be unjust the by-law should stand, or that it had been fraudulently or improperly obtained." And again at p. 635: "Authority being conferred upon the Court to quash by a summary application such by-laws as may be illegal in the whole or in part must I think be qualified by the question whether the same be illegal in the whole or in part upon the face, and that a discretionary power must be vested in the Court in cases where the illegality is proved by matter extraneous."

In *Sutherland* v. *The Municipal Council of the Township of East Nissouri*, 10 U. C. R. 626, the motion was to quash a by-law, because a quorum of the council was not present when it was passed.

The Chief Justice, at p. 627, said: "It is a void proceeding and must be so pronounced if the legality of any act done under it should come to be questioned * * It has been assumed that this Court can act in such cases' (that is, although the illegality does not appear on the

face of the by-law) "under 12 Vic. ch. 81, sec. 155, as well as in those where there is something illegal on the face of the by-law itself. We have on several occasions intimated a doubt on that point. The language of the clause seems to me to be confined to cases of illegality in the contents of the by-law. It directs that any person interested in the provisions of a by-law may obtain a certified copy of it, and may move the Court, *upon production of such copy*, to quash the by-law; and that *if it should appear to the Court* that such by-law is *in the whole or in part* illegal, they may order it to be quashed in the whole or in part, and may award costs in favour of the corporation or against them."

"This provision does not seem to contemplate the case of a by-law complained of on grounds wholly apart from the nature of its provisions, and referring to something irregular in the manner of passing it."

"In the case of *Lafferty* v. *The Municipal Council of Wentworth and Halton*, 8 U. C. R. 232, we intimated that we might be properly called upon, perhaps, to quash a by-law not for any matter appearing upon the face of it, but for matter shown *aliunde;* as that the by-law was made for a purpose directly prohibited by statute, in a manner in which the statute says it shall not be lawful to pass a by-law. The opinion, however, was only given incidentally, for the Court in that case did not set aside the by-law; and there is a clear distinction between cases coming under the 192nd clause of the Act, and those coming under the 168th clause. The former clause" (which was in question in *Lafferty's Case*) "enacts that it shall *not be lawful* to pass a by-law under certain circumstances, or for certain purposes. The 168th clause, which applies to the case before us, contains no such negative words, but merely prescribes in what manner the proceedings are to be conducted."

"Whether with respect to either description of cases this Court may and should exercise the jurisdiction in a summary manner of quashing a by-law, may require to be

more maturely considered, but we do not see our way clear in quashing a by-law on motion, on account of irregularity in the proceedings, and especially in a case like the present, where the by-law has really not been passed by a vote of the municipal body, and so is no by-law."

In *Boulton* v. *The Town Council of Peterborough*, 16 U. C. R. at p. 388, the Chief Justice said: "Our authority to quash by-laws, as given by the statute, is where the by-law appears to us to be either wholly or in part illegal. This seems, as we have intimated in other cases, to have reference to what we shall find on the face of the by-law, whereas the objections we have been considering are of another character. We do not doubt our power to quash a by-law where it is shown to us that it has been passed illegally, as without some notice or other formality required, which appears to be essential to the right of the municipality to pass it. But where we interfere on that ground it is, as we conceive, rather under the jurisdiction vested in us at the common law than under the Municipal Act. And where that is the case we have a discretion not to interfere on summary application, but leave it to the party complaining, if he please, to test the validity of the by-law by resisting its operations, or by bringing an action for anything done under it, as he may be advised."

In *Simmons* v. *The Corporation of Chatham*, 21 U. C. R. 75, the motion was to quash a by-law passed seven years before for uncertainty in the boundaries of a separate coloured school section. The Chief Justice, at p. 77, said: "It must be allowed, however, that the language of sec. 195 of the statute" (C. S. U. C. ch. 54), which gives the power to quash by-laws, is not compulsory, and we would guard ourselves against laying it down in positive terms that the Court are bound to quash every by-law that is properly moved against and found illegal, without regard to the frivolous nature of the objection, and to the length of time it has been in operation and submitted to; and to the increased inconvenience which on that account may follow its being quashed." The Chief Justice also said:

"But if it be on the face of it clearly illegal we apprehend we have hardly a discretion to allow it to stand."

In *Michie* v. *The City of Toronto*, 11 C. P. at p. 386, Draper, C.J., said: "Upon the whole, though leaning in favour of the first objection which strikes at the whole by-law, yet, when I consider the mischief or serious inconvenience which probably would result from quashing the by-law at this late period, I think we might, as a matter of discretion, if we possess such a discretion, rather to discharge than to make absolute this rule. It is true a distinction has been well taken between objections extrinsic to the by-law and such as appear on the face of it, as to the duty of the Court on applications to quash, and this objection is not extrinsic; but the Consol. Stat. U. C. ch. 2, sec. 18, sub-sec- 2, enables us to treat the word *may* as *permissive*, not mandatory, and the 195th section of the Municipal Institutions Act says the Court *may* quash a by-law in whole or in part for illegality, treating the expression as conferring an authority, with a discretion to abstain from its exercise."

In *Secord* v. *The Corporation of Lincoln*, 24 U. C. R., at p. 147, Draper, C. J., said: "I agree with what is said by Burns, J., in *Grierson* v. *The Municipality of Ontario*, 9 U. C. R. 632, as to the extent to which the Court is bound to give way to objections which may be made to the legality of by-laws which depend upon extraneous matter; and where errors in computation only, even although extensive, were shewn (the good faith in which the council were seeking to execute the powers given them being unquestioned), I should lean, *totis viribus*, to support their by-law, and especially when it had been acted upon, money raised or debentures issued under it, or rates voluntarily paid or collected and levied by compulsory process. In the words of my late brother Burns, 'I am of opinion the true construction to give to the powers vested in the Court to quash by-laws is, that, unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest

illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained.'"

In *Grant* v. *Corporation of Puslinch*, 27 U. C. R. 154, the township passed a by-law on the 15th of June for the purchase of a site and for the erection of a town hall thereon; but no provision was made for meeting the expense, and it did not appear there was not surplus money in hand. On the 31st of August the township passed the annual by-law for ordinary expenditure, and in addition thereto provision was made for raising the amount required for the site and building. It appeared the site had been purchased by the township and paid for, and the hall had been built, and that there were funds in the treasurer's hands to pay for it. Held, although the corporation had not been strictly regular, the by-laws should not now be quashed.

In *Re Revell and The Corporation of the County of Oxford*, 42 U. C. R. 337, at p. 347, Harrison, C. J., said "The power of the Court is to quash by-laws for illegality. The Act does not, in words, draw any distinction between by-laws illegal on their face and illegal *aliunde*. But where the illegality is *dehors* the by-law, the Courts in the past have been more reluctant to exercise the discretionary power to quash than when the illegality appears on the face of the by-law. * * Where, on an application to quash a by-law, the Court entertains no doubt as to its *illegality*, it is generally better at once to say so, and to follow up the expression of that opinion with the appropriate legal consequence—the quashing of the by-law.

"If it were made to appear that something has been done under the by-law which ought to be sustained, and which would be sustained in the event of the refusal of the Court to exercise its power, there would be some reason for abstaining from its exercise; but where the by-law, whether quashed or not, is a void proceeding, and so can sustain nothing, the sooner it is out of the way the better for all except those interested in the maintenance of imposture."

I think these are all the decisions relating to the question whether the Court has power under the Municipal Act to quash a by-law for illegality when the objection to it does not appear upon the face of the by-law.

The learned Chief Justice, Sir John B. Robinson, as will be seen, referred to this point in several of his judgments.

In *Lafferty* v. *Wentworth and Halton*, 8 U. C. R. 232, he was inclined to think the Legislature intended the Court to avoid by-laws for illegality appearing on their face; but he thought a by-law might be quashed as *illegal* if it were made in a manner which the Act declared it should not be lawful for the corporation to make it.

In *Hill* v. *Walsingham*, 9 U. C. R. 310, he thought it doubtful whether the Court had the power to quash a by-law *by the statute* for an irregularity in the manner of its being passed, although it might be held to be void in an action for anything which was done under it, and he thought if the Court acted in such a case that it would be rather under the common law than under the statute.

He expressed the like opinion in *Grierson* v. *Ontario*, 9 U. C. R. 628.

In *Sutherland* v. *East Nissouri*, 10 U. C. R. 626, he was of opinion the by-law in that case was "a void proceeding, and must be so pronounced if the legality of any act done under it should come to be questioned;" but as the objection did not appear on the face of the by-law, he said the Court had on several occasions "intimated a doubt" whether they could under the statute quash a by-law where the objection did not appear on the face of the by-law, and he was of opinion that question might "require to be more maturely considered."

In *Boulton* v. *Peterborough*, 16 U. C. R. 388, the learned Chief Justice restated the opinion in substance as he had before stated in *Hill* v. *Walsingham*, 9 U. C. R. 310, and *Grierson* v. *Ontario*, 9 U. C. R. 628.

In *Simmons* v. *Chatham*, 21 U. C. R. 75-77, he said, "It must be allowed, however, that the language of sec. 195 (of the C. S. U. C. ch. 54), which gives the power to quash

by-laws, is not compulsory." That is, as I understand, the Act declared the Court *may* quash a by-law, and did not use any mandatory expression. That has always been the wording of the Act from the 12 Vic. ch. 155 down to the latest enactment of the 46 Vic. ch. 18 sec. 334 (O.)

The learned Chief Justice seems to some extent to have modified his opinion, as stated in the case last referred to, from that which he had expressed in the cases preceding it, by reason of the alteration in the language of the statute in that enactment from what it was in the 12 Vic. ch. 81, sec. 155, to that which is found in the C. S. U. C. ch. 54, sec. 195, for in the first Act it was provided that the Court may, upon the production of the copy of the by-law, quash the by-law *if it shall appear to the Court* that such by-law is in the whole or in part illegal, while in the Consolidated Act these words are omitted, and have not since been inserted.

The Chief Justice does, in *Sutherland* v. *East Nissouri*, 10 U. C. R. 626, rely upon these words, *if it shall appear to the Court*, added to the words, *upon production of such copy of the by-law*, for the opinion which he entertained.

The language of Mr. Justice Burns, in *Grierson* v. *Ontario*, 9 U. C. R., at p. 632, placed the construction upon that enactment which has been accepted generally as correct, and with which Sir John Robinson, in his latest decision in 21 U. C. R., at p. 77, since the alteration in the language of the enactment before referred to, may be said also to agree.

The language of Mr. Justice Burns is, "I am of opinion the best construction to give to the power vested in the Court to quash by-laws is, that unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest illegality that it would be unjust the by-law should stand, or that it had been fraudulently or improperly obtained."

That is the interpretation which I put upon the enactment, and I accept the language I have quoted as expressing the opinion I entertain. I may say also, that it appears to

me if a by-law is so defective or objectionable, although shown to be so by matter extraneous to it, that it would be held void in law if an action were brought for anything which was done under it, that it should properly on a motion to quash it be held to be *illegal;* for a by-law which is void in law must be so because it is illegal; and that appears to me to be a good reason for holding that *illegality* in a by-law must be equally an objection to it, whether the objections do or do not appear upon the face of the by-law.

The statute does not say the illegality shall be that only which is apparent upon the by-law. *Illegality* without qualification is the expression of the Act, and that must apply to illegality generally, however that illegality may be made to appear.

I feel no difficulty then in considering the question of alleged illegality of this by-law, whether that illegality be shown to be upon the face of the by-law, or to be independent of or extraneous to it.

The question then is, whether there were over 750 inhabitants in the area, since constituted the village of Beeton, at the time of the passing the by-law which created it? That requires I should make a scrutiny of the census, such as it was, which was taken, and upon which the by-law was passed.

[The learned Chief Justice here entered upon the scrutiny and found that there were not more than 715 inhabitants, and then continued:]

There are, however, two reasons urged by the respondents why this application should be discharged.

The first is, that the motion to quash is too late.

The order *nisi* was moved for and granted on the 5th of June, 1885, while the by-law was passed on the 18th of June, 1884. The Municipal Act 1883, section 335, provides that "No application to quash a by-law, order, or resolution, in whole or in part, shall be entertained by any Court unless such application is made to such Court within one year from the passing of such by-law, order, or resolution."

The exceptions in that section do not apply to a by-law of this nature.

It was argued by the respondents' counsel that, although the Court could not quash a by-law after a year from its being passed, it did not follow the party moving against it was to be allowed the year within which to move, and that the rule of delay in moving is still as applicable as ever, although the motion was made within the year. I am rather of that opinion. But in this case the section has been so wantonly and unjustifiably violated in every way, the proceedings have been so irregularly and, as I think, so recklessly and untruthfully taken, that I am not in the least inclined to take from the applicants any part of the year within which the motion can be lawfully made.

It appears from a minute of the proceedings of the Single Court, held upon the 3rd of March, 1885, that a motion was made in this case for an order *nisi* to quash the by-law, and that it was granted; and it was said the solicitor employed on the occasion did not attend to it, and that other solicitors had afterwards to be employed in his stead.

The second reason, it is said, why the motion should be dismissed is, that Fenton, one of the four applicants, was nominated as a candidate for the office of Reeve at the first election held under the by-law in January, 1885, and accepted the nomination, and was defeated by Mr. Atkins, who was the enumerator: that Evans, a second of the four applicants, seconded the nomination of a candidate at the same election, and voted: that Riddel, a third of the four applicants voted at the election, and was elected to the school board; and that Brawly, the fourth of the four applicants, voted at the election; and that all four are therefore disqualified and estopped from moving against the by-law, and from disputing the validity of the incorporation of the village which they by their acts and active interference have respectively recognized.

There were many cases referred to on this point. The principal ones were: *The Queen* v. *Lofthouse*, L. R. 1 Q. B. at p. 440; *Re Peck and the Corporation of Galt*, 46 U. C.

R. 211; *Regina ex rel., Regis* v. *Cusac*, 6 P. R. 303, and several cases referred to therein.

In *Regina* v. *Cusac*, 6 P. R. 303, a motion was made against the councillors of the village of Newbury because they had not the necessary property qualification. The defendants contended there were not before and at the time of the election at least two qualified persons to be elected to each seat in the council, so that under section 74 of the Municipal Act, no qualification for councillors beyond that for an elector was required. The relator made a contrary affidavit.

It appeared that on the nomination day, and before the nomination, the clerk announced there were not two persons in the municipality qualified to be elected for each seat in the council, and that therefore only the qualification of an elector was necessary. Upon which statement the nominations were made, and the relator was one so nominated. Those nominated went to the polls without any objection as to qualification or non-qualification, the relator himself having only the qualification of an elector: *Held*, the relator was estopped from disputing the regularity and sufficiency of the election, and his application was dismissed, with costs.

In *The Queen* v. *Lofthouse*, L. R. 1 Q. B. 432, in the 11 and 12 Vic. ch. 63, sec. 24, it is declared that at the election of a local board of health, if the candidates nominated are more than the vacancies to be filled, the chairman shall cause voting papers in the form of Schedule A to be prepared and filled up. The form has columns for the name and address of the voter, and *the number of votes*, as owner or ratepayer.

The papers delivered were duly filled up except that the column for the number of votes was left in blank. A Mr. Maw, an unsuccessful candidate, moved against two of those elected, on the ground that the voting papers having been left in blank were void. Maw himself had voted with a voting paper in blank, and had also taken part at former elections when a similar course had been pursued,

and had been himself so elected: *Held*, Maw was disqualified from becoming relator. *Held*, also, that the blank on the paper did not avoid the election.

Blackburn, J., said: "In the exercise of the discretion to grant this perogative writ we ought not to grant it to Mr. Maw under the circumstances shewn by the affidavits: we must see that the relator is a fit person to be entrusted with this prerogative power of the Crown."

Mellor, J., said: "The circumstances stated in the affidavit bring him precisely within the rule, which is very correctly stated in *Corner's* Crown Practice, 184. The relator must not be disqualified by having acquiesced or concurred in the act which he comes to complain of, or in similar acts at former elections."

Shee, J., said, quoting from what Lord Kenyon, C. J., said in *Rex* v. *Clarke*, 1 East. pp. 46, 47: "The Court have on several occasions said, and said wisely, that they would not listen even to a corporation who has acquiesced, or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose; and so far, I think, we have determined rightly."

I may refer also to *The Queen* v. *Hutchings*, 6 Q. B. D. 300.

In this case the county council had jurisdiction to pass the by-law incorporating the village. The by-law, while it is unquestioned, is binding upon all persons. If fraud can be imputed to the parties procuring the passing of it, or if any gross misconduct can be charged against them, or any wilful disregard of the provisions of the statute, by which the by-law is made to operate against the truth of the facts upon which it assumes to be founded, is established, the by-law may be impeached by any one interested in the matter, so long as such person was not concerned in the fraud, misconduct, or wilful disregard of the statute complained of.

I do not think that any one of the parties moving to quash this by-law can be said to be estopped from making this motion by reason of the part which he took under the

by-law at the election of municipal officers, which was held under it; not even Mr. Fenton who was a candidate for the office of reeve, but certainly not Mr. Brawley, who merely voted at the election.

This is not a matter affecting the *election*, but a matter affecting and impeaching the rightful and lawful incorporation of the village; and although the applicants took a part in the election, they took no part whatever in the proceedings for the incorporation, and they are therefore competent and qualified applicants on this application to quash the by-law, and invalidate the act of incorporation.

The proceedings taken from first to last to pass and to have passed this by-law, appear to me to have been not only irregular in every respect, but to have been based on falsehood, and in utter disregard of the provisions of the statute; so that there is what I may describe as fraud; but undoubtedly there is illegality; and I have no hesitation in saying I have the power to quash this by-law upon the materials before me, although the illegality does not appear upon the face of the by-law; and upon the materials which are before me, I think I am bound to quash it. I may refer to *Almas* v. *Haldimand*, in which my brother Rose gave judgment quite lately quashing a by-law incorporating a village, because the petition for incorporation was not signed by 100 freeholders and residents of the locality; and I make this order to quash it accordingly, with costs to be paid by the respondents, the County of Simcoe, to the applicants.

Order nisi absolute, with costs.

[CHANCERY DIVISION.]

MURRAY ET AL. V. MALLOY ET AL.

Will—Devise—Statute of Mortmain—Bequest of personalty to a charitable institution to build a college.

J. M. died on August 9th, 1884, having made his will three days before, in which, after giving certain legacies, he provided as follows: "I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church for the purpose of building a college in Canada, and not elsewhere, and in his name." The Lutheran Church was not incorporated and held no lands, but was composed of a number of congregations in different parts of the Province. The lands upon which the various churches belonging thereto were erected, were vested in trustees for the benefit of the congregations, and some of these lands were suitable as building sites for a College.

Held, that the devise of the realty and all personalty savouring of the realty was void.

Held, also following *Giblett* v *Hobson*, 3 Myl. & K. 517, that the bequest of the pure personalty was also void; that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself, is within the Statute of Mortmain; and that the *onus* of showing that the intention of a testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in Mortmain must be indicated or the future acquisition of building-land, otherwise than by means of the legacy, must plainly be contemplated, or the words of the will must expressly exclude the application of the money given in the acquisition of land, which was not done in this case.

THIS was an action brought by David Murray and Rebecca Lyon, as heir and heiress-at-law and next of kin of one Isaac Murray, against the executors appointed by his will, and others interested thereunder, for its construction.

The testator made his will on August 6th, 1884, and died on the ninth day of the same month.

After a direction for the payment of debts and the bequest of some pecuniary legacies, the will proceeded as follows:

"I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church for the purpose of building a college in Canada and not elsewhere and in his name, and I hereby appoint * *" (then followed the appointment of executors, &c.)

The testator died possessed of or entitled to both real and personal estate.

The action was tried at Toronto on March 3rd, 1885, before Boyd, C., who held that the devise of the realty and bequest of the personalty savoring of realty was void under the Statute of Mortmain, and that the real estate devolved upon the heirs-at-law, and the personal estate savoring of realty passed to the executors to be administered as upon an intestacy and a reference was ordered to ascertain: (1) Of what the pure personalty consisted. (2) The position, status and landed property in Canada of the Evangelical Lutheran Church of Canada. (3) And as to any other matter requisite to enable the Court to judge of the validity of the bequest of pure personalty given by said will to the Lutheran Church,—and further directions were reserved.

The report of the Official Referee, dated June 12th, 1885, found the pure personalty to amount to $12,732.19.

And as to the status, &c., as follows:

"From the evidence adduced before me it appears that the position, status, and landed property in Canada of the Evangelical Lutheran Church of Canada is as follows:—The said Church is composed of some fifty congregations or thereabouts, having their places of worship in different parts of the Province of Ontario; the members of these congregations are chiefly German immigrants, and although not incorporated have for the last twenty-four years or thereabouts, held annual Synod meetings at different places throughout the Province.

The said Church having long felt the want of a college for the education and preparation of aspirants to the ministry, have applied at the present session of the Parliament of the Dominion of Canada for an Act incorporating the said Synod, with all the necessary powers for such purpose, for the convenience of the members of the different congregations.

It has always been the practice of said Church that said congregations belonging thereto should have the land upon

which its church was built and belonging thereto, vested in trustees for its benefit.

In this way the said Church own lands in many places and throughout the said Province, some of which are suitable for and could be used for the purpose of building a college upon it; that is to say, in the city of Toronto, in the townships of Vaughan and Markham in the county of York, and in the counties of Perth, Waterloo, Grey, and Renfrew."

A schedule was added to the report shewing the trusts upon which these lands were held, which trusts are set out in the judgment.

The action then came on to be heard on further directions and was argued on September 16th, 1885, before Ferguson, J.

W. N. Miller, for the plaintiffs. The words, "for the purpose of building a college in Canada," shew what the money was to be used for and makes the gift void, because it was to be invested in lands to build a college on. The law is laid down in 1 *Jarman*, 4th ed., p. 228, 230. The early cases settled that if money be given to build a college, evidence was not admissible to shew that if the money was not to be used in the purchase of land upon which to erect it, but *Giblett* v. *Hobson*, 3 Myl. & K. 517, relaxes that rule. To be valid, a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land: *Pratt* v. *Harvey*, L. R. 12 Eq. 544, 546. This was followed by Bacon, V.C., who said: "To take it (the charitable bequest) out of the *Statute of Mortmain*, the gift must be to build upon land which is indicated, or there must be a prohibition as to laying out the money devoted to that purpose to any other: *In re Cox, Cox* v. *Davie*, 7 Ch. D. 207. See also *Booth* v. *Carter*, L. R. 3 Eq. 757, there cited. *Davidson* v. *Boomer*, 15 Gr. 1 and 218, will be relied upon by my learned friend. In that case it was held that the Court will receive extrinsic evidence to shew what the testator's

intention was. The *onus* of shewing that the intention of the testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute: *Giblett* v. *Hobson*, 3 Myl. & K. 530. The Referee does not find that the testator knew that the church had any lands. In any event his report shews that all the lands held were subject to certain trusts none of which are available for this purpose.

Black, for the Lutheran Church. The bequest is perfectly good because it may be maintained without its being applied to the purchase of land. The facts found by the Referee shew that. If the devise had stopped at the words "Lutheran Church," the bequest apart from the real estate would have been valid, but my learned friend contends that the addition of the words "for the purpose of building a college in Canada and not elsewhere, and in his name," makes it bad. I contend that the addition of those words was merely to shew particularly as to the site being in Canada. The evidence shews that all the testator's family were well provided for, and that the testator intended that the church should get the benefit of his property. It does not appear that it was intended that lands should be purchased: *Davidson* v. *Boomer*, 15 Gr. 1 and 218. [FERGUSON, J.—But Mr. Miller contends that you should shew that it *was not* intended that lands should be purchased.] I do not think I am bound to go as far as that. A bequest of money to be applied in building upon lands in mortmain is not within the statute: *Williams* on Executors, 8th ed., pp. 10, 67. If the Church had the right to hold lands for the purpose of building a college thereon then the bequest is good, and they have that right under R. S. O. ch. 216, sec. 1. If there is power to take real estate, then the devise does not fail: *Anderson* v. *Dougall*, 13 Gr. 166. See also *Ferguson* v. *Gibson*, 22 Gr. 36.

Middleton, for the executors. The legacies must be deducted from the gross amount of the personalty found by the Referee. My clients, of course, are indifferent as to

the main question, but they have paid the legacies and therefore have not the gross amount on hand.

Miller, in reply. Sec. 19 of R. S. O. ch. 216, must be read with section 1, and they together shew the Statute of Mortmain is not altered by that statute.

September 21, 1885. FERGUSON, J.—The case comes before me on further directions. It was brought for the construction of the will of the late Isaac Murray, and amongst other things, for a declaration that the gift in the will to the Lutheran Church is void. The will was executed on the 4th of August, 1884. The testator died on the 9th of the same month. The will, after providing for funeral and testamentary expenses, gives three legacies of $100 each, and then follows the clause containing the gift in question, which is in these words: "I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church for the purpose of building a college in Canada and not elsewhere, and in his name."

The judgment pronounced at the trial on the 3rd day of March last, declared that the will so far as the land and all property savoring of realty attempted thereby to be disposed of were concerned, was invalid; that the real estate purported to be devised by the will devolved upon the heirs-at-law of the testator as upon an intestacy, and that the personalty savoring of realty, whereof the testator died possessed or entitled to devolved upon the executors; and the action was referred to Mr. Winchester, one of the Referees of the Court, to inquire and state (1) Of what the pure personalty of the testator consisted at the time of his death; (2) As to the position, status, and landed property in Canada, of the Evangelical Lutheran Church of Canada; (3) As to any other matter requisite to enable the Court to judge of the validity of the bequest of pure personalty given by the will to the Lutheran Church; (4) Who are the persons entitled as heirs-at-law, &c. ?—reserving further directions.

The Referee found and reported that the pure personalty amounted to the sum of $12,732.19. He stated in a schedule to his report of what this consisted, that is not however material here. He also reported that the said Church is composed of some fifty congregations, having their places of worship in different parts of the Province of Ontario; that the members of these congregations are chiefly German immigrants, and, although not incorporated, have for the last twenty-four years or thereabouts, held annual Synod meetings at different places throughout the province; that the Church having long felt the want of a college for the education and preparation of aspirants to the ministry, had applied to the then session of Parliament of the Dominion for an Act incorporating the said Synod with all the necessary powers for such purpose; that for convenience of the members of the different congregations, it had also been the practice of the Church that the congregations belonging thereto should have the land upon which its church was built and belonging thereto vested in trustees for its benefit; that in this way the Church owned lands in many places throughout the Province of Ontario, some of which were suitable for and *could be used* for the purpose of building a college upon; that is to say, in the city of Toronto: in the townships of Vaughan and Markham, in the county of York: and in the counties of Perth, Waterloo, Grey, and Renfrew; that the trusts upon which some of the lands were held as appeared from copies of the deeds produced, were those set forth in a schedule to the report, and that no other deeds relating to the property of the Church, were produced before him, nor was any evidence given as to the contents of such deeds.

In this schedule four parcels of land are mentioned. One in Toronto consisting of 5336 square feet, which was on the 2nd July, 1855, conveyed to trustees, to be held by them upon the special trust and confidence, that the same might be forever thereafter held and enjoyed for the site of a chapel for the use of the members of a Lutheran Church, maintaining a church discipline and doctrinal prin-

ciples, with the Augsburgh confession, and with the lesser catechism of Luther.

Another in the Village of New Hamburg, in the county of Waterloo, containing one rood eighteen perches, conveyed the 1st of May, 1869, to trustees of the New Hamburg congregation of the Evangelical Lutheran Trinity Church, of the Unaltered Augsberg confession in trust, for the use and benefit of the said congregation, for the purpose of a church site or manse for the minister of the said congregation.

Another—the east half of lot No. 5, in the 12th concession of the township of Normanby county of Grey, containing one acre, granted by the Crown by letters patent, dated the 15th of September, 1871, to trustees in trust, for the use and benefit of St. Paul's Evangelical Lutheran Church, in the said Township of Normanby.

And another—part of lot 11 in the 3rd concession of the township of Draper, in the district of Muskoka, containing half an acre, granted by the Crown by letters patent, on the 1st of February, 1875, to trustees upon trust, for the erection and maintenance of a building or buildings thereon, to be used as a church or meeting-house for the congregation of the Evangelical Lutheran Church worshipping, at the said township of Draper, and for such other purpose and purposes as the said congregation might from time to time find expedient.

In *Jarman* on Wills, 4th ed., p. 230, *et seq.*, (5th Am. ed., p. 434, *et seq.*,) the author says: "It has been much questioned whether a bequest of money, to be applied in the 'erection' of a school house or other building, for charitable purposes, is bad, as involving a trust to purchase. Lord Hardwicke considered that if the trustees could get a piece of ground given to them, so that land need not be purchased, the gift was good; but the contrary is now settled: and to make such a bequest valid, the testator must either point to land already in mortmain, or he must forbid the purchase of land." And he refers amongst others to the case of *Mathers* v. *Scott*, 2 Keen 172, where

a testator bequeathed a legacy to trustees, with a request that they would entreat the Lord of the Manor to grant land for building almshouses. Lord Langdale, M. R., held that the language of the bequest was not sufficiently expressed to exclude a purchase, and therefore the gift failed. The author lays it down as equally clear that a legacy on condition that the legatee provide land for effecting the testator's object, is void, as being in truth a purchase of the land from the legatee, and that it would not avail, that charity legatees by whom the fund is directed to be laid out in the erection of buildings possess and offer to appropriate for the purpose land already in mortmain, unless the bequest were so framed as not to admit of a new purchase being made for the occasion. A bequest to build is not made valid by a proviso that the legacy shall not be paid until the building has been commenced: *Pratt* v. *Harvey*, L. R. 12 Eq. 544.

In *Giblett* v. *Hobson*, 2 Myl. & K. 519 (one of the cases referred to in *Jarman*,) the Lord Chancellor says, at p. 827: "The first position which I am justified by the cases in laying down, nay, by the whole authorities together called upon to lay down, is this, that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself, is within the statute." This case seems to decide that matter *dehors* the will may be looked at, for the purpose of placing the Court in the situation of the testator, in order to determine whether the testator contemplated building upon lands already in mortmain, or to be acquired by other means than by the application of the legacy. At page 530, the Lord Chancellor says: "That the *onus* of shewing that the intention of the testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that in one way or another, but especially where it is to be by matter *dehors*, that is by considering to what circumstances the instrument was applied, the intention must appear absolutely certain and clear to exclude the employment of the fund in purchasing land, and must not be a matter of speculation and conjecture."

At page 531 of the same case the Lord Chancellor says: "The bequest is of money to a charitable institution, towards building almshouses without more. This, *primâ facie* is a bequest for buying land and building upon it, * * and something must therefore be shewn *dehors* the will, something in the circumstances to which the testator must be understood to refer, and *necessarily* to refer; something which leaves no doubt at all that he did not mean the money to be used in buying land, but only in building houses."

In the case of *Cox* v. *Davie*, 7 Ch. D., 207, Bacon, V. C., at p. 207, "refers to the case *Philpott* v. *St. George's Hospital*, saying that it is an important case in itself, and still more important because * * all the authorities then extant were considered and commented upon, and that in that case the rule is stated in the most distinct manner that can be conceived, namely: "Either the land must be so indicated as that you can say that it is not within the *Statute of Mortmain*, or the direction must be that you must not lay out the amount of the legacy upon any other land than that which is already in mortmain."

In *Pratt* v. *Harvey*, before referred to, Sir John Wickens said: "The rule of the Court is now well settled, that in order to validate a gift of this kind, you must find in the will a reference to an existing site, on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given in the acquisition of land." The gift in that case was a gift of £1,000, to be applied towards building a church at Newark.

The subject is treated of at considerable length in *Williams* on Executors, 8th ed. p. 1067, and following pages. Counsel for the Church placed reliance upon the case *Davidson* v. *Boomer*, 15 Grant 218. As I understand that case, it does not differ materially from cases that preceded it. The learned Judge, after making some remarks in respect of a dictum of Lord Eldon in *Attorney-General* v. *Davies*, says at p. 223: "And I agree that a direction to

lay out money in the erection of a building must now, from the construction these words have long received, be taken in their strict and primary sense to include a direction to purchase land." The same words of Lord Eldon are remarked upon by the Lord Chancellor in *Giblett* v. *Hobson*, at page 530, where he says: "They seem to confine the exception to cases where the land to be built upon is already (that is at the date of the will or at least at the testator's death) in mortmain. But the reason of the matter extends this also to cases where the testator may plainly appear to have in contemplation a future acquisition of building-land otherwise than by means of the legacy," and he says that Lord Eldon clearly assumes this in what he says in another case, *Attorney-General* v. *Parsons*, 8 Ves. 191.

I do not perceive that the other authorities referred to by counsel for the Church, *Anderson* v. *Dougall*, 13 Gr. 164; *Ferguson* v. *Gibson*, 22 Grant 36, R. S. O. ch. 216, have the effect in this case contended for.

It is said by Sir James Wigram that "any evidence is admissible which in its nature and effect simply explains what the testator has written; but no evidence can be admissible which in its nature or effect is applicable to the purpose of showing what he *intended* to write. This passage is referred to by the learned Judge in the case *Davidson* v. *Boomer*, 15 Gr. 220. It appears to me to be a concise statement of a rule of the law of evidence that is generally well understood.

In the present case the testator did not forbid the purchase of land with the money or pure personalty, and the bequest "taken by itself" appears to me to be, upon the authorities, clearly within the statute.

The further questions to be determined seem to me to be: Has it been shown by the extrinsic matters adduced, the circumstances—matters *dehors* the will—that the testator, by the words that he employed, meant that the building should be erected upon lands then already in mortmain, or that he plainly had in contemplation a future

acquisition of building land (otherwise than by means of the legacy) upon which the college should be erected? In shewing, or endeavoring to show either of these, the burden of proof rests upon the party who is seeking to show that the case is not within the statute, and the authorities seem to show that in such cases the meaning or intention must be shown beyond doubt, not left a matter of speculation or conjecture.

As to whether or not either of these has been so shown, I am, I apprehend to look at the report of the Referee. It does not appear by this report that the "Lutheran Church" had any lands. The way in which, and the trusts upon which some of the congregations of this Church held lands, appear by the report, and looking at these and each of them, I cannot arrive at the conclusion that it has been made to appear that the testator meant that the college should be built upon these lands, or any of them, even if it had been shown that he was aware that the respective congregations had these lands, which it was not, and I do not see how I can arrive at the conclusion that it has been made to appear that the meaning was that the college was to be built upon any of the other lands, less particularly referred to in the report. It is not shown that the testator was aware that the respective congregations had any of these lands, and it is to be borne in mind that the matter cannot be left a matter of speculation or conjecture. It must be placed beyond doubt.

The learned Referee states in his report, that in the way that he had before pointed out, (the way that I have already mentioned), the Church owned lands in many places and throughout the province of Ontario, some of which were suitable for, and could be used for the purpose of building a college upon them; but when he says the lands could be so used, I presume he only means, that as a physical fact, a college might be built upon the lands or some of them, without reference to the legal right of the Church as against the will of the congregation holding the lands, to build a college upon them.

How it can be said that it has been made to appear that the meaning of the testator (such meaning being ascertained by the means before stated), was that the college was to be built upon any of these lands, I cannot perceive, and I am of the opinion that the contention that it does so appear fails.

There seems to be no pretence that it has been made to appear that the testator had in contemplation a future acquisition of building land (otherwise than by means of the legacy) upon which the college was to be erected.

I am, for these reasons, of the opinion that the bequest of the pure personalty is invalid.

This is the only matter that was argued before me, and I apprehend it is the only one in contention.

The costs of all parties will be out of the estate.

Judgment accordingly.

G. A. B.

[COMMON PLEAS DIVISION.]

WILKINS v. MCLEAN.

Mortgagor and mortgagee—Equity of redemption obtained by mortgagee—Sale thereof by him—Liability to account for proceeds.

In 1856 R. mortgaged certain lands to J. D. C. to secure £550, payable on 1st January, 1863. In 1857 J. D. C. died, having appointed the defendant and another his executors, who duly proved the will. In 1864, after the death of defendant's co-executor, the mortgage was deposited with H. as security for an advance of $401, as set out in *McLean* v. *Hime*, 27 C. P. 195, whereby H. was declared entitled to hold the mortgage as collateral security for the said sum. In 1856 R. sold the equity of redemption to Z. In 1877 H., by representing that he controlled the mortgage, procured the executors of Z., for a nominal consideration, to give a conveyance of the equity of redemption to A. B. H. as bare trustee for him; and in 1878 obtained conveyances from other parties interested therein. In 1879 H. sold the equity of redemption to M. for $5,000. In 1880 S. C., a beneficiary under the J. D. C.'s will, having made a claim on defendant for her share of the estate, a settlement was effected by defendant agreeing to pay $2,050, and assigning the mortgage to her as collateral security. S. C. commenced foreclosure proceedings thereon, H. and M. being made parties, when a settlement was effected by H. paying S. C. $500 and procuring an assignment of the mortgage to be made to plaintiff as bare trustee for him. The plaintiff commenced proceedings against defendant claiming the $2,050 secured by the agreement made between S. C. and defendant and in default of payment foreclosure.

Held, [reversing the judgment of Ferguson, J.,] that H. by representing himself to be mortgagee obtained the conveyance of the equity of redemption, and must therefore account to defendant for the amount realized on the sale thereof to M.

The plaintiff's claim was therefore dismissed, and judgment entered for defendant for the difference between the $5,000 with interest and the $401 with interest, together with the amount payable to S. C. under the agreement.

THIS was an action of foreclosure tried before Ferguson, J., who delivered the following judgment in which the facts are fully stated.

Moss, Q.C., for the plaintiffs.

Cassels, Q.C., for the defendant.

FERGUSON, J.—By an agreement, dated the 8th May, 1880, the defendant covenanted with one Selina Cameron to pay her the sum of $2,050 on or before the 2nd January, 1881, with interest at the rate of three per centum per annum from the date of the agreement, and at the rate

of six per centum per annum after the 2nd January, 1881. The agreement, however, provided that the clause relating to the rate of interest after the 2nd January, 1881, should not be considered as any extension of time for the payment of $2,050. And the defendant by the same document agreed to assign to her (Selina Cameron), as collateral security for the payment of the money, a mortgage, bearing date the 23rd January, 1856, made by one Charles E. Romaine to one John Dugald Cameron, to which mortgage the defendant claimed to be entitled as the surviving executor of the last will of the said John Dugald Cameron; and this mortgage was on the same day accordingly assigned. The transaction was made apparently in settlement of a claim that Selina Cameron had against the estate of John Dugald Cameron.

On the 9th October, 1880, Selina Cameron assigned and transferred to the plaintiff the said covenant of the defendant to pay the $2,050 and interest, and apparently all the rights under the indenture in which it is contained. And by another instrument, bearing date the same day, she assigned and transferred to the plaintiff the mortgage from Romaine to John Dugald Cameron, which she held as collateral security.

The assignments of this mortgage seem to be full, and to contain all the usual provisions. Default was made in the payment $2,050 and interest, and the bill in the case is filed asking that an account may be taken: that the defendant may be ordered to pay the plaintiff what may be found due; and that on default the defendant may be foreclosed of all rights, &c., in respect of the mortgage, and the plaintiff be declared absolutely entitled to the same, free and clear, &c.

The plaintiff Wilkins is trustee only for Mr. H. L. Hime.

The defendant in his answer, amongst other things, says that at the time the mortgage was assigned to Selina Cameron she agreed to realize the same, and after paying the debt to pay over the surplus to the defendant, and that there was due upon the mortgage a sum exceeding $5,000: that the mortgage was in the possession of Hime, who claimed a lien upon it, and to be the equitable assignee of it to secure a sum of money alleged to be owing from the defendant to him: that Hime, while so in possession of the mortgage, entered into negotiations with the owners of the equity of redemption in the lands embraced in it, representing himself to be the holder of the mortgage, and

entitled to the benefit of it, and that the amount due on the mortgage exceeded the value of the lands upon which it was; and procured them to release the equity of redemption to him or his nominee; and that he afterwards conveyed the lands to one Anne McKay for the sum of $5,000: that after this a suit was brought by Selina Cameron against Anne McKay, and Hime, and the said Romaine to realize the said mortgage: that that suit was brought with defendant's sanction and approval, and for his benefit as well as that of Selina Cameron, but before the suit was brought to a hearing, and after notice had been given of an application to charge Hime with the said sum of $5,000, he, Hime, settled it by paying Selina Cameron what was due to her: that this settlement was without prejudice to the defendant, and that upon its being effected the assignments to the plaintiff were made. And the defendant says that by reason of this settlement the debt to Selina Cameron was paid and discharged, and that there is nothing due to her, or to the plaintiff; and claims that Hime should be added as a party to the suit, and that the defendant is entitled as against him to an order for the payment of whatever balance there may be of the $5,000.

At the hearing Hime was made a party plaintiff.

As to the alleged agreement by Selina Cameron to realize the mortgage, and after paying herself, pay any balance to to the defendant, Munro, the solicitor who acted for her, is called, and says he had brought a suit for her against the defendant; and "these" (the agreement and mortgage) were taken in settlement. He says that it was at first intended that there should be an agreement that no proceedings against the defendant should be taken till such time as the mortgage could be collected; but that upon reflection he refused to do this; and the time was extended on the covenant. He says, however, that it was understood that he would proceed upon the mortgage immediately.

The defendant in his evidence says that in the original draft agreement Munro, had the time, the 1st of July: that he said to him that he would not be able to collect the mortgage by that time: that Munro said that perhaps the defendant was right, and the change was made to the 1st of January. And the defendant then says: "I understood, and, as I believe, he understood, that the mortgage should be collected before I should be called on to pay the $2,050."

Under these circumstances I do not think that I should find that there was a binding agreement such as was stated

in the answer in this respect; but, I do not desire to be understood to intimate that I doubt the sincerity of either of the witnesses.

It appears that the mortgage in question was many years ago deposited or pledged with Hime by Thomas McLean, a brother of the defendant, as a security or pledge for the payment of money.

Hime is called as a witness, and he produces the mortgage. (It was apparently not delivered at the time of the assignment of it to Selina Cameron.) He says: "I have had this mortgage since the year 1864. I got no assignment of it or any conveyance of the property contained in it. It was left with me by Thomas A. McLean as security for money I advanced to him. The defendant denied my right to this paper, and brought a suit against me for it. He has always denied my right to have the mortgage, and never till now asserted that I had such a right. I had nothing but the paper deposited with me."

The defendant in his evidence says: "I never borrowed any money from Hime. I never authorized the deposit of the mortgage with him. I always disputed his right to have the mortgage at all. I had some hopes of getting the mortgage from him, even after the suit in detinue, without paying any money."

The case of *McLean* v. *Hime*, to which both parties referred at the trial, is reported in 27 C. P. 195, and more minute details of the manner of the deposit of the mortgage shewn than appear by the evidence in this case. The only matter that it decides is, that Hime so held the mortgage by virtue of the deposit of it that the defendant in this suit could not succeed against him in an action of detinue for it. The sum claimed to be secured by the deposit or pledge of the mortgage appears to have been $401.

There is no doubt that while Hime held the mortgage so deposited he did deal with the owners of the equity of redemption, and that he became beneficially entitled to it, and made profit by his dealings in respect of it; but it was never vested in him. It was never conveyed to him, nor was the mortgage ever assigned to him; and it is, I think, perfectly clear that there was not from the beginning (the time of the deposit) to the time of the assignment of the mortgage to Selina Cameron, nor, so far as Hime was concerned, to the time of the assignment of it to the plaintiff, anything to prevent the defendant from redeeming or regaining the mortgage on payment of the amount for which it was

deposited, nor has there since been anything to prevent his so doing on payment of the further sum for which it is now held as collateral security. Hime has always had the pledge (if it is properly called a pledge) ready to be delivered on payment of the money, and his dealings respecting the equity of redemption in the land (though he profited by them) cannot, so far as I can perceive, have operated as an injury to the defendant. The defendant had no right or title to the equity of redemption in the land. He was only mortgagee. Hime got nothing that belonged to him, and always kept the pledge ready to be delivered.

On principle Hime was in my opinion, as to his dealings in respect to the equity of redemption in the land, in the same position as a perfect stranger to the property, so far as the defendant was concerned. Whatever representations he may have made to the owners of the equity of redemption, these could have made no difference to the defendant. They were not made to him. He did not act upon them. If they deceived any one, they did not and could not prejudice any property that was his.

The other defences set up, I think, entirely fail, and the plaintiff is, in my opinion, entitled to the order for the payment of the money, and in default, a foreclosure of the defendant's interest.

The plaintiff has intimated his willingness to take the $2,050, and the interest, without any reference to any alleged lien for the money advanced to Thomas A. McLean, the defendant's brother.

The interest on this sum can be computed by the registrar. There is no need of a reference I think.

The judgment is with costs of suit.

In Hilary Sittings, 1883, *Walter Cassels*, Q. C., moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During the same sittings, June 4, 1884, the motion was argued and stood for judgment, when a re-argument was directed.

During Easter Sittings, June 4, 1885, the re-argument took place. *Walter Cassels*, Q. C., supported the motion. The evidence clearly shews that Hime obtained the equity of redemption from the trustees of the Zimmerman estate and the Bank of Upper Canada on the

representation that he controlled the mortgage debt, and that the mortgage was over and above the value of the land. He obtained the release in his character of mortgagee. In the case of *McLean* v. *Hime*, 27 C. P. 195, Hime set up that the loan was to the executors of the Cameron estate, and that he was equitable mortgagee; and it was on that ground that the action failed. Hime, therefore, occupied the position of trustee for the mortgagors, and must account to them for the benefit he derived from his acquiring the equity of redemption; but even if Hime's representation was fraudulent, he cannot set up his own fraud, and by reason thereof, claim to hold the benefit derived to his own advantage. The defendant is therefore clearly entitled to such benefit. He referred to *Grace* v. *MacDermott*, in app., 13 Gr. 247; also to the judgment in the Court below, set out in the printed case in Appeal, vol. vi. of the Library-bound edition of Appeal Cases; *Parkinson* v. *Higgins*, 37 U. C. R. 308; *Kelly* v. *Macklem*, 14 Gr. 29.

Moss, Q. C., contra. The case of *McLean* v. *Hime*, 27 C. P. 195, was an action of detinue; and all it decides is that McLean could not recover in detinue against Hime. It did not decide that any interest in the land passed to Hime. There was no deposit so as to create an equitable mortgage, but merely a pledge of a chattel. The case of *Carter* v. *Wake*, 4 Ch. D. 605, points out the difference between pledgees of chattels and equitable mortgagees. The ground on which the deposit of title deeds is treated as an equitable mortgage is, that the equitable mortgagee can call for a legal mortgage. Here Hime never could have called for a legal mortgage. Hime never represented to the trustees of the Zimmerman estate or to the Bank of Upper Canada, that he had any estate in the land, but merely that he controlled the mortgage. The trustees of the Zimmerman estate and the Bank of Upper Canada were fully aware of all the circumstances, and they considered that the equity of redemption was of no value. Hime did not purchase as representing the estate, but as a stranger. The equity of redemption was not taken to Hime,

but to Harris, and this was done so as to keep the equity of redemption and the legal estate separate. Nothing that Hime has done has in any way prejudiced the defendant in his rights. The defendant all along, until this suit was commenced, repudiated that the relationship of mortgagor and mortgagee existed, and for the first time when this suit was commenced sets it up, and attempts to obtain the benefit that Hime derived from the sale of the equity of redemption. The judgment of the learned Judge appealed from is right, and should not be interfered with. He also referred to *Thompson* v. *Blackstone*, 6 Beav. 470; *Tolson* v. *Sheard*, 5 Ch. D. 19; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236; *Hill* v. *Simpson*, 7 Ves. 152.

Cassels, Q.C., in reply. The other side feel the difficulty of Hime occupying the position of equitable mortgagee, and thus attempt to get over the difficulty by alleging that he was merely a pledgee of a chattel. It cannot be properly contended that Hime merely purchased as a stranger. The basis of the decision of *McLean* v. *Hime*, 27 C. P. 195, is that Hime's position was that of equitable mortgagee, and that he had an interest in the land, and it was in that capacity that he purchased.

June 27th, 1885. ROSE, J.—This is a motion by way of appeal from the judgment of Ferguson, J., directing payment of the moneys claimed by the plaintiff, and in default foreclosure of the defendant in the land in question.

The facts are briefly as follows: In January, 1856, C. E. Romaine made a mortgage of the lands in question to John Dugald Cameron to secure the payment of £550 on or before the 1st of January, 1863, with interest, in the meantime half-yearly at the rate of six per cent. per annum.

Cameron died in 1857, having first made his will appointing the late Honourable Chief Justice McLean and his son Archibald (the present defendant) his executors, who duly proved the will.

In the year 1864, after the death of Chief Justice McLean, the mortgage was deposited with one Hime, the beneficial plaintiff herein, as security for an advance of

about $400 under the circumstances set out in *McLean* v. *Hime*, 27 C. P. 195. The deposit was by Thomas McLean, brother of the defendant, and the repudiation by the defendant and consequences thereof sufficiently appear in the report of that case.

By the decision in that case, Hime was declared entitled to hold the mortgage deposited with him by Thomas McLean as collateral security for $401.

It is not stated in the judgment that he was merely entitled to hold the deed as a chattel, as was argued by Mr. Moss.

The words of the judgment are: "deposit as a collateral security for the whole of the said sum of $401." See p. 201. This decision was in December, 1876.

In 1856 Romaine sold the equity of redemption to Samuel Zimmerman, who gave a bond to Romaine to pay off the mortgage in question and another subsequent mortgage. Zimmerman was killed at the railway accident called the "Desjardins Accident" in 1857, having previously made his will appointing as executors and trustees, Joseph Augustus Woodruff, Sheriff of Lincoln, Richard Miller, Richard Woodruff, and John L. Ranney, Esquires.

In 1877 Hime approached these executors, representing that he controlled the mortgage in question, and obtained from them a quit-claim deed containing words of grant of the lands in question for a nominal consideration of $4.00, the conveyancer's charges for drawing the deed. The deed was made to one Arthur Beveridge Harris, as bare trustee for Hime.

Having obtained this deed he, on the 9th of March, 1878, obtained a quit claim deed, with words of grant, from Mr. Gamble, trustee of the Bank of Upper Canada, and a similar deed from the executors of the late George Crookshank, all confirmatory of the same title; and to which further reference is unnecessary.

On the 3rd of May, 1879, Harris conveyed to one Quin, also a bare trustee for Hime; and on the 29th of same month Hime sold the equity of redemption to one Mrs.

McKay for $5,000. For some reason the conveyance is made to one Hope, who, on the 18th January, 1880, conveyed to Mrs. McKay.

Selina Cameron, a beneficiary, under the will of the said J. D. Cameron, having made a claim on the defendant herein for payment of her share of the estate, a settlement was arrived at in 1880 by which the defendant agreed to pay her $2,050 within the period therein stated, and he assigned to her the mortgage in question as collateral security.

Selina Cameron commenced proceedings to foreclose the mortgage, and Hime was made a party along with Mrs. McKay. A settlement was arrived at by which Hime paid Miss Cameron $500, and obtained an assignment of the mortgage to the present plaintiff as bare trustee for himself.

Thereupon the present proceedings were instituted, claiming an order for the payment of the $2,050 secured by the agreement and assignment of mortgage and interest, or in default for foreclosure.

The defendant, among other defences, set up the proceedings with reference to the equity of redemption; and claimed that the conveyance to Hime or his trustee was to Hime as mortgagee, or that he had fraudulently represented himself to be mortgagee; and therefore that Hime was bound to account to him for the amount realized upon its sale.

It was not disputed that if Hime had so acted as to prevent his denying that he had purchased as mortgagee, or for the benefit of the defendant as mortgagee, then he would be bound to account to the defendant for the amount realized upon the sale to Mrs. McKay. A reference to *Parkinson* v. *Higgins*, 37 U. C. R. 308, 40 U. C. R. 274, 278, will shew that when he comes, as he does here, to ask for payment or foreclosure, he must account for the property which had come into his hands as mortgagee, or the proceeds thereof.

It seems to me, therefore, that the decision of the case turns upon the view to be taken of the evidence as to Hime's dealings with the executors of the Zimmerman estate.

(1). Did he purchase or acquire the interest of that estate as a stranger? or (2). As mortgagee or trustee for the owner of the legal estate? (3). Did he make his interest or alleged interest in the land a ground for being allowed to purchase?

If the two latter questions are to be answered in the affirmative, then under *Kelly* v. *Macklem*, 14 Gr. 29; *Grace* v. *MacDermott*, 13 Gr. 247; *Parkinson* v. *Higgins*, *supra*, it is agreed that he must account for the value having sold the estate, as is stated, for $5000.

In Hime's examination before the Master, and which was read at the trial, it appears (p. 1) that he wrote to the executor of the Zimmerman estate telling them that he then controlled the mortgage interests, and that the lands were incumbered by two outstanding mortgages for more than they were worth; and on that statement they conveyed to him the equity of redemption; and (on p. 3) that he showed the mortgage deed to Mr. Miller, one of the trustees, and who acted as solicitor for the estate.

The question and answer are as follows:

"47. Q. Didn't you have a conversation with him (Mr. Miller) in which you represented to him that you were mortgagee: that the equity of redemption was worthless; and asked him to join in a quit-claim? A. I asked him to join in a quit-claim; and I think I showed him the mortgage."

Mr. Sheriff Woodruff, one of the executors, was examined at the trial. In reply to Mr. Cassels, he stated he would not have signed the conveyance to Harris (the nominee of and bare trustee for Hime) if he had not believed him to be the holder of the mortgage.

As will be seen by perusing the judgment of the learned Judge, there is no finding of fact on this evidence.

I find as a fact that Hime represented to the executors of the Zimmerman estate that he was mortgagee of the mortgage in question, and produced the mortgage deed as evidence of the fact; and that he made his interest in the land a ground for being allowed to purchase; and therefore cannot now be allowed to set up his right to hold as if he had purchased as a stranger.

The above findings are, so far as may be, in the exact language of the late learned Chancellor Spragge, in *Kelly* v. *Macklem*, 14 Gr. 29 at p. 30.

To adapt the language of the Court of Appeal in *Grace* v. *MacDermott*, 13 Gr. 247, 255, I am of the opinion that, assuming Hime not to be the mortgagee of the mortgage as the result of the transactions between himself and the defendant, as set out in *McLean* v. *Hime*, 27 C. P. 195, then he did not purchase the interest of the Zimmerman estate without false representations; and that he is setting up such conveyance in fraud of the express purpose for which it was made.

The full discussion of the law in the above cases renders unnecessary more than the reference to them.

Mr. Moss argued that Mr. Hime did not become a mortgagee and acquire an interest in the land, but was merely pledgee of a personal chattel.

I am of the opinion it is unnecessary to determine whether such is the effect of the decision in *McLean* v. *Hime*, 27 C. P. 195, or of the argument on the plaintiff's behalf, as, in the view I take of the decision in *Grace* v. *MacDermott*, 13 Gr. 247, it seems to me sufficient to find that he represented himself as mortgagee, and by such representation obtained the conveyance; and therefore cannot be heard now to urge to the contrary.

Nor does it seem to me material to consider the power of McLean to commit a breach of trust by depositing or mortgaging the mortgage as security for a private loan.

If McLean recover from Hime the value of the equity of redemption, or of the property less the amount due for the loans made by him and the amount secured to Miss

Cameron, he can, no doubt, be compelled to account for such moneys to his *cestui que trust*, if any there be.

In my opinion the motion must be allowed, dismissing the plaintiff's claim, and directing judgment for the defendant for $5,000, and interest thereon since date of receipt, less the amount of the loan by Hime to McLean, namely, $401 and interest from its date, and less the amount payable to Miss Cameron under the agreement with her. I add the $401 and interest as under *McLean* v. *Hime*, 27 C. P. 195, Hime is entitled to retain the mortgage until it is paid; and, so far as it appears, it would not be honest for the defendant to attempt to obtain relief without paying such sum.

The judgment will be with costs.

GALT, J., concurred.

CAMERON, C. J., took no part in the judgment, having been interested in the case while at the bar.

Motion allowed.

[QUEEN'S BENCH DIVISION.]

MAY v. ONTARIO AND QUEBEC RAILWAY COMPANY.

Railway company—Negligence—Railway employee—Common employment—Dominion Railway Act, 42 Vic. ch. 9, sec. 27 (D.)—Limitation of action—"By reason of the railway."

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying: that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used: that they also directed and required him to be carried, as part of his employment, on the defendants' trains: that accordingly he was received by the defendants "to be safely carried" on a train, and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured:

Held, 1. That if the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman in that new employment, just as he had been in his former employment.

2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment, and that there was no cause of action.

The defendants set up that the injuries complained of happened more than six months before action brought, and that the action was barred by the 27th sec. of the Consolidated Railway Act, to which the plaintiff demurred.

Held, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway."

Browne v *Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202; *McCallum* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527, and *Kelly* v. *Ottawa Street R. W. Co.*, 3 A. R. 616, referred to and followed.

Semble, that the concluding words of the 27th section of the Consolidated Railway Act, viz., that "the defendants may prove that the same" (that is the damage) "was done in pursuance of the authority of this Act and the Special Act," should be read as meaning "in the course and prosecution of their business as a railway company, constituted in pursuance of," &c.

DEMURRER.

The statement of claim set out:

1. That the defendants employed the plaintiff to work at laying the track of the defendants' railway, and while so employed they directed and required the plaintiff to assist in bringing railway supplies from and about the village of Carleton to that part of the track where the supplies were from time to time required.

2. The defendants further directed and required that the plaintiff, as part of his employment, should be conveyed,

between Carleton and that part of the track where the track laying was being proceeded with, on the defendants' trains, in order to facilitate the progress of the said work, and in order that the plaintiff might the more easily assist in bringing forward the supplies.

3. While so employed, and at the direction and request of the defendants, the plaintiff was received by the defendants to be safely carried on a train from Carleton to that part of the track to which the supplies were being conveyed.

4. Owing to the negligence of the defendants in the management of their railway, the train on which the plaintiff was so travelling, was at the time thrown from the track at the Davenport crossing on the defendants' railway, and the plaintiff was thereby thrown off and out of the train, and was cut and much injured internally and externally, and became and was an incurable invalid.

The statement of defence was:

1. A general denial of the statement of claim.

2. That the train the plaintiff was carried upon at the time of the alleged accident was a train used only in carrying materials employed in laying the track of the railway, and the train was not intended for the carriage of passengers, and the plaintiff had no warrant whatever for getting upon or riding on the train except at his own risk, and he did so without the authority of the defendants; and the defendants were therefore in no way liable for any injury which the plaintiff might have sustained while riding on the train.

3. The negligence, if any there was, as charged in the 4th paragraph of the statement of claim, and by reason of which the alleged injuries were sustained, was the negligence of a fellow servant or fellow servants of the plaintiff in the employ of the defendants, and therefore the defendants were not liable in respect of such injuries.

4. At all events (the defendants said) the injuries of the plaintiff, if any, were sustained by him by reason of the defendants' railway, and were sustained more than six

months before the commencement of this action, and under the Consolidated Railway Act 1879, the plaintiff was precluded from bringing an action against the defendants in respect of his said injuries.

Reply:

1. Issue on the allegations in the 1st, 2nd, and 3rd paragraphs of the statement of defence.

2. Demurrer to so much of the defendants' statement of defence as set out in paragraph 4 thereof, on the ground that the injuries complained of were not injuries sustained by reason of the defendants' railway within the meaning of the Consolidated Railway Act 1879, and the plaintiff was therefore entitled to maintain this action.

October 13, 1885. *F. Hodgins*, for the demurrer. The section of the statute relating to the limitation of actions does not apply when the defendants are acting as common carriers. He referred to *Roberts* v. *The Great Western R. W. Co.*, 13 U. C. R. 615; *Auger* v. *Ontario Simcoe, and Huron R. W. Co.*, 9 C. P. 164; *McCallum* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527; *Kelly* v. *Ottawa Street R. W. Co.*, 3 A. R. 616; 42 Vic. ch. 9 sec. 27, (O).

R. M. Wells, contra. The defendants were not acting as common carriers at the time the plaintiff sustained the injury complained of. There was no contract to carry as in the case of an ordinary passenger. They were in the course of constructing their roadway. The neglect complained of was the neglect of a fellow servant in a common employment, for which he alone is liable. The plaintiff sustained injury by reason of the railway: *Browne* v. *Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, 207, and cases already cited; *Hammersmith* v. *Brand*, L. R. 4 H. L. 222.

Hodgins, in reply, cited, *Torpy* v. *The Grand Trunk R. W. Co.*, 20 U. C. R. 446; *Sheerman* v. *The Toronto, Grey, and Bruce R. W. Co.*, 34 U. C. R. 451.

November 5, 1885. WILSON, C.J.—The pleadings shew the plaintiff was a workman of the defendants in laying their track, and that they directed and required him to assist in bringing supplies to the men at the places where the supplies were required, and, as part of his employment, that the plaintiff should for that purpose be carried on the defendants' trains; and while so employed, and at the direction and request of the defendants, the plaintiff was received by the defendants to be safely carried on a train from Carleton to where the supplies were required, but, by the negligence of the defendants, the train on which the plaintiff was travelling was thrown from the track, and the plaintiff was injured.

What the plaintiff means by stating he was employed by the defendants as a workman to lay their track, and while so employed the defendants *directed and required him* to assist in bringing up the necessary supplies for the men, I do not quite understand. Apparently he lays some stress upon his being employed to lay the track only, and that the defendants by taking him from that work and putting him upon the bringing up of supplies, or, as he says, by "directing and requiring" him to bring up such supplies, placed him in a different position towards them than that of an ordinary workman in their service. I do not think it did. The defendants had the right to put him to any work they pleased, and if he accepted it he became their workman in that new employment just as he had been their workman in his former employment.

The plaintiff himself has adopted that interpretation of his change of work, for he afterwards states that the defendants "directed and required him, *as part of his said employment*," that is, bringing up the supplies, to be carried upon their trains. So far, then, the statement of claim means only that the plaintiff was a workman in the employment of the defendants.

This further part of the statement of claim must be considered; to understand what it is that is alleged. The plaintiff says "while so employed," that is, in bringing up

supplies, and "at the direction and request of the defendants, he was received by the defendants to be safely carried on a train," at Carleton, to be taken to that part of the track to which the supplies were to be taken.

The words that the plaintiff was received by the defendants to be carried on a train "at the direction and request of the defendants" can add nothing to the mere fact that he was upon the train *in the due course of his employment, or at the request of the defendants, or with their leave and license*, and as shewing he was not a trespasser or wrong-doer by being upon the train.

Then it is said, the plaintiff was received on the train *to be safely carried on it.* That, I think, does not mean more than would be implied that the plaintiff was to be safely carried according to the nature and extent of the obligation upon the defendants, as between themselves and the plaintiff, as one of their workmen. It does not necessarily mean that the defendants made a special bargain with the plaintiff by which they bound themselves, as on a contract between them and an ordinary passenger, safely and securely to carry him, so as to make the defendants responsible to the plaintiff for the acts of their servants and workmen, the fellow servants and workmen of the plaintiff, whose acts and neglect in their common employment he bears the responsibility of himself.

I construe the statement of claim, notwithstanding the intent of the plaintiff to make it mean something more than the facts can mean or do mean, as stating a mere charge of neglect against his employers by reason of the train running off the track.

The defendants, a railway company or corporation, could not have been guilty of the act of negligence alleged, which is thus stated: "Owing to the negligence of the defendants in the management of their railway, the train on which the plaintiff was so travelling was thrown from the track, and the plaintiff was thrown off the train and was injured." The train must have been under the management of the defendants "by their servants and

workmen," and not by the corporation itself. So that the claim is made for an act of negligence or wrong by one fellow servant to the wrong and injury of another fellow servant, and if that be so the plaintiff has no cause of action against the defendants, the common employers of these servants.

When the master is sued for injury to a servant by neglect, the special cause and ground of neglect are stated; as for instance, that the master knowingly provided unsafe scaffolding, or bad materials, or insecure tackle or machinery, or unfit and incompetent fellow workmen, and the like; and that the plaintiff was not aware of the scaffold being unsafe or unfit for use, and the like.

The plaintiff has in fact framed a charge against the master to or for which the master is not liable, but to or for which the fellow servant alone is liable.

In my opinion the statement of claim is bad in law.

The demurrer, however, is not made to extend to the statement of claim by any notice of objection made to it or taken by the defendants.

The plaintiff has demurred to the 4th paragraph of the statement of defence, which 4th paragraph alleges that the cause of action arose "by reason of the defendants' railway" more than six months before the commencement of the action, and the demurrer to the same is, that the injuries complained of are not injuries sustained "by reason of the railway" within the meaning of "The Consolidated Railway Act 1879."

Thr 27th section of that Act is that, "All suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases and not afterwards; and the defendants * * may prove that the same was done in pursuance of and by the authority of this Act and the special Act."

It is worded the same as the 16 Vic. ch. 99, sec. 10, referred to in *Roberts* v. *Great Western R. W. Co.*, 13 U. C. R. 615. In that case the action was for injury sustained by a passenger on the train of the defendants, and the limitation clause was pleaded, to which there was a demurrer. Robinson, C.J., said: "We are all of opinion that the 10th sec. of the 16 Vic., ch. 99, does not apply to an action of this nature, but only to actions for damages occasioned by the company in the exercise of the powers given, or assumed by them to be given, for enabling them to construct and maintain their railway. This is an action charging them with negligence in the conduct of a description of business that any individual might be engaged in, without requiring the aid of legislative acts enabling them to take or use the property of others against their will."

In *Prendergast* v. *Grand Trunk R. W. Co.* 25 U. C. R. 193, in an action against a railway company for so negligently managing a fire which had begun upon their track that it extended to the plaintiff's land adjoining, it was held the Railway Act, sec 83, limiting suits to six months after the damage sustained, did not apply, the injury charged being at common law by one proprietor of land against another independent of any user of the railway.

In *Browne* v. *The Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, action for damage by collision, the defendants not having sounded the bell or whistle, Robinson, C.J., said, that the words in the English Acts were, as to the limitation of actions, that "no action shall be brought for anything done or omitted to be done in pursuance of this Act," &c., and the words of our Act were "all suits for indemnity, *for any damage or injury sustained by reason of the railway*," &c. "It appears to us that our statute is in effect as comprehensive as the English, though the forms of expression used are very different * * 'By reason of the railway' is a very comprehensive expression, and we think extends to an injury sustained on the railway by reason of the use made of it."

McCallum v. *The Grand Trunk R. W. Co.*, 30 U. C. R. 122, was a case in which an action was brought for that the defendants allowed combustible matter wrongfully to accumulate on their grounds, which was set fire to by sparks from their engine, and the fire spread to the plaintiff's premises and did damage. Held, that the damage was done "by reason of the railway."

The case of *Hammersmith R. W. Co.* v. *Brand*, L. R. 4 H. L. pp. 220, 222, is there referred to, in which the words, "the construction of the railway," or "the execution of the works authorized" in the Acts of the Legislature, are to be looked upon as meaning the *undertaking as a going concern, and to point to a living and active thing.*

In that sense any damage done upon the railway by negligence in the carriage of passengers and the like, would be damage done "by reason of the railway," or as Sir John Robinson put it, damage done "by reason of the use of the railway."

There would, I think, be no difficulty in so interpreting the Act if it were not for the words at the end of that limitation clause, "and the defendants may prove that the same," (that is the damage) "was done in pursuance of and by the authority of this Act and the special Act."

It would be difficult to say that the defendants by their negligence did the damage; for instance, broke the passenger's head, or leg, or killed him "in pursuance of and by the authority of the statute." That language may mean, and probably should be read as meaning, "in the course and prosecution of their business as a railway company constituted in pursuance of," &c., and in any later railway legislation it would be advisable so to amend the limitation of action clause.

I think the Legislature did intend by the section as it now stands to give protection to the railway companies to the extent to which the Court in the cases referred to, and in *McCallum* v. *The Grand Trunk R. W. Co.*, in appeal, 31 U. C. R. 527, and in *Kelly* v. *Ottawa Street R. W. Co*, 3 A. R. 616, have given their sanction. But I am not

altogether satisfied the language of the section strictly authorized that interpretation. The matter, however, is now beyond disputation on my part.

I must therefore give judgment on the demurrer to the 4th paragraph of the statement of defence, and I think as the statement of claim is within the same line of demurrer, I may give judgment for the defendants upon the insufficiency of the statement of claim, although the defendants have not taken formal exception by way of demurrer to the statement of claim. The costs will follow the judgment.

Judgment for defendants on demurrer, with costs.

[CHANCERY DIVISION.]

EASTMAN V. THE BANK OF MONTREAL ET AL.

Assignment—Proof of claims—Collateral securities—Giving credit for amounts received on collaterals—"Line of credit"—Position of commercial paper discounted under—Time for fixing the state of accounts.

F. agreed with the Bank of Montreal for a line of credit to be secured by the discount of certain bills and notes which he had himself discounted, and which he indorsed and delivered to the bank. He also arranged with the Merchants Bank to discount his own notes to be secured by the deposit of his customers notes as collateral. F. then failed, being largely indebted to both banks, and made an assignment for the general benefit of his creditors. In proving their claims on his estate before the assignee, the banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action by another creditor, entitled to share under the assignment, against the banks and the assignee. It was

Held, following *Rhodes* v. *Moxhay*, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole without prejudice to his rights against securities he may hold, subject to the qualification that he must not ultimately receive more than 20s. on the £. The state of the accounts, at the time the claim is put in, is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee, as at that date. Any moneys received prior to that from collaterals are to be credited; those received afterwards from such sources need not to be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cts. on the $.

That substantially both banks were in the same position as to the securities in their hands.

That there was a distinct contract for a line of credit to the debtor by the Bank of Montreal, and as long as that line was not exceeded, the bank could prove on the footing of that contract as the original debt, and hold the customer's notes discounted in pursuance of it as securities.

THIS was an action brought by George A. Eastman, a creditor of the estate of Thomas Fawcett, who sued on behalf of himself and all other creditors who were entitled to share in the proceeds of said estate, under the trusts of an assignment for the benefit of creditors to Alexander Lucas, against the Bank of Montreal, the Merchants Bank of Canada, and the said Alexander Lucas.

The plaintiff's statement of claim set out that on or about the 21st day of September, 1884, the said Thomas Fawcett had made a general assignment of all his real and personal estate to the said Alexander Lucas, for the benefit

of creditors; that the said Lucas accepted the trusts of the said assignment, and had disposed of a large part of the said estate and converted the same into money, and held the said money for distribution under the provisions of the said assignment; that the defendants, the Bank of Montreal and the Merchants Bank of Canada, were creditors for considerable sums; that the indebtedness of the said Fawcett to the said banks, consisted partly of promissory notes and bills of exchange discounted for him by the said banks, and partly of promissory notes and bills of exchange, the property of the said Fawcett not discounted, but deposited with the said banks as collateral security for the payment of certain bills and notes of the said Fawcett, discounted for him by the said banks; that since the date of the assignment, the banks had collected many of the bills and notes deposited as collateral security, and that many of those discounted had been paid and retired by the persons primarily liable to pay the same; that the defendants, the banks, claimed that they were entitled to be paid a dividend upon the full amount of the indebtedness of the said Fawcett to them at the date of the said assignment, without deducting therefrom any payments made since then on account of the bills and notes held as collateral security, or in respect of the bills and notes discounted by them as aforesaid, and since then retired by the persons primarily liable to pay the same; that the defendant Lucas intended to pay the said banks dividends upon their respective claims, made up according to their contention; and they submitted that the whole amount received by the banks from the persons primarily liable to pay the same, either in respect of the bills or notes discounted or deposited as collateral security by the said Fawcett, should be deducted from the respective claims of the said banks in ascertaining the amounts upon which they are respectively entitled to receive dividends from the said estate, in the hands of the said Lucas; and that they were respectively entitled to dividends only on the residue of their claims, after making such deductions.

The statement of defence of the Merchants Bank of Canada set up, that the indebtedness of the said Fawcett to the bank consisted of advances made to him on his own notes discounted, and secured by the delivery to the bank of customer's paper as collateral: that the bank did not discount for the said Fawcett business or other paper on which he was only secondarily liable: and claimed to rank on the said estate for the amount due them at the time of the assignment, without being compelled to credit the amount realized upon their collateral securities, after the said assignment and filing of their claim: that the amount, which had been realized or could be realized from such collateral securities would not, together with the dividends which the said estate would pay on their whole claim, nearly satisfy the indebtedness of the said Fawcett to them.

The statement of defence of the Bank of Montreal set up, that long prior to the assignment, the defendant Fawcett applied to them for an advance of $100,000, and afterwards for a further advance of $25,000, which they agreed to make upon his endorsing and delivering to them certain bills and notes then held by him, and payable to his order, to an amount exceeding in the whole by about one third the amount advanced: that some of such notes were renewed, and others were paid and accounted for by the bank to Fawcett, but the said advances were not, up to the time of the assignment, reduced below the said sum of $125,000: that the assignment had been made in the latter part of October, 1884, and that they had given the assignee notice of the amount of their claim on November 1st, 1884: that payments had been made to them on some of the bills and notes endorsed and delivered to them, but not sufficient to pay the said advance of $125,000: and that some bills and notes had been paid by parties liable upon them, other than said Fawcett, whereby some occasional advances, in addition to the $125,000, were repaid in part, and the bank claimed to rank upon the estate for such occasional advances for the whole amount due at the date of the

assignment, or, in the alternative, for the amount unpaid at the time of giving notice of their claim to the assignee.

The action was tried at the sittings at London on September 29th, 1885, before Boyd, C.

It appeared by the evidence that the Bank of Montreal had agreed with Fawcett to give him a line of credit to the extent of $100,000, which was afterwards increased to $120,000, and which was secured by the discount of notes which had previously been discounted by him in the course of his business, but the bank always had a margin of thirty-five or forty per cent. of what they advanced to him: that some of the collateral notes were not discounted: that his line of credit was always definitely fixed and adhered to, and he also had the privilege of an overdrawn account to a certain amount. Some of the notes were taken up after the failure by parties primarily liable.

In the case of the Merchants' Bank of Canada, Fawcett's notes were discounted and his customers notes were held as collateral for collection, but not discounted, and some of the latter were paid after the failure.

Street, Q.C., for the Bank of Montreal. There is no distinction between the collaterals which were discounted and those which were not, Fawcett was the primary debtor in every case. The hypothecation papers shew that the whole was welded into one debt against him. The collaterals were held for the whole debt. The bank is in the position of a mortgagee and can rank on Fawcett's estate in proving a claim for the whole debt, due at the time of the assignment, without crediting moneys received after that date: *Be Barnet's Banking Company—Kellock's Case*, L. R. 3 Ch. 769. The account is to be taken as at the date of the assignment: *Early* v. *Early*, 16 Ch. D. 214.

Gibbons for the Merchants Bank. All our securities are purely collateral and we are not bound to value them, but can prove for the whole amount of the debt: *Beaty* v. *Samuel*, 29 Gr. 105; *Badenach* v. *Slater*, decided in the Supreme Court and reported in 20 C. L. J. 306. There

may be a distinction between the positions of the two banks, as Fawcett did not discount any of the collaterals with the Merchants Bank, while he did with the Bank of Montreal.

Meredith, Q.C., for the plaintiff. *Greenwood* v. *Taylor*, 1 R. & M. 185, is not yet overruled, though the cases in our own Courts are opposed to it. The cases cited by my learned friends are all on the *Winding-up Act*, and do not apply; see judgment of Selwyn, L.J., *Re Kellock's Case*, at p. 782, as to the reason for the rule, under that Act, *Mason* v. *Bogg*, 2 My. & C. 443. There is a distinction between the positions of the two banks, as there was no liability to the Bank of Montreal except on the paper discounted, and as any of that paid was retired the debt was discharged. The principal question is, however: At what time the debt is to be ascertained? They should give credit down to the time the dividend is declared, or, at all events until their claims are sent in pursuant to notice under 46 Vic. ch. 9 sec. 1 (O). That is discussed in *Kellock's Case*, at pp. 780, 783. No notice was given under the statute. Notice under the statute would be the equivalent of notice under the Winding-up Acts.

Street, Q.C., in reply. My clients could prove their claim on the estate without producing any of the notes, as on one advance of moneys made to Fawcett. There is no obligation on a trustee to give any statutory notice.

Moorehead appeared for Lucas, the assignee.

October 14, 1885. BOYD, C.—The rule in Chancery for the administration of assets, first placed on a firm footing by Lord Cottenham in *Mason* v. *Bogg*, 2 My. & C. 451, and recognized by Lord Lyndhurst in *Re Plummer*, 1 Ph. 56 has been adopted as that which is to prevail in this province: *Re Baker—Bray's Claim*, 3 Ch. Ch. 499; *Beatty* v. *Samuel*, 29 Gr. 105.

It is thus well defined by Stuart, V. C., in *Rhodes* v. *Moxhay*, 10 W. R. 103: "The creditor is entitled to prove for the whole amount of his debt, and to take a dividend

upon the whole, without prejudice to his rights against securities he may hold, subject, of course, to this qualification, that he must not ultimately receive more than twenty shillings on the pound. To hold otherwise would be virtually to deprive the secured creditor of any advantage from his security." Such is the rule also affirmed in *Kellock's Case*, L. R. 3 Ch. 769, as applicable to winding up proceedings.

The manner of taking the account is plainly enough indicated in *Kellock's Case*, *supra*, and in *Re London &c. Bank*, L. R. 9 Ch. 686. The state of the accounts at the time the claim is put in is that which forms the basis of the dividend sheet. In the present case the proceedings were conducted to some extent informally by the assignee. He, however, advertized for creditors claims and in response to this both banks sent in claims—one of them verified by affidavit, the other not. The assignee appears to have accepted both as sufficient for the purposes of the investigation before him. Had he objected to the account which was unverified, because not complying with his direction as to the manner in which the accounts were to be furnished, I incline to think that the claim could not be regarded as properly in till an affidavit was supplied, and then the credits for money received on collateral account would have to be given up to that time. But as no objection was made, I hold that both claims were properly made when first sent in, and that the amount is to be fixed by the assignee as at that date. Any moneys received prior to that from collaterals are to be credited, those received after that from such sources, need not be taken into account unless they with the dividend, as to that part of the claim to which such securities are referable, bring up the amount received by the creditor to 100 cents on the dollar. If any part of the claim is thus satisfied in full of principle and interest, no further dividend can be received in respect of that part: *In re Joint Stock Discount Co.*, L. R. 5 Ch. 86.

Though the manner of keeping the account by the two banks differed in form, I think that substantially both are in the same position as to the securities in their hands. There was a distinct contract for a line of credit to the debtor on the part of the Bank of Montreal, and as long as that line was not exceeded, this bank can prove on the footing of that contract, as the original debt, and hold the customers' notes discounted for him in pursuance of that contract as securities.

It is not unreasonable that the costs (as some of the parties suggested) should be borne by the fund; the point is in some respects a new one, and of general importance in the winding up of insolvent estates.

G. A. B.

[QUEEN'S BENCH DIVISION.]

LONDON AND CANADIAN LOAN AND AGENCY COMPANY v. MORPHY ET AL.

Toronto Stock Exchange, sale of seats at—Practice—Order to pay after judgment, by a day certain, writ of sequestration on—G. C. O. 291—O. J. Act, Rules 339, 342, 343, 352, 357, 360.

The plaintiffs, having recovered a judgment against the defendants for a large sum, obtained an order from a Judge in Chambers ordering defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against defendants' goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made a writ of sequestration issued accordingly.

Held, that though the writ could not have issued to enforce the judgment, which was for the payment of money, without limiting a time certain, yet that the Judge's order was a judgment for disobedience of which the writ might issue, and that the writ was regularly issued.

Defendants were members of the Toronto Stock Exchange (a corporation), and had seats at the Stock board thereof, shown to be of considerable value, and to be saleable by the defendants on compliance by them with certain by-laws of the corporation, which, among other things, provided for a written application to the Exchange by any member wishing to sell his seat, for leave to sell, submitting at the same time the name of the proposed purchaser, and if the purchaser was in such a case acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the Stock Exchange could not, under the by-laws, be admitted a member unless he had been previously a stock broker, resident, doing business publicly as such, in Toronto, for at least six months previously to his application, and had upon his own application been accepted by the Exchange as a member, the vote for his acceptance to be by ballot, and one black ball in five, or a portion of five, to exclude. After being accepted he might purchase a seat from some one already a member, or pay an entrance fee of $4,000 to the Exchange, and by such payment create a seat for himself. The total number of seats on the board was limited to 40, whereof 33 were taken up by the 33 members of the Exchange. The sequestrator having applied for an order under the writ of sequestration to sell the defendants' seats at the Exchange,

Held, that although such seats were the property of the debtor and should be saleable under process, and that the Court could implement its execution by ordering the defendants to do any act necessary to effect, or to refrain from any act to obstruct, the sale of the said seats; yet that, inasmuch as the Court could not control the exercise of the ballot by the members of the Exchange, no effectual order for sale of the seats could be made: the application was, therefore, refused, without costs.

Remarks on the desirability of legislation to extend the operation of the writ of sequestration to meet such cases.

THE plaintiffs recovered a judgment in this action on the 2nd July, 1885, for the sum of $7,971.71, and on the same day issued execution to the sheriff of the county of York.

Subsequently the plaintiffs obtained an order requiring the defendants to pay the amount of such judgment to them or to the said sheriff on or before the 15th October, and on default of payment that a writ of sequestration should issue. On the 16th of October the sheriff certified to the default in payment, whereupon the plaintiffs obtained a writ of sequestration directed to him.

On the 20th October, 1885, *Arnoldi* moved on notice, by leave of Rose, J., on behalf of the plaintiffs, and the sheriff of the county of York, the sequestrator under the writ of sequestration issued in this action, for an order that the seats of the defendants, respectively, on the Board of the Toronto Stock Exchange might be sold in such manner as this Court should direct, and the proceeds of such sale applied in and towards payment of the plaintiffs' judgment debt in this action, and the costs of the application, or for such further or other order as might seem meet.

Morphy, contra.

It was objected that certain persons interested in the seats in the Stock Exchange sought by the plaintiffs to be sold under the sequestration, should have been, or should now be made parties to this application.

Oliver Morphy made affidavit that on the 1st of January, 1885, he entered into partnership, by deed, with the defendant Morphy: that part of the consideration for the partnership was, that the seat owned by the defendant Morphy on the Toronto Board of Exchange was agreed to be, and did become, and had been, and was then partnership property: that the deponent and the defendant Morphy had, since the 1st of January, carried on, and still continued to carry on business under the name of Morphy & Morphy, and all the profits accruing from said business had been divided as provided by the deed: that the deponent claimed under the said deed his interest in the said seat, and in the event of an order being made directing the sale of the same, he claimed that the debts and liabilities of the said co-partnership should be first paid and satisfied out of the proceeds of such sale; and that the deed of partnership

was entered into in good faith, and not for the purpose of defeating or defrauding the creditors of the defendant Morphy of their just debts.

The defendant Niven made a similar affidavit, stating that on the 5th of January, 1885, he by deed entered into partnership with one Malcolm Niven, which partnership was still subsisting: that he received a good and sufficient consideration for the transfer of his seat in the Toronto Stock Exchange to the firm of John K. Niven & Co., &c. It was also objected that the seats at the Board of Exchange were not such property as could be sequestered or sold. It was not objected that the writ had been issued upon a judgment for the recovery of money, and that the writ was not issuable in such a case.

November 5, 1885. WILSON, C. J.—Under the English Act, Order 47, referred to in *Ex parte Nelson—In re Hoare*, 14 Ch. D. 41, it is provided that, "when any person is by any judgment directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment, shall at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person."

The English Order 47 has not been adopted here, and that is the order which was so much relied upon in the above case in 14 Ch. D. 41, and to which reference was also made in our own case of *London and Canadian Loan Co.* v. *Merritt*, 32 C. P. 375, to show that sequestration was not grantable upon a judgment for the mere payment of money; but our Chancery Order 291, as Mr. Justice Osler stated in the case last mentioned, is substantially, so far as the payment of money is concerned, like in terms to the English Order 47. Then the provisions relating to sequestration may be said to be similar in England and in this country.

Our Rule 339, similar to the English Order 42, Rule 1, would, if it stood alone, authorize the issuing of a writ of sequestration in every case upon "a judgment for the recovery by, or payment to any person of money." But Rule 342 provides that "a judgment for the recovery of any property, *other than land* or *money*, may be enforced by writ of delivery of the property; by writ of attachment; by writ of sequestration."

Rule 343: "A judgment requiring any person to do any act *other than the payment of money*, or to abstain from doing anything, may be enforced by writ of attachment, or by committal."

Rule 360 provides that "nothing in any of the rules of this order shall take away or curtail any right heretofore existing, to enforce or give effect to any judgment or order in any manner, or against any person or property whatsoever."

That does not apply here, because there was no right theretofore existing to have upon a judgment a writ of sequestration.

Our Chancery Order 291 provides that "if a party who is ordered to pay money neglects to obey the order according to the exigency thereof, the party prosecuting the order may at the expiration of the time limited for the performance thereof, apply in Chambers for a sequestration against the defaulting party," &c.

A judgment in the ordinary form, that the one party recover so much money from the other, is not *an order* upon the debtor to pay money, nor is there in the ordinary form of judgment in such a case *any time limited* for the payment of the money. In the absence of these terms the debtor is not by the terms of that order a *defaulting party*. Then Rule 342 does not give the writ of sequestration upon a judgment for the recovery of money, and Rule 343 does not give the remedy by attachment or committal upon any judgment which merely requires the debtor to pay money.

It seems, therefore, to be quite clear that upon an ordinary judgment for the payment of money a sequestration cannot issue, and the cases of *Ex p. Nelson—In re*

Hoare, 14 Ch. Div. 41, and the case before mentioned in 32 C. P. 375, are conclusive upon that point, because such a judgment does not direct the debtor to pay the sum awarded against him, nor to pay it by a day certain. If the judgment directed the money to be paid by a day certain, under Rule 352, there seems to be no reason why a sequestration might not issue, notwithstanding Rule 342.

The next matter for consideration is, whether a judgment creditor is entitled to procure an order upon the debtor to pay the judgment claim by a time certain, and upon default of payment to have a writ of sequestration.

Can it be said the granting of such an order to pay is the same as a judgment requiring the debtor to pay?

An order on a judgment debtor's summons is not a judgment. *In re Nelson*, 14 Ch. D. 41.

In *Willcock* v. *Terrell*, 3 Ex. D. 323, in appeal, there was a judgment against the defendant. After the recovery of the judgment the debtor covenanted to pay the amount of the judgment with interest by certain specific days, and if default were made the plaintiff might enforce payment by any means he might deem expedient. The defendant failed to pay the instalments. The plaintiff thereupon applied to a Judge for an order for payment of the amount then due upon the judgment by quarterly instalments. The defendant paid four of the instalments, but failed to pay anything further. The Judge then made an order that the defendant for default in payment of the fifth instalment be imprisoned for six weeks, or until he should pay that sum with the costs of the order and sheriff's fees. The order was lodged with the sheriff of Breconshire, who was unable to execute it while the defendant (a County Court Judge) was on circuit, and was also privileged from arrest while on circuit, and having, as it was believed, since left the country, and no payment had been made in obedience to the order. The defendant afterwards resigned his office of County Court Judge, and he was allowed a pension of £1,000 a year, payable quarterly, out of the Consolidated Fund. A

writ of sequestration was issued against the defendant's estate before the pension was granted. Notice of the sequestration was given to the Lords of the Treasury, and they were requested to pay over a portion of the pension of the defendant to the plaintiff, but they declined to do so. A motion was then made for an order upon the Lords of the Treasury to pay. The Court made an order according to *McCarthy* v. *Goold*, 1 B. & B. 387, that the defendant be restrained from receiving the pension.

Lindley, J., said: "It is said that this is not a judgment. That is quite true; but by Order 42, Rule 20, this order is equivalent to a judgment directing the defendant to pay money at certain specified times, and it appears to me to fall clearly within Order 47."

He also said that it was urged for the defendant that the order was made for the purpose of sending the defendant to gaol in case of default to pay, and that it could not be used for any other purpose, and he proceeded: "I apprehend it would be competent to the Court, irrespectively of the Debtor's Act, to make an order upon the defendant to pay the whole or part of the debt, and upon an order so obtained it would be competent to the plaintiff to issue a writ of sequestration. Is the order less effective because it is made under the Debtor's Act? It is made in the action and in the matter of the Debtor's Act. I think it is a proper case for a sequestration; the writ therefore is regular, and ought to be enforced."

That decision was affirmed in the Court of Appeal.

The English Rule 20, Order 42, was referred to for the purpose of treating the order of a Judge as a judgment. Our rule is 357, and is the same as the English rule, that "every order of the Court or a Judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect."

I am therefore of opinion the order to pay not having been obeyed, the writ of sequestration has rightly gone against the defendants.

The remaining question is, whether these seats at the Board of Exchange have been or can be reached by the sequestration.

I shall state generally in what cases the writ can be applied. The writ of sequestration goes against goods and chattels, and personal estate, with a direction to the sequestrator to enter into and take possession of such parts of the real estate as are in the occupation of the defendant in the writ, whether freehold or copyhold: *Coulston* v. *Gardiner*, 2 Ch. Ca. 43, 46; *S. C.* 3 Swanst. 279, note; 1 *Daniell's* Pr. 916, 6th ed.

The land is not sold when taken possession of; the rents and profits only are collected, and tenants in possession are for that purpose ordered to attorn to the sequestrator.

The land, although leasehold, was not sold under the writ, although it could be sold under a *fi. fa.* against goods and chattels, because, it was said, the Court "cannot well order the sequestrators to sell without at the same time warranting the title. * * It does not transfer the term to the sequestrator. The difficulty is this, if the sequestrators sell, and the purchasers should be brought before this Court to complete their contracts, I could not compel them to pay the money. I cannot make a man take a title which he is to support by a bill for an injunction. You will not find any instance of an order to sell under a sequestration, a subject which passes by title and not by delivery." Per Loughborough, L. C., in *Shaw* v. *Wright*, 3 Ves. p. 23.

It was leasehold property which was in question in that case, and the writ was for contempt in not putting in an answer, and not to compel the performance of any act or duty; but the language is general, and seems plainly to imply that what was then said was applicable as well to writs to compel the performance of an act or duty as to compel the party to free himself from the contempt.

A sale of land is not ordered then, not because the land cannot be sold by any legal process, for leaseholds might

be sold, but freehold land could not in England be sold by any process, but extended only by *elegit*. So copyhold land could not formerly be taken under an *elegit*, "for that would be prejudicial to the lord, and against the custom of the manor, that a stranger should have interest in the land held of him by copy, where by the custom it cannot be transferred to any without a surrender made to him, and by the lord allowed, and admitted": *Heydon's Case*, 3 Co. 23. That is now altered by statute. In Chancery copyholds can be sequestered: *Coulston* v. *Gardiner*, 2 Ch. C. 43-46, 3 Swanst. 279, note; 1 *Daniell's* Practice, 6th ed. 916.

Goods and chattels which pass by delivery, or rents in kind, or rents which are paid to the sequestrator, or moneys which he receives, may all be made available to the creditor by being applied in payment of the debt, the goods and chattels being first sold under the order of the Court.

As to choses in action. It is said in 1 *Daniell's* Ch. Pr. 918, 6th ed., that in a clear and simple case the order will be made against a *chose in action*: *Wilson* v. *Metcalfe*, 1 Beav. 263; *Francklyn* v. *Colhoun*, 3 Swanst. 276; but in other cases it will not, unless the person holding the fund or assets consent to the order, referring to *Johnson* v. *Chippendall*, 2 Sim. 55, and several other cases which quite support the text.

Then at p. 914 it is said: "The sequestrators may take all the goods and chattels in possession of the disobedient person, or which they can come at without suit or action, with respect to *choses in action* in the hands of a third person, where a *chose in action* is in the hands of a third person who is willing to abide by the order of the Court, or who admits it to belong to the party against whom the sequestration has issued, the Court will consider it liable to the sequestration and will order it to be paid into Court, but where the individual in whose hands it is disputes either the amount or the title of the party whose property is to be sequestered, it seems the Court cannot, in such a case, make an order upon the unwilling person."

In *Wilson* v. *Metcalfe*, 1 Beav. 263, the Master of the Rolls said that the person who was subject to the rent-charge in question upon her estate, admitted her liability, and that she had placed the amount of arrears in the bank to be paid to the party entitled; "so that there was no controversy as to the amount due, and if this had been then brought on before me by motion to pay the money into Court I should have had no hesitation in ordering payment. * * In this state of things, and in the absence of any question as to her liability to pay the £225 or as to the right of John Ness" [the grantee of the rent-charge] "to receive it, if an application had been made for payment of the £225 to the sequestrators or into Court, I think that an order to that effect ought to have been made. * * I think the plaintiff or the sequestrators were bound to proceed in such a manner as would protect Mrs. Brown" [the grantor of the rent-charge] "from the demands of Ness, and that she would have been protected if an order had been obtained directing her to pay, as she was willing to do. * * It appears to me in such a case as this a *chose in action* is subject to the process of sequestration; but how the sequestration is to be made effective in respect of *choses in action* may be a question requiring much consideration. In a clear and simple case it may be by order only, or a voluntary payment may be protected; in other cases it may be necessary to resort to an action or suit under the direction of the Court."

In *Francklyn* v. *Colhoun*, 3 Swanst., at p. 309, the Lord Chancellor said: "If sequestrators by bill, or otherwise, bring the money into Court, it will be detained until the Court is satisfied that the party by whom it has been paid cannot be compelled to pay it elsewhere. The true question is whether this *chose in action* * * can be taken by this sequestration, or whether there must not be some proceeding in aid of the sequestration.

"Speaking with the caution which befits one of a process so unusual, I have supposed it to be clear that where there is tangible property, the Court will allow the sequestrators

to lay their hands on it, whatever claims third persons may have, and will compel them to come in *pro interesse suo*; but a *chose in action* cannot be so taken, and the question arises how are rights of third persons to be decided? It is generally done by order. Before I decide this case I will refer to *Simmonds* v. *Lord Kinnaird*, 4 Ves. 735."

An order was afterwards made for payment of the money into Court. Rucker, who held the money for Calhoun, the defendant, admitted the debt, but third persons claimed an interest in it. Rucker, admitting the debt, was ordered to pay it into Court. When the money is in Court there seems to be no difficulty in dealing with it—*Claydon* v. *Finch*, L. R. 15 Eq. 266—although the money may be in a different division of the High Court: *Re Slade—Slade* v. *Hulme*, 18 Ch. D. 653.

It appears then that goods and chattels and lands of which the debtor is in possession, property which is tangible, and which passes by delivery and not merely by title, may be taken possession of by the sequestrator. So also *choses in action* which the debtors or the persons upon whom the burden of them rest as grantors of rent-charges, mortgagors, tenants by whom rents are in arrear, and the like, may be bound by the sequestration, by the debtors, or such persons who are burdened with the *choses in action*, attorning to or assenting to submit to the claim of the sequestrator.

Now can this seat at the Board of Exchange be taken or attached in any way whatever by the sequestrator? Or is there any one in the analogous position of a debtor, or other person liable on a *chose in action*, who can attorn with respect to the seat to the sequestrator, or who can assent to hold it for his benefit?

I do not make any question at present about the claims made by the partners of the respective defendants to participate in the proceeds of the seats, if the seats can be affected by the writ, or to have the proceeds of the seats, as partnership property, applied to the payment of the partnership debts as the first charge upon the seats,

because these are matters of detail to be determined if the seats can be disposed of as claimed by the plaintiffs; but such matters will not arise if the seats themselves are not subject to the writ.

The *Toronto Stock Exchange* was incorporated by the 41 Vict. ch. 65, (O.) Those persons named in the Act, and such others who may thereafter become associated with them, shall become a body corporate by the name above mentioned. They are empowered to acquire property, real and personal, to the extent requisite for the purposes of their business, and to sell, lease, or otherwise dispose of their property, and may borrow money on mortgage, provided the clear annual value of their real estate shall not at any time exceed $5,000.

The Act is general in its terms as to the business of the corporation, and the management of its affairs.

The by-laws of the corporation, which may be referred to on this motion, are the following. I take them from those which were passed on the 24th November, 1882:

V. Sec. 2. The secretary shall keep a book shewing the names of all the members; the date of admission of such, shewing whether by payment of admission fee, and amount of the same, or by purchase of seat, and from whom, and for what amount, and the disposition whether by death, sale, or otherwise.

XIV. Sec. 1. None but stock brokers, residents, and doing business publicly as stock brokers in the city of Toronto for at least six months immediately previous to application for admission, shall be eligible as members.

XV. Sec. 2. Each person hereafter elected shall only be admitted to membership on payment of an admission fee of $4,000, or the purchase money for his seat and transfer fees.

XVI. The number of members is limited to 40.

XXIII. Sec. 1. A member wishing to withdraw from the corporation (or in case of the death of a member his legal representative) shall apply to the committee of management in writing for leave to dispose of his seat, stating the name and address of the proposed transferee thereof, and the committee on approving of such application shall give fourteen days notice thereof at the board, and put the same upon the notice board.

Sec. 2. At the first board meeting after the expiration of the said time the corporation shall decide whether such leave shall be granted, and if said leave be given he may proceed to sell said seat to such proposed transferee as herein provided.

Sec. 3. Such leave is granted only on the express stipulation that the whole of the purchase money of the said seat be paid in to the treasure forthwith upon the election of the transferee, and no election of such transferee, based on the granting of such leave, shall be valid or of any effect to entitle the person to take his seat at the board, until such purchase money shall be paid in as aforesaid.

Sec. 4. The committee of management shall deduct from such proceeds of sale all fines and liabilities to the corporation, or any member thereof.

Sec. 6. The balance of such proceeds, if any, shall be handed over to the member so withdrawing, or in case of death to his legal representative.

Sec. 7. The purchaser of such seat must apply for election as provided for in by-law No. XIV. secs. 1, 2, 3, 4.

These sections are: 1. That none but stock brokers, resident and doing business as such in Toronto shall be members.

2. That no foreigner shall be a member unless naturalized for two years.

3. A notice in writing of each application, giving the name of the applicant, with the names of the proposer and seconder, may be presented to the chairman at any meeting of the board, and shall be by him submitted to the committee of management, who will report thereon in writing to the corporation, and if the same is favourable, the application shall be put upon the notice board in the Board Room for at least fourteen days before the application be balloted on.

XXIII. Sec. 9. No member shall be permitted to hold more than one seat.

XXV. Sec. 1. Any member forming or dissolving a partnership with any other member or person shall immediately give written notice thereof to the secretary, and the chairman shall announce the same at the next meeting of the board, and notice of such partnership or the dissolution of a partnership shall be posted up on the notice board for at least one week.

XXXI. Sec. 1. Any member of the corporation may make application to the Committee of Management to appoint a registered member of the firm his attorney to do business for him at the board during his absence from the city or from sickness, and such appointment shall not extend beyond twelve months from the date thereof.

Sec. 2. Such application shall be accompanied by a power of attorney appointing such parties.

Sec. 3. The application having been considered, the committee shall report thereon, and if favourably, shall give notice for an election of such

attorney at the expiration of fourteen days, and put the application on the notice board.

Sec. 4. Such election shall be by ballot, as provided for in by-law No. XIX. secs. 5, 6, 7.

These by-laws shew that a member of the Stock Exchange must be a resident of Toronto and publicly doing business here for at least six months immediately before application for membership: that he is to be admitted to membership only on payment of $4,000: that he may dispose of his seat on application in writing to the committee of management, if the committee approve of the proposed transferee, and if the corporation give leave to sell; but the proposed transferee must be balloted for before he can be a member, and if elected he is to pay the whole of the purchase money to the treasurer of the board.

The committee of management has then the right to deduct all the fees, fines, and liabilities of the retiring member to the board, or to any member of it, and the balance is the sum which is to be paid to the retiring member.

The question now is, how can these seats at the board be sequestered? Or, how can I make any supposed or implied seizure of them available to the creditors? Or, what can I order to be done to the prejudice of the debtors?

What the creditors want is the money which can be produced by sale of the seats, or that something may be done with respect to them which will be a prejudice to the members, and which will act as a pressure upon them unless and until they assent to a sale of the seats for the benefit of the plaintiffs.

By what means, assuming this is a kind of property which can be taken under the writ, am I to direct the money to be raised? By a sale of the seats? If this is property which can be taken, that which the owners of the seats may sell, the sheriff as sequestrator may also sell. But if the sheriff find a purchaser, by the by-laws he must apply in writing to the committee of management for leave to dispose of the seats, and state the name and

address of the proposed transferee, and he must get the committee to approve of his application to sell; and if the committee approve of it, he must get the committee to give the necessary notice and put it up on the notice board. He must then get the board meeting to decide that leave should be granted to sell to the proposed transferee.

When that is done the proposed transferee must give notice in writing to the chairman, of his application to be admitted as a member of the board, and the chairman must submit the notice to the committee of management, who have to report in writing to the board, and if the report is favourable, the application for the admission of the transferee must be put upon the notice board at least fourteen days before the application is balloted upon. Then the ballot takes place, and one black ball in five, or in a portion of five, excludes the applicant. If the ballot is favourable for the applicant, he then pays the whole of the purchase money to the treasurer of the board, and the committee of management deduct from it all claims against the retiring member to the board, or to any member of it, in respect of stock transactions, and the balance (if any) is then paid over to the retiring member, or to the person entitled to the money under him.

How is the committee of management to be compelled to approve of the application for leave to sell? It may be they would not be allowed wantonly to refuse such leave at the instance of the member himself, and if so then why not as against the sheriff also?

The same observation may be made as to the board granting the necessary leave to sell. Then, when the application comes before the committee of management for their report upon the candidate, what means are to be taken to compel the committee to report favourably upon the candidate, if in fact they ought to do so?

The like observation may be made here as I have made just before this, that the committee would not be allowed wantonly to report unfavourably against the truth and right of the case, if the member were applying for leave to

sell, and so it may be said, if the sheriff is to be considered as exercising the like right under the writ as the member himself when acting in his own right, the Court will not allow the committee to act wantonly to the prejudice of the sheriff any more than it would allow the committee to act to the prejudice of the member.

If all these difficulties are got over then follows the ballot. And what is to be done if the ballot is unfavourable to the proposed transferee?

Is the Court to enter into a scrutiny of the balloting, and to put the members voting upon their examination for the purpose of discovering in what way they voted? And if they voted against the applicant, are they to be further examined, why, and upon what grounds, and for what cause they so voted? Or, if the Court has not the power to get, or cannot get the necessary information from the member who voted, is the Court to determine of its own authority whether the adverse votes were or were not properly given, and reject the ballot altogether?

I think there is a difficulty here which I cannot get over. The black-balling may have been for no kind of objection to the candidate, but upon the ground that those who voted against the candidate did so because they were desirous that another qualified person should become the purchaser, and be the member instead of the applicant: and that would be a satisfactory reason. Then, if that other became an applicant, he might in turn be rejected.

If I cannot control the proceedings and direct a sale of seats and the conversion of them into money by adverse measures under the writ, and so aid the plaintiffs by the direct reduction of their debt against the defendants, can I direct anything to be done by way of pressure upon the defendants with respect to their seats, and so compel them to yield to that pressure, and to assent to the sale of their seats and to the proceeds of such sale being applied upon their debts to the plaintiffs?

In *Willcock* v. *Terrell*, 3 Ex. D. 323, the Court could not directly make an order upon the Lords of the Treasury to

pay the pension money to the plaintiff, but they restrained the defendant from receiving the pension, in accordance with the case of *McCarthy* v. *Goold*, 1 B. & B. 387; and no doubt there are other cases of the like nature.

But what am I to restrain here? I cannot restrain the defendants from acting as members of the Stock Exchange, in carrying on their ordinary business of stock brokers, as I could from their receiving money or other property, which money or property the plaintiffs ought to have. Here the plaintiffs cannot act as members in their stead, nor can any other person.

The defendants cannot themselves control or sell these seats without the concurrence of the Stock Exchange, who may or not assent to the sale of the seats, and the members of which may or may not vote for or against any applicant as purchaser.

Both the plaintiffs and defendants are in the power of this corporation, and I do not see how or by what means I can give any effective aid to the plaintiffs with respect to these seats at the Exchange under the writ in question. There is some difficulty in getting at a *chose in action*. But this seat is not even a *chose in action*. As to the claim set up by a private partner of each member to an interest in the seat of his copartner, there is no objection to a member of the Exchange having a partner who is not a member. The by-laws expressly provide for such a partnership, and there can be no objection to the partners making any bargain they please between themselves about the seat of the Exchange partner, and about the price or value of it, subject, of course, to the superior rights of the corporation of the Stock Exchange.

In that way the respective partners of the respective defendants, as members of the Stock Exchange, may have an interest, as between the partner who is a member of the Exchange and his co-partner, to have the value of the seat of the partner who is such member dealt with in like manner as the assets of the firm. But how a creditor, either of the partner who is a member of the Exchange, or of

the firm of which he is a member, is to get the seat disposed of and made available for the debts and liabilities, either of the member or of the firm of which he is a partner, I do not quite see; for the same difficulties which beset the sequestration creditors would equally obstruct a creditor pursuing the ordinary execution process, and would equally be in the way of an assignee of all the estate and effects of the member, whether such assignee was appointed by the voluntary act of the member, or adversely, in a bankruptcy or insolvency proceeding, or upon a creditor's bill. If the plaintiffs could get any benefit from the proceeds of the sale of the seats of the defendants the partnership accounts of each defendant and his partner would have to be taken and satisfied before the plaintiffs, who are creditors of the individual partner in each firm, could claim upon the proceeds. If these partners or the members have not a *bonâ fide* claim they would have to be examined as to their interest respectively.

If the committee of management would interpose no difficulty, and if the members of the Stock Exchange in exercising their power of election would not oppose the proposed transferee of the seat being accepted in the place of the member whose seat it was desired to sell, and if the seat were such property which could be attached, the seat might no doubt be laid hold of by the sequestrator, in like manner as a *chose in action* may be reached with the assent of the person or body holding the fund, which could not be otherwise reached without such assent, or without an action or some other judicial proceeding.

To effect a sale the leave of the Court must first be given, and the question is, whether the Court would grant the leave to proceed to a sale to ascertain whether a transfer of the seat, if it could in any way be reached by the process of the Court, could or could not be perfected according to the terms and conditions of the by-laws; for the Court cannot be informed now what the members of the exchange would do, or might do, when the ballot is taken on the application of the proposed purchaser of the seat when he offers himself for election.

The by-laws provide for a seat being disposed of in the following cases:

1. When a member wishes to withdraw.

2. When the legal representative of a deceased member desires to sell the seat. [In the latter case leave must be obtained to sell it to some qualified person to be approved of, and who is afterwards duly elected. By-law 18.]

3. When the corporation claims the seat by reverter of an insolvent, or bankrupt member, or of one becoming a defaulter under by-law 19.

4. Or being convicted of any criminal offence.

5. Upon a complaint being proved against a member for contravening or refusing to comply with any of the by-laws, and upon a vote being given for the forfeiture of the seat.

The defendants do not desire to withdraw their membership, and they are not within the other provisions referred to. They, no doubt, will not consent to withdraw. If the seat could be attached under the writ the Court, no doubt, would find the means to make the sale of it available, by compelling the holders of the seats not to withhold their consent to withdraw, or to authorize the sequestration to apply to withdraw in the defendants' names, and oblige the corporation body to act upon it as if it were the act of the defendants themselves.

There is no use speculating upon what might be done if the seats themselves could be attached. The difficulty I have is, considering the powers which may be exercised by and under the authority of the writ, how it is possible to make this kind of property exigible to the purposes of the writ.

That so large a sum as $8,000, the price of these two seats, should not be an investment out of the reach of creditors is quite clear, and the observation of the Lord Chancellor in *Simmonds* v. *Lord Kinnaird*, 4 Ves. at p. 746, is very valuable on this point. He said: "I wish the process could go to the extent you desire. When one considers the immense mass of property that may be

possessed in this kingdom answerable for nothing,—suppose a great landed estate was converted into an annuity upon the Consolidated Fund—no process can reach it unless the Court can get at it."

In *Londheim et al.* v. *Cumberland et al.*, 67 Howard's Pr. R. (N. Y.) 467, the seat of a debtor at the Stock Exchange was held upon the authority of many decided cases there referred to, to be subject to be taken in execution for debt, and the decision is very largely based upon the necessity there is for holding it from its great value to be a species of property, which should not be withdrawn from the reach of creditors. The value of the seat in that case was $10,000.

In *Barclay* v. *Smith*, 16 Central L. J. 437, following two cases there referred to, a seat at the Stock Exchange was held not to be a kind of property which could be taken for debt. The value of the seat in that case was $5,000.

But a few days ago I saw that a seat at the New York Stock Exchange had been sold for $33,000. Now it is quite plain that so very large a sum is some kind of property, or an investment of a valuable nature, which should not be exempt from seizure for the ordinary liabilities of the holder of the seat. It is, although there is no premium or dividend payable in money from it, or for it, a profitable beneficial investment, and in the nature of stock, and the holder of it should not be allowed to make that pecuniary investment a profit to himself, and to withdraw it from liability for his just debts, to the prejudice, it may be, even of the creditors who may have lent him the money with which to buy the seat.

The result is, that the forty members of this association have invested $160,000, which no body can touch but themselves, and immediately among themselves for their own claims one upon the other.

The writ of sequestration should be extended to such a property as this, and the Court will find no difficulty in perfecting the mode of executing and completing its process.

As at present advised, I must decline to give any direction or order to the sequestrator to deal with the seats of the two defendants at the board of the Stock Exchange, because the seats have not and cannot be sequestered under the writ which has been issued upon the judgment in this action. I must repeat that I think it is time the value of such seats should be made available upon a writ of execution.

I must dismiss the motion, but I shall do so without costs.

Motion dismissed, without costs.

[QUEEN'S BENCH DIVISION.]

IN THE MATTER OF THE ESTATE OF THE LATE EDWARD BECKETT AND THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Expropriation of land—46 Vic. ch. 18, sec. 488 (O.)—Payment into Court of compensation awarded.

Upon the petition of the corporation of the city of Toronto, under "Consol. Mun. Act, 1883," sec. 488, to be allowed to pay into Court money awarded to the estate of B. for the expropriation of certain lands of said estate for a Court house site, on the ground that the executrix and trustee could not under the will appointing her sell the property till her son was of age, or died, or she herself married again, and therefore had not the absolute estate; and also that one M. had a rent-charge or annuity charged on the land for her life, payable to one S., *Held*, that the Act does not expressly authorize the payment into Court of the amount awarded: that the section in question is imperative, and makes it obligatory on the corporation to ascertain whether the person in question was absolute owner or not, and if not that the corporation was a statutory trustee of the money, and liable to pay six per cent. interest until the party entitled to the principal claimed the same.

Held, also, that it was not intended the Court should interfere at the instance of the corporation, but at that of the claimant of the money or part of it; but, *Semble*, that the Court might do so at the instance of the corporation, the facts here, however, did not shew sufficient ground for it.

PETITION by the Corporation of the city of Toronto praying to be allowed to pay into Court the sum of $32,379.50, balance of the sum awarded to the estate of the late Edward Beckett, for the expropriation by the corporation of certain land belonging to the said estate for the site of a Court house.

The petition was presented under section 488 of the "Consolidated Municipal Act, 1883," and the arbitration under which the award was made was conducted under and in pursuance of the said Act. The grounds presented for the relief sought were, that by the will of the late Edward Beckett the land expropriated was devised to Mary Ann Beckett, the widow of testator, in trust to retain all moneys belonging to her separate estate held by testator or loaned by her to him upon the security of his note or notes. (2) To retain for her own use absolutely

all the income of said estate until testator's son, Samuel Gustavus Beckett, should attain the age of twenty-one years, provided she remained a widow. (3) In the event of the widow's marriage again before the said son attained twenty-one years, or upon said son dying before he attained twenty-one years, then the estate, real and personal, should be converted into money by the widow, who was to be at liberty to retain one-third of the proceeds of the sale of the real and personal estate, after payment of all expenses connected therewith, for her own use absolutely, instead of and in full satisfaction of all claim for dower, the remaining two-thirds to be equally divided between testator's said son and two daughters, share and share alike: the share of the son, if living and under age, to be placed in a bank and to remain in trust for him until he should attain the age of twenty-one years, the interest in the meantime to be paid to him for his own use absolutely: that under this will the widow, who was appointed executrix and trustee, and acted on behalf of the estate, had not the absolute estate in the property: that one Anne McNeil had a rent charge or annuity charged upon the land amounting to $216 a year, payable by monthly instalments of $18 each, to one Sinclair, until a debt due by the said Ann McNeil to him should be paid and satisfied; and the corporation did not wish to be burdened with the duty and risk of determining the rights of the respective parties.

Mrs. Beckett, the devisee, resisted the application on the ground that she did not require the payment of the money, and wished the corporation to retain and pay her interest thereon at the rate of six per cent. until the testator's son attained the age of twenty-one years, when a distribution could be made in accordance with the will of the testator, as she contended the corporation was bound to do under the said section 488 of the said Consolidated Municipal Act; and it would be inequitable and unjust to cast upon her the expense of obtaining an investment for the money and the loss of interest till such investment was obtained; and

that in the event of the Court directing the payment into Court in accordance with the prayer of the petition, it should only be on the terms of the corporation paying the costs of this application and an adequate sum equal to six months' interest upon the balance due under the award.

Eddis, for the petitioners.
George Morphy, contra.

November 11, 1885. CAMERON, C.J.—The Municipal Act does not expressly authorize the payment into Court of the amount awarded. The only provision that appears is the said section 488, which enables the corporation to retain the principal and pay interest till such time as the person entitled to the principal claims it and executes a valid acquittance therefor, unless the High Court of Justice, or other Court having jurisdiction in such cases in the meantime, directs the council to pay the same to any person or into Court. The clause further provides that the council shall not be bound to see to the application of any interest so paid, or of any sum paid under the direction of such Court. I am inclined to think Mr. Morphy's contention is well founded, that this section is imperative, and imposes upon the corporation the obligation of ascertaining whether the person acting in respect of the property expropriated is the absolute owner or not, and if he or she be not such owner, then the corporation is created a statutory trustee of the principal for the owner or owners, as the case may be, and becomes burdened with the payment of six per cent interest until the person or persons entitled to the principal shall claim the same.

It was not intended that the Court should interfere at the instance of the corporation, (though I do not say the Court may not so interfere), but at the instance of some party claiming to be entitled to the principal or some part thereof. The payment of interest at six per cent is the compensation payable for the present use by the corporation of the expropriated land, and whether the person

acting in respect of the land is in fact entitled to the interest or not, payment to him relieves the corporation from liability in respect of the interest, if he should have the status of those specially indicated as having the right to act in respect to the land under section 487. There is no question in this case that Mrs. Becket had such status, and the corporation run no possible risk in paying the interest to her. I think I am therefore bound to hold that no case has been made out for the Court's interfering with the express direction of the statute. I am not asked or required to say whether the corporation would be safe in paying at once the principal to Mrs. Beckett. If Mrs. Beckett has, within the meaning of section 488, an absolute estate, it is clear on the material before the Court there is no case made out for directing the sum awarded to be brought into Court, and if she has not such estate the duty of the corporation is declared to be to pay interest at six per cent. I do not think the claim of the judgment creditors of Mrs. McNeill can make any difference in the disposition of this motion, and I do not therefore enlarge the application to give Mr. Morphy an opportunity of answering Mr. Cassels' affidavit.

The petition must be dismissed, with costs to Mrs. Beckett. The other parties appearing are not entitled to costs, as their interests would not have been prejudiced by the payment of the balance of the award into Court.

Petition dismissed.

[QUEEN'S BENCH DIVISION.]

IN RE THE HON. G. W. ALLAN.

Assessment and taxes—Court of Revision—Appeal to County Court Judge—Time—Mandamus—Farm land—Plans—Alteration.

Where an assessment roll was returned to the County Clerk's office on 1st May, but the certificate was neither signed nor sworn to till 4th May, and additions were made to the roll between the 1st and 4th May, and the notice to the parties assessed (signed) informed them that they must give notice of appeal within fourteen days from the latter date, *Held*, that a notice of appeal given on 18th May was in time, because the roll was not "delivered to the clerk completed and added up with the certificates and affidavits attached" before 4th May; and that the County Judge should not therefore have dismissed an appeal to him on the ground that the notice was not served within fourteen days from 1st May, as well as because that was not the ground taken before the Court of Revision.

Held, also, had the Court of Revision proceeded on that ground their decision would have been binding on the County Judge.

A *mandamus* was therefore directed to the County Judge to try the said appeal.

Quære, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he find he cannot dispose of them as such, or for any other reason, replace his land as it was before.

Semble, the county council having extended the time for the return of the roll to the 15th of June, although that date was disregarded by all parties to this application, the applicant had of right the power to appeal within fourteen days from such date.

OCTOBER 13, 1885. *Wood* (of Stratford) moved absolute an order *nisi* for a mandamus to be directed to Daniel Hume Lizars, the Judge of the County Court of the county of Perth, commanding him to hear and determine the appeals of the Hon. G. W. Allan to the said Judge from the Court of Revision of the town of Mitchell, in the county of Perth, against the judgment of the said Court of Revision, confirming the assessments of lands assessed to the said G. W. Allan on the assessment roll of the said municipality for the year 1885.

The learned Judge had dismissed the appeal, without costs, on the ground that the roll was returned by the assessor to the clerk on the 1st of May, 1885, and notices of appeal to the Court of Revision were not served until the 18th of May, 1885, being more than fourteen days after the time allowed by the statute.

The evidence taken before the learned Judge was returned.

At the Court of Revision it was objected that the notice of appeal was too late. The roll produced had a printed form of certificate attached to it, the jurat being dated 4th of May, 1885.

The assessor said he returned the roll as nearly as he could recollect to the clerk on the 1st of May: that the certificate attached was then signed by him, but was not sworn to for some days after: that he thought he signed the certificate on the 1st of May, but would not swear positively to it: that he wrote in the name of Lewis Henchliffe on page 40 of the roll on the 4th of May, and he made one other change in the roll before the 4th of May, but not after that day: that to the best of his recollection he returned the roll on the 1st of May signed by him.

Davidson, the county clerk, said that by-law 277, passed on the 25th of January, 1885, extended the time for the return of the rolls of the town of Mitchell and other towns until the 15th of June.

It was argued by counsel for the appeal that the roll could not be said to be delivered until the assessor had sworn to it, and that was not until the 4th of May, and against the appeal that if the roll was returned by the 1st of May the notice of appeal on the 18th was too late.

It was contended also by counsel against the appeal that if the notice were given in time the appeal had not been attended to.

The minutes of the Court of Revision, taken on the 29th of May, stated that Broderick, the assessor, had stated that Block C of the company's lands was at one time laid out in town lots and the valuation was made on that ground: that he based his valuation on the value put upon Blocks A, B, C, by the Judge in 1884: that lots in Block C were not assessed as high as some other lots in the town, but were assessed at the value placed upon them by the Judge: that he had looked over the total assessment referred to in the

Canada Company's appeal, and thought the assessment correct.

Coleman, the agent of the Canada Company in Mitchell, was examined, and said the assessments should be equalized, and thought the assessor's valuation of *this* was about correct; that there was about thirty per cent in favour of this lot as compared with Park lot 79.

The minutes went on to state that the Court then adjourned till ten a.m., the following day, when it met.

The appellants, Richard H. Coleman and G. W. Allan, not appearing, the Court went over the remainder of the lots appealed against, and sustained the assessor's assessment, and the rate was then confirmed as amended and revised by the Court of Revision.

The list of lots for which notice of appeal was given had written opposite to each lot so appealed against by the present applicant, "*sustained*"; that is, the assessor's valuation was maintained by the Court of Revision:

The copy of the assessment roll, which was posted up, had the following notice at the foot: "Take notice that you are assessed as above specified for the year 1885. If you deem yourself over-charged or otherwise improperly assessed, you or your agent may notify the clerk of the municipality, in writing, of such over-charge or improper assessment within fourteen days after the 4th day of May, 1885, and your complaint shall be tried by the Court of Revision for the municipality of the town of Mitchell."

"J. BRODERICK, *Assessor*."

Coleman says he was general agent of the Canada Company: that the company owned blocks A, B, C: that block A was a park lot containing about thirteen acres of land: that block B was a park lot containing about eight acres of land; and block C was a park lot containing about seven acres of land: that block A was assessed at about $350 an acre; block B at about $400 per acre, and block C at about $560 per acre: that the blocks were under lease to different tenants for a long term of years, who cultivated the same as farm lands, and who paid a

yearly rental of about $6 per acre without taxes: that he valued block A at about $250 per acre; block B at about $200 per acre, and block C at about $250 per acre, as the outside value; and that the company were willing to sell the same at the said prices subject to the tenancies: that other lots of the company in Mitchell, which were vacant and were for sale, were assessed at more then their selling value, and at more than the company asked for the same: that other park lots in Mitchell of equal value to the above blocks were assessed to residents of the town at about one-fourth of the assessment of blocks A, B, C: that the assessor, on the night of the 2nd of May, made enquiries of deponent as to the lands of the company, and he then said he wanted to return the roll on the following Monday, the 4th of May, and the roll was not returned on the 1st of May to the clerk, and he believed it was not returned till the 4th of May.

Notice of appeal against the assessment was served on the 18th of May, and the Court of Revision sat on the 29th and 30th of May, and confirmed the assessment.

The notice of assessment given by the assessor did not purport to have been delivered until the 4th of May.

Mr. Dougherty, mayor of Mitchell, swore that the Canada Company about forty years ago laid out the lands in question into town lots, and streets, and lanes, and these lands had until about two years ago been assessed in that manner, and about three years ago the company applied for and got an order changing their plan, under which they closed some of their streets, and formed out of the lots and streets what they had since chosen to call park lots, or blocks A, B, C, and they had insisted on being assessed as if the same were farm lands. They made a later application of the like kind which the town opposed, which application was refused.

The company in 1884 appealed against the assessment of these blocks, and of other lands, in respect of which Mr. Allan appealed this year, and the Judge of the County Court made reductions, and fixed the assessed

value at the figures the assessor had adopted in this year's assessment.

Mr. Allan did not, nor did any one for him, appear on the hearing of his appeal last May before the Court of Revision, and the Court dismissed said appeal accordingly.

A large number of appeals had been entered, and a list was made of them for the said Court, and the appeals were heard in the order they were upon the lists. The Court heard about 40 of them the first day of their sitting, the company's solicitor being present the first day, but not on the second day when the Court reached the appeal of Mr. Allan. He, the Mayor, was not aware the county council had extended the time for the return of the assessment roll, and he therefore required the assessor to return his roll on the 1st of May and the deponent saw it in the clerk's office on that day, as he believed duly returned.

He believed the object of making blocks of A, B, C, and giving long leases of the same was to tie up the lands that they could not be reached by any such test as asking them (a well known speculating company) to sell and name a fixed price. The corporation of Mitchell in no way intended to recognize the said blocks as such, and did not intend to submit to the closing up of the streets long ago dedicated to them, and the using said streets for the purposes of farm lands, as the company pretended to do now. The assessment complained of he believed to be fair and reasonable.

Mr. Christie, the town clerk, swore that the assessment roll was returned to him by the assessor on the 1st of May, and it was not taken from his office after that until it was taken before the Court of Revision, and he believed the oath was not taken until the 4th of May. No one appeared for Mr. Allan, the appellant, before the Court of Revision to support his appeal when the same was reached on the list and called, "and the same was dismissed accordingly."

Mr. Broderick, the assessor, swore that no one appeared for Mr. Allan to support his appeal before the Court of

Revision when the appeal was called, "and it was dismissed accordingly."

Mr. Dent, a member of the same council, swore that no one appeared for Mr. Allan at the Court of Revision when his appeal was called, "and the same was dismissed accordingly;" and that no application was made to the Court to hear the appeal, or to have the case restored to the list.

Wood, for the applicant, referred to *In re County Court Judge of Perth*, 12 C. P. 252; *Re McCullough*, 35 U. C. R. 449; *McCrea* v. *The Waterloo County Mutual Ins. Co.*, 26 C. P. 431; *Conroy* v. *Pearson*, 4 P. R. 199; *Bank of Montreal* v. *Taylor*, 15 C. P. 107; *Fitch* v. *Walker*, 7 P. R, 8; R. S. O. 180, sec. 43, sec. 46, sub-sec. 2.

Moss, Q. C., contra, referred to *Regina* v. *The Justices, &c.*, 3 Q. B. 810; *Tobey* v. *Wilson*, 43 U. C. R. 230; *Regina* v. *Justices of Middlesex*, 9 A. & E. 540; *Williamson* v. *Bryan*, 12 C. P. 275; R. S. O. ch. 180, sec. 56, sub-secs. 14, 15, 16 17, 42, 43.

November 11, 1885. WILSON, C. J.—The substantial question I have to decide is, whether the learned Judge of the County Court should have heard the appeal of the applicant against the alleged over valuation of the lands referred to by the assessor.

The learned Judge dismissed the appeal to him from the Court of Revision, on the ground that the notice of appeal to the Court of Revision was given at too late a day, the assessment roll, he held, having been returned by the assessor on the 1st of May, and the notice of appeal not having been given till the 18th of May, and so more than fourteen days after the return of the roll to the clerk, according to the Assessment Act, sec. 56, sub-sec. 2.

If that objection were taken by the learned Judge, and was not taken or made at the Court of Revision, or if it were not the ground upon which the Court of Revision adjudicated upon the appeal, I think it was a matter not properly before the learned Judge.

If the Court of Revision did adjudicate upon the alleged lateness in giving the notice, their decision, if warranted in fact, would be a binding decision, and the learned Judge would in such a case be bound to affirm it.

Was the notice of appeal to the Court of Revision given in time?

The town council of Mitchell, before the learned Judge at the County Court and before myself on this application, say it was not, because the assessor delivered his roll to the clerk of the town on the 1st of May, and the notice was not given until the 18th May.

The notice, it is admitted, was not given until the 18th of May. The roll, I think, upon the evidence before me, was given by the assessor to the town clerk on the 1st of May.

The applicant says, even so, the notice is still in time, assuming for the present the time for the return of the roll had not been extended—

1. Because the roll was not on or before the 30th of April *completed* by the assessor, according to section 42; nor was it on or before the 1st of May delivered to the clerk completed and added up with the certificate and affidavits attached, according to section 43.

2. Because the roll was not completed until the 4th of May, when the certificate and affidavit of the assessor were made—section 43—and by section 56, sub-sec. 2, the notice may be given within fourteen days after the day upon which the roll is required by law to be returned, or within 14 days after the return of the roll, in case the same is not returned within the time fixed for that purpose.

The fact that the return day of the roll was extended by by-law of the county council until the 15th of June, under section 46 of the Act, would, I think, entitle the applicant to appeal within fourteen days from the 15th of June; but as the Court of Revision and all others affected by the assessment, and the learned Judge of the County Court, and the applicant, from the beginning up to the argument before me, have treated the roll as returnable on

the 1st of May, and the contention has been whether the return was made in fact on that day, or not until the 4th of May, I may for the purposes of this motion assume that the roll was returnable upon the 4th of May, and that the time for that return had not been extended; but, as I have already said, I think the applicant had as of right the power to appeal within fourteen days from the time so extended by the by-law.

If it were a matter in controversy when the roll was returned and the Court of Revision had determined the notice of appeal was not in time, I should be disposed to hold the decision of the Court of Revision to be binding on the parties.

In this case there is no dispute.

1. It is proved the roll was not "delivered to the clerk completed and added up with the certificates and affidavits attached," before the 4th of May.

2. No objection was taken to the alleged lateness of the notice before the Court of Revision.

The roll was not *completed* on the 1st of May, because the assessor admits he added two names to it after that day, and he could not have done so if it had been a completed roll—*Tobey* v. *Wilson*, 43 U. C. R., at p. 234, is an authority for that, if authority were required—because also the notice to the parties assessed, which is signed, informs them they must give notice of their intention to appeal within fourteen days from the 4th of May, 1885.

The learned Judge, I think, was not altogether right in giving effect to this objection when it had not been raised in the Court of Revision, and he was not right in dismissing the appeal to him, because in fact the notice to the Court of Revision was within the fourteen days.

If such an objection had been taken in the Court of Revision, the appellant might have said he would give another notice within fourteen days after the 15th day of June, the day to which the return of the roll had been extended.

The *affidavits* before me on the part of the town of Mitchell shew the appeal of the applicant was disposed of because he was not, nor was any one for him, in attendance when his appeal was called on. I do not think the appeal was determined upon that ground.

The appeal list before the Court of Revision shows the assessment of each lot was *sustained*, that is, as I understand i t, was adjudicated upon and held to have been rightly valued; and the minutes of the Court of Revision shew that evidence was taken to establish upon what basis these lands were valued, and at the conclusion it is stated that Coleman and Mr. Allan not appearing "the Court went over the remainder of the lots appealed against and *sustained* the assessor's assessment," and they determined "that this assessment roll be confirmed and amended and revised by the Court of Revision."

It is safer to act upon the written evidence of what was done and decided than upon the affidavits of persons giving their recollections and impressions of what took place.

I am quite satisfied the appeal was not dismissed for non-attendance of the appellant, but that his appeals were tried in his absence and evidence taken, and that upon the merits of the case, as they appeared to the Court of Revision, the assessment of the official officer was sustained and confirmed.

I have nothing to do with the merits of the case, which have yet to be tried, but I may say it does appear strange to me that a person who has laid out his land in town or village lots for sale should not afterwards, if he find he cannot sell them as such lots, or for any other reason, be at liberty to replace his land as it was, as a park or farm land, unless others have acquired rights, as by dedication of streets or otherwise, which preclude the owner from the right so to deal with his property.

I must make the order absolute that a mandamus do issue as moved for.

Order nisi absolute.

[QUEEN'S BENCH DIVISION.

IN RE SCOTT AND THE CORPORATION OF THE TOWN OF TILSONBURG.

Municipal corporations—Exemptions from taxation—"Consolidated Municipal Act, 1883"—"Municipal Amendment Act, 1884"—By-law not submitted to ratepayers—Purchase of exemption—Invalidity of by-law.

An exemption from taxation under the "Consolidated Municipal Act, 1883," sec. 368, and "The Municipal Amendment Act, 1884," sec. 8, cannot be granted arbitrarily: there must be a sufficient public benefit to the taxpayers of the locality, actual or anticipated, to sustain a by-law, which exempts any such establishment, company, or works from taxation; and there must be a good and valid consideration to support the exemption or grant which should be in some way connected with the business of the manufacturing establishment.

The municipality of a town agreed with T. to exempt from taxation for a series of years two of T.'s manufacturing establishments already in operation, in consideration of his assuming their place in an arrangement made by them with a railway company, by which they were bound to pay the latter $1,800, and also to find the railway company the right of way free upon the company constructing a switch from the latter's station into the town.

Held, not a case within section 368 of the "Consol. Municipal Act, 1883," as amended by the "Municipal Amendment Act, 1884,"—that there was not a proper public consideration from T. for granting the exemption, and that the arrangement was in effect a purchase by T. and a sale to him of an exemption from taxation, and a by-law passed by the municipality for the purpose, but not submitted to the ratepayers, was therefore quashed with costs.

OCTOBER 27, 1885. *Norris* moved to make absolute an order *nisi* to quash by-law No. 163 of the town of Tilsonburg, passed upon the 27th of July, 1885, on the following grounds:

1. The by-law was passed to aid the Michigan Central Railway Company to build a branch railway or switch from the Canada Southern Railway station in the said town to the amount of $1,800, and to provide the right of way therefor, without submitting the said by-law to the vote of the ratepayers of the town, as provided by law, and under colour of exempting certain property of E. D. Tilson from taxation.

2. That the enactment and passing of the by-law was corruptly procured by the said E. D. Tilson's agreeing with the council of the said town to pay the sum of $1800

to the Michigan Central Railway Company, and to provide a right of way for a branch railway, or switch, from the Canada Southern Railway station in the said town to Elgin street in the said town.

3. That the by-law was not passed by two-thirds of the members of the council of the town.

4. No notice whatever was given of the passing of the by-law and it was passed at a single meeting of the council.

5. The exemption of the mills of E. D. Tilson from taxation tended to create a monoply in the milling business in the town.

6. No cause whatever was shewn in the by-law for exempting the property of E. D. Tilson from taxation, and taxing the property of all others engaged in the milling business in the town, and it was an injustice and increased the taxation to the other taxpayers in the town.

7. The bargain made was unjust to the town and corrupt, as while E. D. Tilson was only paying $1,800 and providing a right of way, which would cost $1,000, property which E. D. Tilson owns and is assessed for, paying taxes or liable to $500 per year, is exempt for ten years, amounting to $5,000.

8. And upon grounds disclosed in affidavits and papers filed.

9. The said order *nisi* also directed that an enquiry should be held before His Honour Alexander Finkle, Judge of the County Court of the county of Oxford, as to whether any of the provisions of sections 207 and 208 of the 46 Vic. ch. 18, (O.), had been contravened in procuring the passing of the by-law; and that such enquiry should be held at such time and place as the said Alexander Finkle might direct; and that two days notice of the holding of the said enquiry should be given to the said town, and also to the Michigan Central Railway Company; and that upon such enquiry all witnesses, both against and in support of the by-law, should be orally examined and cross-examined upon oath before the same Judge.

And it was also ordered that the argument of the said rule should be enlarged until the first Court day after the said Judge should have made his return to the said enquiry.

The by-law was as follows:

BY-LAW NO. 163 OF THE TOWN OF TILSONBURG.

1. Whereas it is necessary and expedient to exempt from taxation for a period of years some of the manufacturing establishments of E. D. Tilson.

2. Therefore the municipal corporation of the town of Tilsonburg enacts as follows: That for a period of ten years from the date hereof the mill known as Tilson's Roller Process Flouring and Gristing Mill, and the mill known as Tilson's Split Pea Mill, both lying and situated upon Block number fifty-seven, south side of Bloomer street, Tilsonburg, be and are hereby exempted from all municipal and school taxation according to the statute in such case made and provided.

Read a third time and passed the twenty-seventh day of July, 1885.

WM. S. LAIRD. L. C. SINCLAIR,
Town Clerk. *Mayor.*

{ SEAL }

Evidence according to the order *nisi* was taken before the Judge of the County Court of the county of Oxford, under "The Consolidated Municipal Act, 1883," section 210. That evidence was objected to by Osler, Q. C., on showing cause to the order *nisi*, as evidence which was not warranted to have been so taken by the Judge of the County Court, as that section applied only to cases of bribery connected with municipal elections; but he was willing to admit it as evidence if it were to be considered as if it had been furnished by affidavit, and that was agreed to by the counsel for the application.

The minutes of the municipal council showed that the mayor of the town received a communication from Mr. Ledyard, the general manager of the Michigan Central Railway Company, about appointing a delegation of the townspeople to act with the Board of Trade, in jointly conferring with the railway company regarding the construction of a freight switch from the Canada Southern Railway station in the town to the business part of the town, and the erection of freight warehouses, to accommodate the business men of Tilsonburg.

A meeting was called by the mayor, and a deputation was appointed at the meeting to wait upon the general manager of the Michigan Central Railway at Detroit, to endeavour to complete arrangements for the building of a spur from the Canada Southern Railway station to the town.

The conference was held and the mayor stated the result of it, which was that the cost of constructing the switch along King street was estimated at $8,000, exclusive of the right of way, and that the railway company would construct the switch if the right of way were found and one-half the cost of grading was paid to the company. Afterwards the terms were that the right of way should be found for the company and the payment of $1500 be made to the company, which sum the company in consequence of some additional expense afterwards raised to $1800.

At a meeting of the council, Mr. Tilson applied to have his flour mill and split pea mill exempted from taxation for ten years. A by-law was introduced for that purpose, and passed the same day, giving the exemption.

Charles Thompson made affidavit that Mr. Tilson agreed with the town council that he would pay the railway company the said sum of $1800 and provide the right of way for the switch, if the town council would exempt his said mills from taxation for ten years, and the council assented thereto: and that it was not thought advisable to submit a bonus by-law to the vote of the ratepayers of the town, and to carry out the agreement the by-law 163 was passed on the 27th of July, 1885.

John B. Scott made affidavit that Mr. Tilson was a large property holder and carried on a large milling business in the said town: that he was anxious, for his personal convenience and to save the expense of teaming his flour and other products from his mills to the said station, to have a branch or switch made from the said station to the business portion of the town, about the distance of a mile, and the said railway company was anxious to construct the said switch in order to increase their business: that the said council, being greatly under the influence of

Mr. Tilson, and finding it would be impossible to pass a by-law granting a bonus of $1800, and sufficient money to purchase the right of way, corruptly agreed with him to exempt certain property of his situate in the town for ten years, and in consideration of such exemption the said Tilson agreed that he would pay the railway company the said sum of $1800 and provide the land necessary for the right of way for the switch: that in order to carry out the said corrupt agreement, and to evade the law requiring all by-laws for the granting of aid to railways to be submitted to the vote of the ratepayers, a special meeting of the council of the town was called for the 27th of July last, and the said by-law No. 163 was passed at one sitting: that the property exempted from taxation by the by-law was of the value of $30,000, and the rate of taxation for the town for the year 1885 was 18 mills in the dollar, and for the year 1884 19½ mills in the dollar, and the amount of taxes which would be lost to the town during the ten years would be on an average $500 yearly: that to provide and purchase the right of way for the switch would cost about $1,000.

The deponent further said he was the owner of real estate in the town, and it was unjust to him, as a ratepayer, and illegal, to have such a large amount of taxes taken from the town without submitting to the vote of the ratepayers a by-law for the purpose. The deponent also said his property would be injured by the making of the switch.

The evidence taken before the Judge of the County Court shewed that the council did not think it desirable to submit a by-law to the popular vote as to raising money enough to pay the $1,800, and to pay for the right of way for the railway switch into the town, according to the agreement between the town and the railway company * * because, as the mayor in his examination said, "I was not desirous that too many by-laws should be submitted to the ratepayers that year, as we already purposed submitting a by-law for the enlargement of our school

building, which would be for $4,000, and if this railway by-law had been submitted it would have involved a further debt of $6,000. I advised the council not to do this, but afterwards I suggested the course taken, and it was finally carried out."

Tilson said: "What I get is the exemption. The mayor thought a by-law would carry if submitted to the ratepayers, and to avoid submitting it the by-law was passed. * * Several councillors spoke to me about going into the arrangement. * * I was subsequently asked by some of the councillors to step into the town's position and I agreed to do so; but I first asked for other exemptions and the Council thought I was asking for too much. Subsequently I consented to take the exemptions given."

Hare, the Deputy Reeve, said: "It was understood Tilson would build the road on being exempted from taxation on his roller mill and split pea mill, and at that time on his stave factory, too."

Peter Graham, a Councillor, said: "It was stated the cost of the roadway and the $1,800 cash would come to about $6,000. We were building a school-house and we were raising debentures for the money, and instead of submitting too many by-laws the mayor thought it better to devise some other scheme and this was resorted to."

Mr. Stinson, the station agent of the Grand Trunk Railway Company at Tilsonburg, said he heard the mayor in the Council chamber speak about submitting a by-law to the people. "He said there would be no use in doing so, as it would not carry, and if the Council intended to accept the proposition of the Michigan Central Railway Company they would have to adopt some other method."

The examination before the County Court Judge shewed also the construction of the switch would be a great benefit to the town: that Tilson's proposition to contract with the railway company in the place of the town, and to be exempted from taxation upon two of his mills for ten years, was greatly to the advantage of the town, or, as many of the witnesses said, the town had got the best of

the bargain: that Tilson owned about one-fifth of the property in the town, and his yearly taxes were about $2,000: that there was another grist mill in the town owned by Mr. Gowing and that mill was exempted from taxation: that it was exempted to enable Mr. Gowing to rebuild his dam when it gave way some time ago: that the mercantile people in the town would gain by a reduced cartage of their goods when the switch was built.

Mr. Williams, a member of the town council, said the property of Tilson which was exempted would be assessed at about $20,000, and the taxation last year was nineteen mills on the dollar, and this year eighteen mills.

Mr. Caulfield, also a member of the council, said the remission of taxes to Tilson was about $200 or $300 a year.

W. S. Law, the town clerk, said the assessed value of the grist mill was $4,000, and the pea mill $5,000: that the land was only exempt on which the mills stand, the deduction from the assessment being $1,000: that Tilson's whole property was assessed at $108,000, the total assessment of the town being $501,195.

Tilson said he had expended lately on his mills about $15,000: that he had paid for the right of way $4,225, and he had to pay the cost of the road bed $1,800: that his yearly taxes from which he was to be exempt were about $280: that the saving to the town by the construction of the switch would be about $4,000, of which the saving to himself will be about $1,100: that he had contributed to the improvement of the town in public works as much as $40,000.

Norris, for the motion, referred to *The Municipal Amendment Act*, 1884, sec. 8, amending sec. 368 of the Act of 1883; *Re Bate and the City of Ottawa*, 23 C. P. 32; *Pells* v. *Boswell*, 8 O. R. 680; *McLean and the Corporation of McConnell*, 31 U. C. R. 317; *Jenkins* v. *The County of Elgin*, 21 C. P. 325; *Re Morton and City of St. Thomas*, 6 A. R. 325.

Osler, Q.C., contra.

November, 11, 1885. WILSON, C.J.—The enactment in force when the by-law in question, which was passed on the 27th July, 1885, was section 368 of "The Consolidated Municipal Act, 1883," as amended by "The Municipal Amendment Act, 1884," section 8, which reads: "Every municipal council shall, by a two-third vote of the members thereof, have the power of exempting any manufacturing establishment, or any water works or water company, in whole or in part, from taxation for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years."

This section does not state any cause, or ground, or reason, or consideration, or under what circumstances the exemption may be asked for or granted; it is a mere power conferred to give such exemption.

The exemption cannot, however, be granted arbitrarily: there must be a sufficient public benefit to the taxpayers of the locality, actual or anticipated, to sustain a by-law which exempts any such establishment, company, or works from taxation: there must be a good and valid consideration to support the exemption or grant.

A person who purposes to expend a large sum of money in erecting a manufacturing establishment, and to employ a great many operatives in it, and whose yearly expenditure would be very considerable, might very properly claim, and be granted, exemption from taxation for a time. Or a person establishing a new branch of manufacture in a municipality which would in some way be of public advantage might also be exempted from taxation.

The consideration for the grant would seem to be that which in some way is connected with the business of the manufacturing establishment, although the enactment does not say so; and sec. 482, sub-sec. 10, of the "Consolidated Municipal Act, 1883," appears to sustain that opinion or idea. It is: "For granting aid by way of bonus *for the promotion of manufactures within its limits*, by granting such sum or sums of money to such person or body corporate, *and in respect of such branch of industry* as the said municipality may determine upon," &c.

The exemption would seem to be a benefit given in and for the encouragement of manufactures, and to induce their establishment within the limits of the municipality.

If that be so, the payment of a sum of money by the manufacturing establishment to the municipality would not be a proper consideration for the grant to it of exemption from taxation for any period of time. The transaction would be a purchase of freedom from taxes, and not properly an exemption from taxation granted to a manufacturing establishment, and it might just as correctly be granted to any other kind of establishment or private person as to a manufacturing establishment.

If a Gas Company were to bargain with a municipality to supply the streets, and other public places belonging to or under the care of the municipality with gas free of charge, or at a greatly reduced rate, in consideration of being freed from taxation for a limited time, it may be that a consideration of that kind might be sufficient to support a by-law passed to exempt the company from taxation for such a time, for the arrangement would be one which was made with a manufacturing establishment, and the consideration would be one which was connected with the business of that company, and which might be beneficial not only to the company but to the ratepayers.

In the present case, the council of the town of Tilsonburgh could have given the exemption to Mr. Tilson for his two mills, if there had been a proper public consideration or inducement for granting it. I do not, however, think there was, although he had made shortly before the by-law was passed great improvements in his milling property. These improvements were made for his own personal gain and without any particular intent to benefit the town, and there is no reason to believe he would not have been amply repaid by the additional work he would be enabled to do, and by the greater profits he would have made for and by reason of the improvements he had made; and he made the improvements without any reference or view to any claim being ever made by him for exemption from taxes.

I have no doubt that no person, nor any company, or body corporate, can buy an exemption from taxation, however advantageous such an arrangement might be for the municipality. If one whose yearly taxes were $100 a year were to pay at once to the municipality $1250 in cash for exemption of his particular property so charged for ten years, that would be a profitable bargain for the municipality; but it would not be a valid proceeding; for if they could deal so with one they could deal so with all, and they would thus be living in advance of their income. They would be enabled to spend extravagantly while the money lasted, which might be for three or four years, and they would be destitute of resources for the remainder of the time.

The position of a Municipality is that of a body acting under certain prescribed conditions, and one of these conditions is as in settlements of a different description, where there is an express clause against anticipation: that there is from the nature and constitution of these bodies a restraint implied againt anticipation by them unless in the special cases provided for by "The Consolidated Municipal Act, 1883," sections 371, 372, 373.

A purchase of an exemption from taxation is a thing unknown in law, and it is opposed to the whole scheme and policy of the assessment laws, and if allowed it would lead to great abuse and to confusion and difficulty, and in all likelihood to embarrassment and ruin.

What is it then which has been done here? It is in my opinion a purchase by Mr. Tilson, and a sale by the town of Tilsonburgh to him, of an exemption from taxes for ten years to come, in consideration of his assuming the place of the town in the arrangement which the town had made with the Michigan Central Railway Company, to pay $1,800 in cash to that company, and to find the company the roadway free, upon the company constructing a switch from the company's station into the town as far as Elgin street.

The right of way has cost $4,250, and the $1,800 added to it will make $6,050, which the town would have had to pay for having the switch constructed. That sum or liability Mr. Tilson has assumed for the town, and in consideration of his having done so he has been exempted in respect of two of his mills from taxation upon them for a period of ten years, and that is in effect a mere purchase by Mr. Tilson from the town of an exemption from taxation for ten years.

If the town had carried out its own bargain with the railway company it would have been obliged to submit a by-law to the rate-payers in order to enable the town, if the by-law were carried, to raise the funds required to pay that sum of $6,050.

The Council did not think it advisable to submit such a by-law to the ratepayers, as there was another by-law about to be submitted to them to raise $4,000, and it was feared the additional by-law for $6,050 might not be well received, or might not be approved of by the ratepayers, and a scheme was devised, and this is the most objectionable part of the whole proceeding, by which Mr. Tilson should assume the liability of the $$6,050 for the town, and the town would, in consideration of his doing so, exempt two of his mills from taxation for ten years, and the money would then be raised for the construction of the switch without the assent of the ratepayers, and the town would, by way of an equivalent to Mr. Tilson, and in consideration of the debt he had assumed for them, grant him the exemption from taxation, because they could do that without the assent of the people.

I do not charge the members of the town council, nor do I charge Mr. Tilson, with corruption in the ordinary and common sense of the term, for the parties intended no wrong to any one, and the work desired will be a public benefit, and Mr. Tilson has acted liberally at all times in affording assistance to public works of the town; but I may say the whole arrangement is one which cannot be approved. It was a scheme devised to prevent the rate-

payers from exercising their undoubted right of expressing their opinion upon the expenditure of their money, and although Mr. Tilson may not have been the gainer to the least possible amount, and I do not think he was or would have been, the arrangement was based upon a false consideration, and it might, if followed in other cases, lead to abuse and to fraud and corruption of the most serious nature.

I am obliged to quash the by-law, with costs to be paid by the town of Tilsonburg.

Order absolute to quash by-law.

[CHANCERY DIVISION.]

SNARR ET AL. V. BADENACH.

Annuity—Interest on as against assignee in insolvency—R. S. O. c. 50, ss. 266, 267——Repairs—Covenant to keep houses suitable for tenants.

J. S. by his will gave his wife E. S. an annuity of $2,000 a year, and charged it on his estate. After his death E. S. the annuitant, C. E. S. and M. A. S. two daughters, and W. A. S. and G. E. S. two sons, entered into an agreement whereby the annuity was charged on certain real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J. S. to the said sons, subject to the said charge. Subsequently all parties joined in borrowing $16,000 on mortgage of part of the property for the purpose of reconstructing the buildings, the annuity being postponed to the mortgages. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died having made a will by which she devised all her estate to C. E. S. and M. A. S., who brought an action against B. to have a lien declared on the property for the amount of the arrears of the annuity. On a reference to the Master he found that they had the right to maintain the action, and settled the amount of the annuity due, and allowed interest for the six years preceding action brought. On an appeal from the Master's report, it was

Held, that R. S. O. ch. 50, secs. 266 and 267, under which the interest was allowed, is not applicable to cases where a recovery is sought not against a defendant personally, but against his estate, and following *Booth* v. *Coulton*, 2 Giff. 520, that except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity. In this case, under any circumstances, the award of interest could not be upheld as against the assignee in insolvency.

Held, also, that the expense of some flooring, lathing, and plastering, was properly charged against the defendant, as W. A. S. and G. E. S. had covenanted to keep the houses tenantable, and these repairs were made because the tenant threatened to leave.

Held, also, on the evidence in this case that the Master was right in disallowing a large set off brought in by the defendant over and above the sum of $16,000 allowed for reconstructing the buildings.

THIS was an appeal from a report of the Master-in-Ordinary.

The action was brought by Charlotte Elizabeth Snarr and Mary Ann Stibbs, as sole executrices and devisees under the will of their mother, Elizabeth Snarr, against William Badenach as assignee in insolvency of the estate of their brothers William A. Snarr and George E. Snarr.

The plaintiffs' statement of claim set up that John Snarr late of the city of Toronto, who died on the 15th February, 1875, by his will provided that his widow Elizabeth Snarr

should have an income out of his estate of $2,000 per annum, and that a sufficient part of the estate should be set apart for that purpose; and also that she should be provided with a comfortable house at the expense of the estate: that subject to such provisions and certain other conditions set forth in the said will, the testator bequeathed and devised the residue of his estate to the said George E. Snarr and William A. Snarr*: that by an agreement in writing dated the 4th of August, 1876, (the terms of which are sufficiently set out in the judgment of the Chancellor,) certain properties were charged with the said annuity, and the said George E. Snarr and William A.

*The will was in these words:

This is the last will and testament of John Snarr of Toronto, coal merchant.

I give, devise, and bequeath all my estate real and personal to my executors, my brothers Thomas Snarr and George Snarr, and my executrix Mrs. Elizabeth Snarr and my son William Snarr and Edmund Shuttleworth.

1. I will that my beloved wife Elizabeth Snarr shall have an income of $2,000 per annum during her life in lieu of dower and all other claims upon my estate, and that a sufficient part of my estate shall be invested and set apart for that purpose;

2. I give and bequeath to my daughters Charlotte Elizabeth Snarr, and Mary Anne Snarr, the proceeds of my life insurance, and I give and bequeath to each of them one of the houses I now own, on the north side of Wellington street, Toronto, Nos. 32 and 34, but this devise is subject to the devise and bequest to my said wife, who is to have the above income in any case. I wish Charlotte Elizabeth to have the house next to the lane;

3. I also will and direct that my said beloved wife shall be provided with a comfortable house at the expense of my estate during her life:

4. The proceeds of the insurance and the rent of the said houses, are not to come into possession of my said daughters until after the decease of my said wife. I give $400 of the stock I hold in the Canada Permanent Loan Savings Society to Mrs. Lucy Loughead.

I give to my son George Snarr, jr., $1,200 of stock I hold in the said Canada Permanent Loan Society, or in any other Building or Loan Society, all the rest and residue of my property real and personal, I give and devise to my two sons William and George Snarr. My executors shall have full power and authority to sell and dispose of such part of my real estate as they shall think proper, and charge the same with payment of all my just debts.

(Signed) JOHN SNARR.

Snarr covenanted to pay the said annuity, and the executors and executrix then conveyed all their interest as such executors and executrix in the said properties to the said George E. Snarr and William A. Snarr, subject to the said charges: that there were large arrears of the said annuity due the said Elizabeth Snarr at the time of her death, which happened on September 13th, 1883: that by her last will she devised all her real and personal estate to the plaintiffs, and made them her sole executrices: that after the making of the said agreement of the 4th August, 1876, the said George E. and William A. Snarr became insolvent, and the defendant was their assignee in insolvency, subject to the plaintiffs' claims and charges: and the plaintiffs claimed to have the amount of the said arrears of annuity with interest and costs realized as a lien and charge on the said properties.

The defendant's statement of defence after setting up payment, alleged that after the making of the agreement of the 4th August, 1876, it was agreed between the said Elizabeth Snarr, George E. Snarr, and William A. Snarr, and the plaintiffs, that the said George E. Snarr, and William A. Snarr should expend a large sum of money on part of the said premises, called the Wellington street houses, and as that would benefit the plaintiffs and increase the annual income of the said premises, that the said Elizabeth Snarr should look to the rents thereof for payment of her said annuity in lieu of the said George E. Snarr, and William A. Snarr, and that the money was so spent, and the said Elizabeth Snarr in her lifetime acted upon the said agreement, and received the amount payable to her out of the said premises, and at her death had no claim against the other properties: and alleged that under no circumstances ought the plaintiffs to be entitled to any interest.

The action came on for trial at Toronto, on the 13th December, 1884, before Ferguson, J., when it was referred to the Master-in-Ordinary to find and report upon all questions arising between the parties in respect of the claim

of the plaintiffs, and all questions of set-off, and to take all the accounts.

The Master found due to the plaintiffs $8,993.95 for principal money, and $1,738.05 for interest for the six years before action, making together $10,652: that the said sum of $10,652, was a lien upon the properties sought to be charged: that the defendant brought in an account claiming an expenditure of $23,336.28 by the said George E. Snarr and William A. Snarr, but that under the various agreements produced, the said George E. Snarr and William A. Snarr had no authority to spend more than $16,000 without the written consent of the plaintiffs, the giving of which had not been proved, and that as the plaintiffs admitted $16,000, he did not go into the account: that the defendant claimed the excess over the $16,000 which was disallowed, and that the plaintiffs had the right to maintain their action.

From this report the defendant appealed on the following grounds: 1. That the sum of $1,738.05 allowed as interest on the arrears of annuity, should not have been allowed; 2. That the repairs on the Wellington street property made by the plaintiffs, and being in the nature of permanent improvements, were improperly charged against the defendant; 3. That the finding as to the balance of the $23,336.28 over the $16,000, was contrary to the evidence: and that the Master should have found that such balance was properly chargeable against the plaintiffs as a set-off to their claim for arrears of annuity.

The appeal was argued on October 15th, 1885, before Boyd, C.

W. A. Reeve and *G. F. Ruttan*, for the appeal. The properties were charged by the agreement in the following order: 1. The Church street house; 2. The Sherbourne street mill; 3. The rents of the Wellington street houses, which houses were devised to the daughters; and 4. The interest on the insurance money, the *corpus* of which had been also devised to the daughters. The

sons managed the estate up to the month of March, 1879, when they became insolvent, and the defendant is their assignee in insolvency. The mother did not die until September 13th, 1883, and when she died, there was a large sum due for arrears of annuity. The plaintiffs claim they are entitled to the amount in arrear as her executrices and devisees. The Master has allowed the arrears of annuity at $8,993.95; and he has also allowed six years interest on the same at $1,738.05. There is no doubt he was wrong in allowing the interest. No interest should be allowed on an annuity. The rule of this Court is not to allow interest; *Crone* v. *Crone*, 27 Gr. 425; *Blogg* v. *Johnson*, L. R. 2 Ch. 225; *Earl of Mansfield* v. *Ogle*, 4 DeG. & J., 41; *Booth* v. *Leycester*, 3 My. & C. 459; *Torre* v. *Brown*, 6 H. L. C. 555, at pp. 577 and 579; *Aylmer* v. *Aylmer*, 1 Molloy 87. *Re Powell's Trusts*, 10 Ha. 134. [*Hamilton*—There is a covenant to pay in this case.] That makes no difference, the Court has a discretion and always had.

Then, as to the second ground of appeal—the repairs. The sons deducted all repairs from the rents before they were paid over in payment of the annuity, and the Master has allowed the sum of $93 to the daughters for some plastering and flooring of the Wellington street houses. After the daughters took possession the sons became insolvent. The Master held that this work should have been done by the sons under the agreement and should be paid for out of the $16,000 to be expended by them. The evidence shews that this work was required to complete the buildings and not properly speaking annual repairs, and the Master was therefore wrong in allowing them to the daughters.

As to the third ground: The evidence shows also that the sons expended much more upon the buildings than has been allowed. Even the plaintiffs admit that they properly expended $16,000, but the Master should not have stopped there, he should have investigated the defendant's set-off, and if the amount claimed was so expended he

should have allowed the whole of it, and that would materially reduce the amount of arrears of the annuity. The Master finds that the sons had no authority to exceed $16,000, even if they had not at the time, they got it afterwards, for the agreement of August 4th, 1876, allowed an expenditure of $6,000, and there were two subsequent mortgages on the property to raise $11,000, and $5,000 respectively, to which the mother, sons, and daughters were all parties, and in those mortgages were contained recitals postponing the lien for the annuity to the mortgages. This would make a total of $22,000, and the Master should have found in favour of the defendants to that amount.

J. C. Hamilton and *A. Cassels*, contra. The question of the allowance of interest on an annuity has been fully discussed in the English cases, but in the Canadian cases only where *puisne* incumbrancers were concerned: *Crone* v. *Crone*, 27 Gr. 425. The question is in some degree discretionary with the Court, but depends upon the circumstances: *Gaunt* v. *Taylor*, 3 My. & K. 310; *Morris* v. *Dillingham*, 3 Ves. Sr. 170. Interest has been allowed: *Hyde* v. *Price*, 8 Sim. 578; *Wilcox* v. *Butcher*, 16 Sim. 366; *Playfair* v. *Cooper*, 1 W. R. 376. [*Reeve*—That case is overruled.] No; it was not overruled, but Malins, V.C. in another case, *Wheatley* v. *Davies*, 24 W. R. 818, declined to follow it. Interest should be allowed as is apparent from the principles laid down in *Spartali* v. *Constantinidi*, 20 W. R. 825; *Rodger* v. *Comptoir D'Escompte de Paris*, L. R. 3 P. C. 478; *Webster* v. *British Empire Mutual Life Ins. Co.*, 15 Ch. D. pp. 178-9; *Hutton* v. *Federal Bank*, 9 P. R. 568; *Re Kirkpatrick—Kirkpatrick* v. *Stevenson*, 10 P. R. 4. The word "rent" in sec. 17 of R. S. O. 108, is explained by sec. 2, sub-sec. 3 of that statute. The original of this Act was passed in 1834, while ss. 266, 267, of R. S. O. ch. 50, were not passed until 1837, after the Act limiting actions. Our statute should therefore be more liberally construed than the English Act, because our Act in addition to declaring what the law was, which was all the English Act did, went further and gave other

powers. The leading case on which defendant relies: *Torre* v. *Brown*, 5 H. L. C. 555, began in the year 1800, and admits certain exceptions, and if it sustains the cases cited this case comes within the exceptions: *Seton* on Decrees, 4th ed., p. 962, contains the principal exceptions with the cases for and against. In this case there was also gross misconduct on the part of the sons, they received and appropriated as much of the rents as the interest allowed instead of paying the annuity. [BOYD, C.—But it seems that they put it in the building, not their pockets.] Not in such a way that the plaintiffs got the benefit or should be chargeable, for the evidence shows that the walls when built were condemned. Then there is the covenant for indemnity in the agreement. See also *Tew* v. *The Earl of Winterton*, 1 Ves. 451.

Reeve, in reply. There is no misconduct shown on the part of the sons. The covenant to indemnify was not made with the annuitant, so that the plaintiffs cannot claim under it, and the indemnity was not made in respect to the annuity, but merely to protect the plaintiffs from any failure in the rents to meet the annual interest on the cost of the improvements. *Newman* v. *Auling*, 3 Atk. 579, is overruled by *Torre* v. *Brown supra*.

October 21st, 1885. BOYD, C.—All the persons interested in and under the will of Mr. Snarr came together, and arranged a settlement of their rights, which was embodied in a deed signed by all and dated August 4th, 1876. By this an annuity of $2,000 in favour of the widow, and for her life, was charged upon the house property on Church street; upon the mill property; upon the rents or annual proceeds only of the Wellington street houses (devised to the two daughters); and upon the interest or annual proceeds only of life insurance money.

The two sons, William and George, covenanted with the widow for the payment quarterly of the said annuity. It was then provided, that in case of default in payment by the sons, the annuitant might enter into possession of the

houses and lands and receive the rents, and also take the rents of the Wellington street houses and the interest of the insurance fund, and in case of deficiency in all said rents and interest, then she was to recover the same from the sons, or might sell the first two properties.

It was then provided that the widow and the two daughters might reside in the Church street house, and that the daughters were to be provided for out of said annuity during the mother's life, and while they were unmarried. [This remained the place of their abode till the mother's death.]

There is next a provision for changing the houses on Wellington street and reconstructing them into wholesale or retail stores at an expense which is not to exceed $6,000, that to be a first charge on this property in priority to the annuity, if after reconstruction there is a surplus of rents, &c., beyond the annuity, that surplus is to be paid to the daughters, but if there is a deficiency after the reconstruction, the sons covenant with the daughters to make up such deficiency and to save the daughters harmless therefrom.

The sons then covenant with the mother and daughters to keep the houses in good and reasonable repair, and at all times reasonably and sufficiently tenantable for the tenants taking the same. The executors then convey all the property to the two sons, subject to the charges in the will, and as in the said agreement expressed.

It was stated during argument and not denied, that the rents and income of the property fell short yearly of the full amount of the annuity.

The widow died the 13th September, 1883, the annuity being then in arrears. The sons became insolvent early in 1879, and the defendant is their assignee in insolvency. The Master has found arrears to be due to the amount of $8,993.95, and has allowed interest thereon for six years before action (that began the 15th March, 1884,) the sum of $1,738.05, from which allowance of interest the defendants appeal.

No case is made in the pleadings for the allowance of interest, and the Master has reported no special circumstance which induced him thus to take the account, but from a memorandum of his reasons put in, it appears that he allowed interest because of the Statute R. S. O., ch. 50, secs. 266, 267. There was here a written instrument providing for the payment of a debt at a time certain, and as a jury might allow interest in such a case, so might the Master. That statute is not applicable to cases where a recovery is sought, not against a defenddant personally, but against his estate. Here no personal right of relief obtains against the assignee in insolvency, and all that is claimed by the plaintiff is to have a lien or charge declared against the land, and other assets in the the hands of the defendant.

In *Jenkins* v. *Briant*, 16 Sim. 272, after the death of a person who had covenanted to pay an annuity, a suit was instituted for administration of his assets, pending which the annuity fell into arrear, and the Court refused to allow interest, though 3 & 4 Wm. IV. ch. 42, sec. 28 (the English original of our statute) was cited. Counsel there admitted that if the claim had been made against the estate charged with the annuity, it could not have been supported, referring to *Booth* v. *Leycester*, p. 274. In that case which is reported first in 1 *Keen*, 247, and afterwards by *Lord Cottenham*, in 3 My. & C. 460, some of the annuities were secured by the covenant of the grantor and his surety, in quite as stringent a form as in the present case; but the judgment was that interest could not be received on the arrears, because there was no proof that the annuitant had been delayed by the absence or conduct of the grantor.

This point is also adverted to by Lord St. Leonards in *Martyn* v. *Blake*, 3 Dr. & War. 140, as follows: "That a mere covenant to pay an annuity will not enable the Court to give interest, is quite settled; but a covenant to indemnify a man against the effect of incumbrances, is a cove-

nant of a very different nature, and if the perception of the annuity was prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, then a case for damages under the covenant has been clearly made out. * * Then the covenantee would be entitled to recover interest * * as damages." I may observe that the covenant to indemnify here given to the daughters by the sons, is of a totally different nature from that under which interest might be given, and the covenant was not made with the annuitant.

Again in *Re Powell's Trusts*, 10 Ha. 134, the question arose upon a covenant to pay the annuity, and the decision was based on the inapplicability of the Statute 3 & 4 Wm. IV. ch. 42, sec 28, to justify the allowance of interest upon arrears even as against the person to pay. This case was recognized and followed in *Earl of Mansfield* v. *Ogle*, 4 De G. & J. 41. and *Blogg* v. *Johnston*, L. R. 2 Ch. 225. So that it may well be said in the language of Stuart, V. C., in *Booth* v. *Coulton*, 2 Giff. 520, that it is to be inferred from all the reported cases, that, except under extraordinary circumstances, upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity.

The Master's decision was sought to be upheld on the ground that this allowance was made as for the support and maintenance of the widow and her daughters, but any exception from the general rule on that ground is now obsolete: *Beamish* v. *Farmer*, Ir. R. 1 Eq. 472; *Torre* v. *Brown*, 5 H. L. C. 578. It was also suggested that the conduct of the sons was such as to amount to a misappropriation of the rents properly payable towards the annuity, but no distinct evidence on this head was referred to, even if any such misconduct could avail to charge the land with interest in the hands of the assignee, and as against the other creditors of the estate. The annuitant has had the power all along to enter upon the property and take all the rents, issues, and profits in satisfaction of the yearly payment to her, and if the proceeds fell short of that, it

is not the course of the Court to enforce the payment of interest upon the deficiency, in the absence of an express contract to that effect.

This ground of appeal is allowed; as I think no interest whatever should be allowed up to report as against the estate and other creditors. See *Lainson* v. *Lainson*, 18 Beav. 7; *Edwards* v. *Warden*, 1 App. Cas. 294. Even if the statement as to interest justified the giving of it, as between the parties to the contract, I should not be able to uphold the awarding of interest as against the assignee in insolvency; the general rule being that interest ceases at the date of the assignment, upon all debts as to which interest is not made a part of the contract, unless it is evident that there is a surplus to be returned to the debtor: *Ex p. Hill*, 11 Ves. 564.

The next ground of appeal is, as to three items of $29.81, $13,16, and $50, making up $93, which the Master allowed as proper deductions from the rents of the Wellington street houses after their reconstruction. The smallest item was for re-flooring a cellar, and the others for lathing and plastering the cellar, without which the tenant was unable to store goods there, and threatened to leave. The sons had put up the buildings and omitted to lathe and plaster the cellar, and they had covenanted to keep these houses reasonably and sufficiently tenantable and suitable for the occupation of tenants taking the same. I think that this was a matter of reparation which the sons ought to have made, and that the expense of it was rightly deducted from the rent received by the widow. I over-rule this ground of appeal.

The third ground of appeal is, that the Master disallowed a set-off brought in by the defendants claiming a large sum as expended by the sons in reconstructing the Wellington street houses, over and above the $16,000. allowed on that head.

Upon the evidence, I think the Master's conclusion on this is right. The daughters agreed to an expenditure not exceeding $6,000 on the reconstruction of the Wellington

street buildings by the instrument of the 4th August, 1876. No money was expended by the brothers for reconstruction under this clause, when they procured the loan of $6,000 from the Confederation Life Company, and that mortgage signed by the sisters was really equivalent to their sanction in writing for the expenditure of the $6,000 as proposed. At the outset we have not a cumulative lien on the land, but only the one lien for $6,000 represented by this mortgage. Only $4,000 was advanced upon this, and then a further loan of $11,000 was obtained from the North of Scotland Credit Company in February, 1877, in which the sisters joined. Out of this the $4,000 was repaid to the Confederation Life Company, and their mortgage discharged. It was found that a further sum was needed in November, 1877, and then the further advance of $5,000 was obtained from the North of Scotland. I regard the recitals in these mortgages as inserted by the conveyancer *ex abundanti cautela*. The lending company did not propose to be entangled in any enquiry as to whether there was or was not any lien for $6,000 enuring to the brothers. And so it was simply postponed, together with the mothers charge for the annuity, to the mortgages taken by the company.

By executing the first mortgage to the Confederation Life for $6,000, the sisters satisfied their engagement to sanction an expenditure to this extent, and fulfilled their contract to charge the lands therewith; that was the sum specified in the agreement, and it was then supposed to be a sufficient sum to do what was required. Afterwards it was ascertained that more was needed, and the sisters by signing the mortgages gave in effect their consent to a sum of $16,000 being expended on the property: but there is no writing to bind them any further, and they have broken no contract in refusing to allow more. Instead of apportioning costs, the simpler way is to allow the respondent one-third of the whole bill after taxation, which one-third is to be paid by the defendant.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. KLEMP.

"Canada Temperance Act, 1878"—"The Liquor License Act, 1883," and amendment of 1884—Information before a single magistrate—Conviction—Penalty—Bias or interest in magistrates.

An information under the "Scott Act" can be laid before one Justice, although two must try the case.

Section 91 of the "Liquor License Act, 1883," 46 Vic. ch. 30 (D.), amended by 47 Vic. ch. 32, sec. 16 (D.), applies only to localities in which the Canada Temperance Act is not in force.

In this case the information was for selling liquor, and the conviction was for "selling intoxicating liquor and having hotel appliances in the bar-room and premises":

Held, that even if a double offence had been charged in the information the magistrate had power to drop one and proceed on the other; but that in this case a second offence under sec. 118 of the Canada Temperance Act was not embraced in the words used.

Held, also, that the conviction not having been made by a stipendiary magistrate, &c., under sec. 111 Canada Temperance Act, 1878, was appealable or removable by *certiorari*.

Semble, that notwithstanding *Fitzgerald* v. *McKinlay*, 21 C. L. J. 299, the informer may be entitled to half of the fine.

It was alleged that the prosecutions for offences against the Act were taken before the magistrates in this case because it "was notorious they were thorough-going Scott Act men," and that they had said that in no case of conviction would they inflict a less fine than $50. It was also alleged that one of the Justices was a member of a local committee for prosecuting offences against the Act, but it appeared he had resigned from the committee before the Act came into force in the county.

Held, that there was no disqualifying interest in the magistrates, nor any real or substantial bias attributable to them, nor any reason why they should not lawfully adjudicate in the case.

The cases relating to disqualification by reason of favour or interest in a judge or magistrate discussed.

Clement obtained an order *nisi* on behalf of the defendant Klemp calling upon Thomas Law and James Clark Gibson, two of her Majesty's Justices of the Peace for the county of Bruce, and Patrick Heffernan, of the town of Walkerton, to shew cause why certain records of conviction returned to this Court, bearing date the 23rd day of May, 1885 [one of such convictions purporting to be an amended conviction of the other] should not be quashed, with costs to be paid by the said Patrick Heffernan, or the Justices, on the following grounds, as to both the said convictions:

1. That the said magistrates had no jurisdiction to make the said convictions, the information having been laid before only one magistrate, contrary to the statute.

2. That the magistrates had no jurisdiction to impose a higher fine than $20, under the provisions of the "Canada Temperance Act, 1878," as amended by the "Liquor License Act, 1883," in respect of the offence charged.

3. That the magistrates were incapacitated by reason of interest from hearing the charge in respect of which the convictions were made.

And on the following grounds, so far as related to the original conviction:

1. That the said conviction, and the information upon which the same was founded, were for a double offence, contrary to the provisions of the statute.

2. And on grounds disclosed in affidavits filed.

The information was laid on the 16th of May, 1885, by Patrick Hefferman, constable, before James C. Gibson, a Justice of the Peace for the county of Bruce, that the informant "has just and reasonable cause to suspect, and doth suspect that intoxicating liquor in respect to which an offence against the second part of 'The Canada Temperance Act of 1878,' hath been committed on the 15th day of May last past, and is concealed in the hotel and premises of J. P. Klemp, in the town of Walkerton, in the county of Bruce, and he suspects from the appliances contained in said premises, and from the persons seen to frequent said premises, that said intoxicating liquor is kept for sale."

The same informant on the same day, and before the same magistrate, laid an information in the like terms as the preceding one, and upon it he prayed that a search warrant should be granted to him to search the premises of Klemp for the said intoxicating liquor, which search warrant was granted and the search was made.

"The Canada Temperance Act of 1878" was in force in the county of Bruce at the time.

The conviction first drawn up was "that on the 23rd of May, 1885, Klemp is convicted before the undersigned

[J. C. Gibson and Thomas Law] two of Her Majesty's Justices of the Peace for the county of Bruce, for that the said Klemp, on the 15th day of May, 1885, at the said town of Walkerton. did commit an offence against the provisions of the Canada Temperance Act of 1878, second part, by selling intoxicating liquor, *and by having hotel appliances in the bar-room and premises*, said Act being now in force in said county, Patrick Heffernan being complainant; and we adjudge the said Klemp for the said offence to forfeit and pay the sum of $50, to be paid and applied according to law, and also to pay to the said Patrick Heffernan the sum of $11.10 for his costs in in this behalf, and if the several sums be not paid within fifteen days from this date, we do order the same to be levied by distress and sale of the goods and chattels of the said Klemp; and in default of sufficient distress we adjudge the said Klemp to be imprisoned in the common gaol of the county at Walkerton, there to be kept for the space of thirty days, unless the said sums and the costs and charges of conveying the said Klemp to the common goal be sooner paid."

An amended conviction was drawn up omitting the part in italics in the first conviction, the said words in italics being "and by having hotel appliances in his bar room and premises." In other respects the amended conviction was similar to the original conviction.

Clement, for the applicant:

The complaint was made under the Act of 1878, sec. 103, which provides "that such prosecution may be brought" in the Province of Ontario before a stipendiary magistrate, or before any other two Justices of the Peace for the county, &c., wherein the offence was committed, or if the offence was committed in any county, &c., having a Police Magistrate, then before such Police Magistrate, or in his absence then before the Mayor or any two Justices of the Peace, or if the offence was committed in any city or town not having a Police Magistrate, then before the Mayor or any two Justices of the Peace.

The complaint in this case was laid before one magistrate only, and the offence alleged to have been committed is charged to have been committed in the town of Walkerton, for which there must be a mayor, who could have acted if there was no Police Magistrate, and if there was a Police Magistrate he could have acted alone; but one Justice had no power to take the information. See *Regina* v. *Risteen*, 22 Sup. Ct., N. B. 51; *Ex parte Manzer*, 23 Sup. Ct., N. B. 315.

Regina v. *Lennox*, 34 U. C. R. 28, and the cases there referred to shew the information is the beginning of the prosecution.

The penalty imposed is $50 under section 100 of the Temperance Act, 1878, while it should have been not more than $20 by section 102 of the Liquor License Act of 1883, if the offence is one under that Act.

If these objections do not prevail the defendant contends the proceedings are void, because the convicting Justices are members of an organized association for prosecuting offences against the Act, and the convictions are invalid, because the Justices were persons who were specially interested in procuring the conviction of the defendant: See *Regina* v. *Justices of Great Yarmouth*, 8 Q. B. D. 525; *Regina* v. *Chapman*, 1 O. R. 582; *Regina* v. *Rand*, L. R. 1 Q. B. 230; *Regina* v. *The Justices of Surrey*, 1 Jur. N. S. 1138; *Regina* v. *Allen*, 10 Jur. N. S. 796; *Regina* v. *Milledge*, 4 Q. B. D. 332.

The original as well as the amended conviction should be quashed; *Regina* v. *Malcolm*, 2 O. R. 511.

The conviction first made is bad for the reasons urged as to the amended conviction, and also as being for a double offence, the selling of liquor, *and* having hotel appliances in the bar room and premises: *Regina* v. *Clennan*, 8 P. R. 118.

The Act of 1878, sec. 111, does not allow a writ of *certiorari* to be issued, but the writ will still be granted where the objection goes, as here, to the jurisdiction. See *The Colonial Bank of Australasia* v. *Willan*, L. R. 5 P. C.

417; *Ex parte Bradlaugh*, 3 Q. B. D. 509; and besides the Liquor License Act, 1883, sec. 145, applies to the former of these Acts, and practically repeals sec. 111 of that Act.

Section 124, sub-sec. 12, of the Act of 1883, does not apply here, because that refers only to convictions which have been affirmed, or amended and affirmed on appeal by the Judge. Section 116, sub-sec. 2, confirms the right of issuing a *certiorari*.

Allan Cassels, contra. The Act of 1878, section 107, enacts that every offence against the second part of the Act may be prosecuted in the manner directed by the 32-33 Vic. ch. 31 (D.,) so far as no provision is made by the Act of 1878, for any matter or thing which may be required to be done with respect to such prosecution, and all the provisions contained in the said Act shall be applicable * * as if they were incorporated in the Act, &c. And section 85 of the Act of 1869 enacts that one Justice may receive an information in all cases of summary proceedings before a Justice or Justices of the Peace out of sessions, and grant a summons or warrant thereon, and may issue his summons or warrant to compel the attendance of any witness for either party, and do all other acts preliminary to the hearing, "even in cases where by the statute in that behalf the information or complaint must be heard and determined by two or more Justices:" See sec. 88.

The Act of 1878, sec. 105, contains a provision admitting of trial before different Justices of the Peace from those before whom the information may be laid, and it enacts that "If *such prosecution is brought* before any *two* other Justices of the Peace, the summons shall be signed by *one* of them."

The information was therefore rightly taken, and the summons was rightly issued by the one magistrate: See *Regina* v. *Russell*, 13 Q. B. 237.

The information, it was said, contained two distinct offences. The Act of 1878, sec. 116, allows the Justices to substitute for the offence charged in the information any other offence against the Temperance Act of 1864, or the

Act of 1878; and the Act of 1869, ch. 31, sec. 5, does not allow any objection to prevail which is taken to any information for any alleged defect in substance or in form.

Under these provisions the Justices may proceed upon one of the charges: *Regina* v. *Bennett*, 1 O. R. at p. 452. Besides it is not a separate offence: Act of 1878, sec. 118.

As to the penalty which has been imposed, it is said it should have been $20 only, and not $50. But sec. 145 of the Act of 1883 does not make the penalty under sec. 91, as amended by the Act of 47 Vict. ch. 32, sec. 16, under which section, if any, the offence comes, the penalty which is applicable to an offence under the Act of 1878, and if it did, the amending section admits a penalty of $50.

It is denied that Law, one of the Justices, took any part in the proceedings of the association referred to, after the Act of 1878 came into force in the county, even if his taking part would have been a disqualification.

It is not shewn the Justices had any interest to bias them, and favour is not the same as interest: *Regina* v. *Rand*, L. R. 1 Q. B. 230; *Regina* v. *Alcock*, 37 L. T. N. S. 830; *Regina* v. *The Mayor of Deal*, 45 L. T. N. S. 439. In this case, if the matter is properly before the Court, an enquiry must be made into the merits of the case before the conviction can be quashed: Act of 1878, sec. 118.

November 5, 1885. WILSON, C. J.—I am of opinion that as one Justice may issue the summons or warrant against the party, "and do all the other acts preliminary to the hearing," even in cases where by statute the information or complaint must be heard and determined by two or more Justices, the taking of the information and the issuing of the summons by one of the two Justices who heard the case and convicted the defendant were proceedings rightly taken by the one Justice alone.

The statutes, which were referred to upon that point, enable me to dispose of that objection. I refer also to the case cited of *Regina* v. *Russell*, 13 Q. B. 237. I am of opinion also that even if the information contained two

distinct offences, the Justices could drop one charge and proceed with the other. I refer to the statutes cited upon that point, and to the case which was also cited. The penalty is quite right, as it is $50 according to the Act of 1878. The penalty of $20 for the first offence mentioned in sec. 91 of the Act of 1883, amended by the Act of 1884, applies only to localities in which the Temperance Act is *not* in force, for that section refers to persons who sell or barter liquor *without the license therefor required by law*, which has no relation to the Prohibitory Act of 1878.

As this matter is before me I am required by the Act of 1878, section 118, to dispose of such application upon the merits, notwithstanding any defect in form or substance, provided it be understood from such conviction that the same was made for an offence against some provision of such Act, within the jurisdiction of the Justices, and provided there is evidence to prove such offence, and no greater penalty is imposed than is authorized by the Act, sec 117; and I am further required to amend the conviction, if necessary, and when it appears the merits have been tried, and the conviction is sufficient and valid under section 118, or otherwise, such conviction shall be affirmed, or shall not be quashed.

This conviction not having been made by a stipendiary magistrate, &c., under section 111 of the Act of 1878, is still appealable, or removable by *certiorari*, or *habeas corpus*; and so far as the merits are concerned *I decline to quash the conviction.*

The principal matter I have to determine is, whether the convicting Justices were interested in the matter of complaint, or prosecution, so as to have become disqualified from acting in or disposing of the case.

What then is the interest which is said has disqualified these Justices from acting?

Mr. Klein, the solicitor of Klemp, says that all prosecutions against offenders of the Act in the East Riding of Bruce have been brought by Patrick Heffernan, who is employed by the Scott Act Association in the Ridings

of Essex and Bruce to do so, and in every case, about ten of them, the information was laid before the said Gibson and Law.

Gibson and Law reside about sixteen miles from each other, and there are other Justices in Walkerton, but Heffernan has not brought any complaints before them, because they are not known to be Scott Act men, although the deponent believes they are willing and competent to try such cases. It is quite notorious in the town and neighbourhood that Law is a strong Scott Act man, and that he is strongly prejudiced against any party brought before him charged with an offence under the Act: that since the 23rd of May one Messner was brought before Law and Gibson for selling contrary to the Act. Heffernan being the informant. The deponent appeared as counsel for Messner, who pleaded guilty. The deponent asked the Justices to inflict a less fine than $50, which he thought might be done under the Acts of 1883 and 1884. The Justices said they could inflict a less fine, but when the Temperance Act first came into force in the county they (Gibson and Law) had arranged with each other that in no case would they convict an offender for a less sum than $50, although they had the power, and as one-half of the fine went to the informer, and as he had not received any money to that time for fines under the Act, they could not very well make the fine against Messner less than $50, to which Heffernan said, on being referred to, he had "nothing to say in it," and the said Justices then fined Messner $35 for his offence. Hefferman is in the employ of the Scott Act Association for the east riding of Bruce, and is to be paid a salary for his duties as an informer against offenders of the Scott Act, but he is to credit all fines received by him on his salary.

Mr. Macnamara, a Justice of the Peace for Bruce, says Heffernan was appointed at a meeting held at Walkerton, on the 30th of April last, of the supporters of the Scott Act, in the east riding of Bruce, "as the enforcing officer for the association:" that Law told the deponent he, Law

was present at the meeting, and that the subject of getting a Police Magistrate for the town was considered by the meeting, and that he (Law) had gone against D. W. Ross as the person to be appointed, because of a speech he had made against the Act, and that the meeting recommended Joseph Baker for the office, as he was known to be a thorough-going Scott Act man, and that he, Law, took part in the meeting. The deponent says that Law is well known as a thorough Scott Act man, and a man of strong prejudices on the question, and that those accused of violating the Act have no reasonable prospect of obtaining justice at his hands.

George S. Wilson says about the beginning of last June when he was applying to Mr. Gibson, the magistrate, to adjourn a case then before him, Gibson said "he was acting for the Scott Act party in said county as a magistrate," and the deponent says he believes from what Gibson said to him that Gibson would give every possible advantage to the Scott Act party on a trial under the Temperance Acts.

These are the charges against the Justices relied upon to shew an interest on their part to disqualify them from acting as Justices in the conviction of the defendant.

For the prosecution Mr. Sheffield says he is the secretary of the local committee, having for its object the promotion of temperance: that the minutes of the committee shew that on the 20th of April last Mr. Law's name was dropped from the committee at his request, and he has not taken part in the deliberations of any committee, local or county, with reference to the Scott Act, so far as he (the deponent) knows, and he would be likely to know if he had done so.

The deponent speaks of Law being a man of great self-control, and that no Justice of the Peace in Walkerton would give a fairer decision unbiassed by his own sentiment on a trial relating to the Scott Act than Mr. Law.

Mr. Stephens, the editor of a newspaper published in Walkerton, says he has for the purposes of his paper attended nearly if not all the prosecutions held under the

Scott Act in Walkerton: that he was at a public meeting when Mr. Ross's name was mentioned while discussing what person should be recommended for the office of Police Magistrate: that he and Mr. Law attended as spectators, there being no test required of any one before admittance, or before voting on motions: that neither Law nor the deponent voted on the motion for the appointment of a Police Magistrate. In his opinion no one could act in a more unbiassed manner on the bench than Mr. Law and his associate magistrate; and he has heard that opinion expressed of them by Mr. O'Connor, M.P., a counsel who had appeared before them for the defence in a prosecution under the Scott Act.

The deponent says Mr. Law is an extremely quiet, inoffensive man, and seldom if ever expressed himself in public on the Scott Act, or any other question.

The charges then are that the prosecutions for offences against the Temperance Act are taken before these two Justices, because it is notorious they are thorough-going Scott Act men: that they have said in no case would they impose a less fine than $50 on any one convicted of violating the Act, as the informer had half the penalty, and he had so far got no money for his services; and that Gibson told Wilson he was acting for the Scott Act party as a magistrate.

The cases which relate to interest in a Judge are *Dimes* v. *The Grand Junction Canal Co.*, 17 Jur. 73.

In that case Parke, B., delivered the opinion of the Judges to the House of Lords as follows: "That the interest of the Lord Chancellor as a shareholder in the canal company disqualified him from acting as a Judge in the case: that the order in question, if he had made it, would not have been void, but voidable only: that in the case of there being a disqualification in the Judge, his order or decree may be set aside by an appeal or an application of some kind, or by prohibition where a prohibition lies."

In *Regina* v. *Dean, &c., of Rochester*, 17 Q. B. 1, a schoolmaster, appointed under a statute of the founder of the Cathedral Church, published a libel on the Bishop and on the Dean and Chapter. He was cited to appear, and was dismissed from his office by the Dean and Chapter. Held, although he was removed for the libel on the Bishop as well as upon the Dean and Chapter, that he should have appealed to the Bishop as visitor, and that the Bishop was not disqualified because the Dean and Chapter had removed the schoolmaster for libelling not only the Dean and Chapter, but the Bishop. Patteson, J., in giving judgment said, citing from Hardr. 503: "Favour shall not be presumed in a Judge."

In *Regina* v. *Allen*, 4 B. & S. 915, the conviction was for an offence against the Salmon Fishery Act, 1861.

In that year an association called the Tees Salmon Fishery Landowners Association was formed to enforce the provisions of the Act.

The association consisted of two classes of members, ordinary members, who were owners of riverside property, or occupiers of the right of fishing in the river and its tributaries, and honorary members, who might be desirous of promoting the objects of the association by contributing to its funds.

The secretary and treasurer were [subject to the approval of the committee] to determine what proceedings should be taken against any person acting in contravention of the laws.

There were three convicting Justices. Allen was an ordinary member of the association. Smith was an active member of the committee, and was present at the annual meeting when a resolution was passed authorizing the committee to take proceedings for the recovery of such further penalties as in their opinion had been incurred at the defendant's locks. Pease was a subscribing member of the association.

The information was made by Robert Little, who was superintendent watcher, appointed and paid by the associa-

tion. The defendant was convicted and Little was ordered a portion of the penalty.

Cockburn, C. J. "This rule must be made absolute. It is impossible to hold consistently with the principles which have been established by decided cases and are founded on the very essence of justice that these magistrates were competent judges upon the occasion in question. * * The prosecutors were an association including riparian proprietors interested in the protection of the salmon fishing of the river. Certain members of that association were present as Justices and took part in the conviction. They were essentially prosecutors, being members of an association, the aggregate of which were undoubtedly the prosecutors. It is impossible to say that persons who are parties to a criminal proceeding, as prosecutors, can act as Justices with jurisdiction to convict summarily."

Mellor, J., said: "Here one of the convicting Justices was not only a member of this association, but was present at a meeting which authorized the present proceedings to be taken. It would be very mischievous if Justices so circumstanced could sit upon the inquiry."

In *Regina* v. *Rand*, L. R. 1 Q. B. 230, the corporation of Bradford owned water-works, and were empowered by statute to take the water of certain streams, without the permission of the mill owners, on obtaining a certificate of Justices that a certain reservoir was completed of a given capacity, and was filled with water. The Justices granted the certificate. Two of the Justices who granted the certificate were trustees of an hospital and friendly society respectively, each of which bodies had lent money to the corporation on bonds charging the corporate fund.

The security of the *cestuis que trust* would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect as increasing the value of the water-works. The Justices acted *bonâ fide*. *Held*, these Justices were not disqualified from granting the certificate.

Blackburn, J., in giving the judgment of the Court, refusing a *certiorari*, said: "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs or other pecuniary loss or gain in consequence of their being so, we should think the question different from what it is, for that might be held an interest. But the only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees, and that is an objection not in the nature of interest, but of a challenge to the favour. * * We are not to be understood to say that where there is a real bias of this sort" (kindred) "this Court would not interfere."

In a contest between the Corporation of London, as owners of Epping Forest, and a commoner of the Forest, proceedings were taken by the city against the commoner, and they were heard before two Justices. The defendant at the hearing objected to one of the Justices on the ground that he was disqualified from interest in acting, he having made an affidavit on behalf of the city, in which he stated he was a commoner, and that the city by their proceedings had rendered the forest better fitted for the use of commoners and the public. The Justices convicted the applicant.

Held, the Justice was not disqualified: *Regina* v. *Alcock, Ex p. Chilton*, 37 L. T. N. S. 829.

In the *Queen* v. *Handsley*, 8 Q. B. D. 383, an officer of a corporation appointed to collect the borough rate procured a summons in the discharge of his duty against a ratepayer. He acted on his own responsibility. At the hearing the Justices dismissed the summons because one of them was a town councillor, and was disqualified. Held, no disqualification: "It must be established in such a case that the Justice has such a substantial interest in the result of the prosecution as to make it likely that he has a real bias in the matter."

The possibility of bias is not sufficient to disqualify: it must be a real bias, and a substantial interest when it is not pecuniary: *Ibid.*; *Regina* v. *Mayer*, 1 Q. B. D. 173; *Regina* v. *Milledge*, 8 Q. B. D. 332.

In *Regina* v. *Justices of Great Yarmouth*, 8 Q. B. D. 525, the chairman of the magistrates at a special session was an appellant in one of the cases for hearing, and he took part in all the cases but his own. When his own case came on he left the bench, and conducted his own appeal. Held, that the chairman being a litigant in a matter similar to the other matters before the Court, he was disqualified from acting as a Justice, and that the orders he took part in were bad.

A member of the sanitary committee under a public health Act, who was a Justice of the Peace, was held disqualified to act in the prosecution of a person for the violation of the Act, although the Act provided that "no Justice of the Peace shall be deemed incapable of acting in cases arising under the Act by reason of his being a member of any local authority," because the member did not merely act as a Justice in hearing the case, but he attended at a meeting and agreed in the resolution that the town clerk should prosecute the defendant for the violation of the Act; and as Field, J., said, in giving judgment, "The Legislature went one step in the direction of removing that difficulty" (of getting Justices to sit who were not members of the corporation,) "by enacting that the mere fact of membership should not disqualify the Justice. The section therefore removes one ground of interest merely. There is no warrant for holding that where the Justice has acted as a member by directing a prosecution for an offence under the Act, he is a sufficiently disinterested person as to be able to sit as a Judge at the hearing of the information. I am of opinion the rule must be made absolute, but this being a criminal matter, the Court has no power to give costs." *The Queen* v. *Lee*, 9 Q, B. D. 394.

I may refer also to *Regina* v. *The Bishop of St. Albans*, 9 Q. B. D. 454, which decides that a magistrate having

been served with a subpœna to give evidence in a particular case is not thereby disqualified from sitting as a magistrate on the hearing and adjudication of the case: *Regina* v. *Tooke*, 32 W. R. 753.

In the case before me neither of the Justices directed this prosecution to be brought, and neither of them belonged to the association which was formed for the purpose of having the Act enforced against those who should violate its provisions.

I cannot act on so vague and indefinite a statement as that which is said to have been made by Mr. Gibson, "that he was acting for the Scott Act party as a magistrate." It may mean much and it may mean little. He was in the ordinary discharge of his magisterial duties, even if there had been no Scott Act association in the locality, "acting for the Scott Act party," that is, for those who were in favour of the Act being put in force, while prosecuting any one for the contravention of the Act; and why am I to put the worst construction upon the language imputed to him, when there was no real or substantial bias, and not the least pecuniary interest, and no act of injustice done or favouritism for one side or observable prejudice against the other side, and the evidence was all fairly taken and a perfectly warranted judgment followed upon that evidence?

I do not rely much upon the statement that the magistrates had determined, as it is said they had, never to fine less than $50 because the informer was to get half the penalty, and he had not received anything so far for his services, because the penalty is by the Temperance Act not to be less than $50. See *In re Fitzgerald*, 21 Can. L. J., 299, and 31 Vict. ch. 1, sec. 7, sub-sec. 22. It is likely that part of the penalty may be paid to the informer. The only provision as to the disposal of the penalties under the Act of 1878 appears to be that contained in section 124.

I do not find that there was any disqualifying interest against these magistrates, nor any real or substantial bias attributable to them; nor is there any reason shewn why

they could not lawfully adjudicate upon the case; nor is there any ground for impeaching the conviction upon the merits. I therefore discharge the order *nisi*, and as to costs the party in whose favour the decision is may on notice discuss the question whether there is the power or not to grant costs in such a case.

Subsequently the question of costs was argued by the same counsel, when the learned Chief Justice concluded his judgment as follows:

The question of costs has since been argued by the counsel for the parties, and it appears, according to the authorities, costs may be given in certain cases, but they are not generally given.

In *The Queen* v. *Meyer*, 1 Q. B. D., 173, costs were given against the Justice who was disqualified from acting. There is a note at the foot of page 179, taken from *Gray* on Costs, p. 466, stating neither party is entitled to costs when the conviction is quashed.

In *The Queen* v. *Goodall*, L. R. 9 Q. B. 557, Cockburn, C. J., said, "The Court does in some cases inflict costs on justices when they have been guilty of some gross impropriety in the exercise of their summary jurisdiction." The motion against the justice failed and the other party was ordered to pay the costs of the justice.

In *The Queen* v. *Lee*, 9 Q. B. D. 394, Field, J., said, in a case of this kind, "This being a criminal matter the Court has no power to give costs."

In *Regina* v. *Justices of Deal*, Field, J., said, "I must discharge this rule, with costs," 45 L. T. N. S. 440. See also *Crowther* v. *Boult*, 13 Q. B. D. 680. *The Great London and North-Western Joint Committee* v. *Inett*, 2 Q. B. D. 284; *Paley* on Convictions, 6th ed. 458-459.

I shall therefore discharge the order *nisi*, with costs, as this is a case in which they should be given, if I have the power, as I think I have, to give them.

Order nisi discharged, with costs.

[CHANCERY DIVISION.]

RE CROWTER—CROWTER V. HINMAN.

Executors and trustees—Misappropriation—Acting trustee—Liability of co-trustee—Interest.

By his will, P. S. C. empowered his executors, if required, to sell a parcel of his lands to pay off "debts or encumbrances" against his estate. The land was sold by the executors, all of whom in some degree acted in their executorial capacity or as trustees, but by tacit consent, one of them took the actual management of the estate and received the moneys arising from it, including the proceeds of the said sale, which he misappropriated. H. A. C., an executrix, joined in the conveyance to the purchaser for the sake of conformity, but did not receive any of the purchase money, nor was there any evidence that she knew a balance remained in the hands of her co-trustee after satisfying the "debts or encumbrances," or that he was misapplying it.

Held, that under these circumstances, H. A. C. was not responsible to the estate for the misappropriation by her co-trustee.

Held, also, that even if she had been liable for the principal money so misappropriated, she would not have been for the interest, inasmuch as the principal never came into her hands.

McCarter v. *McCarter*, 7 O. R. 743; *Burrows* v. *Walls*, 5 DeG. M. & G. 233; *Rodbard* v. *Cooke*, 25 W. R. 536, and *Cowell* v. *Gatcombe*, 27 Beav. 568, distinguished.

THIS was an appeal, on the grounds stated in the judgment, from the report of the Master at Colborg, dated May 27th, 1885, made in a certain action brought for the administration of the estate of Peter Stephen Crowter, wherein a son and a daughter of the testator, being beneficiaries under his will and codicil, were plaintiffs, and the defendants were the widow of the testator, now Hester Ann Chord, and one Smith Hinman, being executrix and executor under the said will and codicil, and Minerva Ann Hinman, executrix of Derrick Hinman, who had also been an executor under the said will and codicil, but was now dead.

The present appeal was by Hester Ann Chord.

The facts sufficiently appear from the judgment.

The appeal was argued on September 23rd, 1885, before Ferguson, J.

C. Moss, Q. C., for the appellant. Notice to the appellant that Derrick Hinman was misappropriating, might

be a ground for charging her, but there was nothing of the kind. Then I refer also to 29 Vic. ch. 28, sec 32, (R. S. O. ch. 107, sec. 2). Was there any wilful default by the appellant as executrix? This is the question. See *King* v. *Hilton*, 29 Gr. 381; *Speight* v. *Gaunt*, 9 App. Cas. 1; *Brice* v. *Stokes*, 11 Ves. 319. *McCarter* v. *McCarter*, 7 O. R. 243, is distinguishable. At any rate she should not be charged with interest, as she did not receive the principal: *Lewin* on Trusts, 7th ed., p. 315; *Underhill's* Law of Trusts, p. 337-344; *Vanstone* v. *Thompson*, 10 Gr. 542; *Blain* v. *Terryberry*, 12 Gr. 221.

J. Kerr, for the respondents, we rely on the findings of the Master, and the cases: *McCarter* v. *McCarter*, 7 O. R. 243; *City Bank* v. *Maulson*, 3 Ch. Ch. 334; *Burrows* v. *Walls*, 5 DeG. M. & G. 233. The Master has found there was wilful neglect and default. The duty rested on the executors to invest the surplus. As to interest that was a question for the Judge, as it is for the jury.

C. Moss, Q. C., in reply. The direction to invest is to the executors *qua executors*. It cannot be applied to the sale of the realty. It is in terms inapplicable to that.

October 5th, 1885. FERGUSON, J.—The appellant is Hester Ann Chord, an executrix under the last will of the late Peter S. Crowter. She was the widow of the testator. The other two executors were Derrick Hinman and Smith Hinman. Derrick Hinman is dead, and the defendant, Minerva Ann Hinman is his widow, and executrix of his will. The action is for the administration of the estate of Peter S. Crowter.

The appeal is on the grounds: (1) That the Master erroneously determined that the appellant is liable to make good and owes jointly with the defendant, Minerva Ann Hinman, the sum of $1,602, and charged her with the same in taking the accounts, she, the appellant, contending that she is not properly chargeable with this sum, or any part of it; (2) That in any event, she, the appellant, should not have been charged interest on the sum of $793, mentioned

in the report. This principal sum of $793, and the interest allowed thereon make up the whole sum of $1,602, as to which the appeal is. The will provides for the sale of the residue of the personal estate, and payment of the debts and the investment of the balance, if any, remaining. It bears date the 28th of August, 1866. The testator made a codicil to the will. This bears date the 19th of September, 1866, and by it he empowered the executors, if the same should be required, to sell one parcel of his land to pay off "any debts or encumbrances" against his estate, and in the event of such sale and disposal being insufficient to pay such "debts or encumbrances," then to sell and dispose of another parcel of the land, describing each parcel and making a change in his will, in another respect, in case it should be necessary to sell the second parcel, saying nothing, however, in respect to the investment of any surplus there might be after the sale of the land and payment of such "debts or encumbrances" against his estate *(a)*.

(a) In the will, the testator simply named his executors and executrix, adding the words "directing my said executors and executrix to pay all my just debts and funeral expenses, and the legacies hereinafter given out of my estate," and then proceeded to make sundry specific bequests and devises, and proceeded: "Seventh, I will and devise that all of the personal effects, goods and chattels, horses and cattle, of which I may be possessed at the time of my decease, shall be sold within one year after my decease in the manner which my said executors and executrix may deem most advantageous, and pay all my just debts out of the proceeds of such sale and disposal by me owing at the time of my decease, and the balance of the proceeds of such sale and disposal, if any, shall be equally divided * * Ninth, I will and desire that any balance which may remain of the proceeds of the sale and disposal of my personal effects as aforesaid, my executors and executrix shall loan out the same in some good responsible manner, and upon the most advantageous terms possible to the benefit of my said wife, son, and daughter, as aforesaid," &c.

In the codicil, he directed that his executor and executrix "shall, if the same shall be required, sell in the first place, that part of my estate known and described as the north nine acres of, etc., to pay off any debts or encumbrances against my said estate, and in the event of such sale and disposal being insufficient to pay such debts or encumbrances, then in the next place to sell and dispose of the south fifty acres of," etc.

The above were the only portions of the will and codicil at all material to be noticed here.

It appears, or, at least it does not seem to be disputed, that it was necessary to sell both parcels for the purpose of paying such debts or encumbrances against the estate. No question is raised as to this, nor is any question raised as to any matter respecting the sale of the first parcel of the land, or the disposition made of the purchase money.

The question that is raised is in respect to the appropriation of the purchase money of the second parcel.

Probate of the will was granted to and taken by all three of the executors. The Master found that each had in some way or other acted as executrix, or executor or trustee at some time, but that Derrick Hinman, not by any actual appointment amongst themselves, but by tacit consent, took the actual management of the estate, and received all the moneys arising from it except the sum of $70 paid to the widow and disbursed by her, on which, as he says, nothing turns.

Derrick Hinman died before the commencement of the action, having misappropriated a considerable portion of the moneys of the estate.

The sale of the second parcel of land was in the spring of 1868, and without the knowledge of Smith Hinman. The learned Master says that he took no part in it, and the case before me was argued on this footing. The conveyance of this was executed by Derrick Hinman and the widow, who now appeals.

The learned Master expresses the opinion that the appellant did not make herself liable for any money misappropriated by Derrick Hinman simply by joining in the deed of conveyance that enabled him to receive the money, relying, I apprehend, upon the rule stated in the case, *Chambers* v. *Minchin*, 7 Ves., at p. 198, subsequently referred to in *Brice* v. *Stokes*, 11 Ves. 325, that where executors joined in a receipt, both having the whole power over the fund, both were chargeable, but where trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was by the general rule chargeable, and considering these executors

trustees merely as to the sale of the lands. He, however, held that she was liable on the ground that having joined in the conveyance, she helped Derrick Hinman to get the money, and must be taken to know that he was consequently a debtor to the estate until he applied it in a due course of administration; that she was guilty of wilful neglect and default in not bringing him to an account concerning it; and that by such neglect and default she made herself liable for the loss to the estate.

The will does not contain what is commonly, or, at least, sometimes called, an indemnity clause, but it is, I think, to be read as if it contained what is provided for by 29 Vic. ch. 18, sec. 32, if this would make any real difference.

On the argument it was not contended that the appellant's joining in the conveyance of this second parcel of the land was for any purpose, but as it was said "conformity." She did not receive any of the money in fact. She must be taken, I think, to have known that her co-trustee was receiving the purchase money. It was not contended or asserted that the circumstances had not arisen, or were not in existence, under which it was proper to exercise the power of sale, that is to say, that the sale was not necessary to obtain money to pay off and satisfy "debts or encumbrances" upon the estate.

It is not found or shown against the appellant, that she had in fact a knowledge of the state of the accounts, or as to what portion of the purchase money would be necessary for this purpose, or whether or not the whole of it was necessary. It does not appear from the report or the judgment—(reasons given by the learned Master) that she knew that a balance of this purchase money, or the whole of it, remained in the hands of her co-trustee after satisfaction of the "debts or encumbrances against the estate," or that if such money or balance were in his hands, that he was misappropriating it in any way.

In *Brice* v. *Stokes*, 11 Ves., at p. 327, the Lord Chancellor says:

"But though a trustee is safe, if he does no more than authorize the receipt and retainer of the money, as far as the act is within the due execution of the power, yet if it is proved that a trustee, under a duty to, say, his co-trustee, shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and, therefore, with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns upon this: not whether the receipt of the money was right, but, whether the use of it subsequent to that receipt was right, after the knowledge of the trustee that it had got into a course of abuse" * * "as soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those, who ought to take better care of it."

The respondents relied on the case *McCarter* v. *McCarter*, 7 O. R. 243, but I think that case clearly distinguishable on the facts from the present case. The learned Judge there, at p. 249, said:

"Here McCarter knew the moneys were in the hands, or under the control of his co-trustees to be invested, and he allows them so to remain, in one case for eight years, and in the other for ten years, without any inquiry or any assurance that the trust was being properly administered. This was wilful neglect and default," &c.

As I have before said, this was not, in the view that I take of the matter, the position of this appellant. In *Burrows* v. *Walls*, 5 DeG. M. & G. 233, referred to by the learned Judge in *McCarter* v. *McCarter*, it appears to have been known to all the trustees that there was a fund to be invested for a specific purpose, or for specific purposes, which, I think, distinguishes that case from the present one. In *Rodbard* v. *Cooke*, 25 W. R. 556, referred to in the same case, the rule acted upon appears to me to have been this: Where there are two trustees, and one of

them places a fund so that it is under the sole control of the other, if the money is misapplied by that other, both are equally liable. I do not think that rule applies to the present case, because I venture to think that in the light of the authorities it cannot be said that this appellant "placed the fund" so that it was under the sole control of her co-trustee. I think it cannot be said that she placed the fund at all. In that case it is said at p. 557:

"The object of having two trustees is to double the control over the trust properties, and when one trustee thinks fit to give the other the sole power of dealing with the trust property he defeats that object, and he, therefore, becomes himself responsible."

In the present case, there was no agreement that one should have the sole control over the property. There was no act done by the appellant to that effect, as appears to have been found in *Rodbard* v. *Cooke*. The only act was the execution of the conveyance, and of that I have before spoken. In *Cowell* v. *Gatcombe*, 27 Beav. 568, the case turned upon the evidence of Stephens, the solicitor, who had assumed to act, and had acted for both trustees, and it appeared that the defendant there enabled him to receive the money, and that he paid it to the other executor. There was the act done by that defendant, which as it appears to me has no equivalent in the conduct of the appellant here, and I think that case also distinguishable from the present case.

The learned Master by his report shews that this sum of $793 is the balance remaining in the hands, or that remained in the hands of Derrick Dinman, of the proceeds of the sale of the testator's real estate, and in his judgment he says that this sum is proceeds of the last sale, and it is in respect of this last sale that the appellant is held liable.

I am of the opinion that the mere joining in the conveyance, as this appellant did join, has not the effect of making her liable, and that, as it does not appear that she knew that there was a balance of this purchase money in the

hands of Derrick Hinman after satisfaction of the "debts or encumbrances" aforesaid; or, if such money or balance were in his hands, that he was misappropriating in any way, she has not been shewn to be liable for the balance of the sum of $793 in question, and not being liable for this principal sum, she is of course not liable in respect of the interest. But even if she were liable for the principal sum, I should still think her not liable for the interest, as the money never came into her hands at all: *Lewin* on Trusts, 7th ed., 315; *Vanston* v. *Thompson*, 10 Gr. 542, and there are many other authorities to the same effect as these.

At the argument a matter was mentioned regarding the appellants being charged by the learned Master with some moneys, the proceeds of the sale of timber, but as there was no appeal as to this, the argument was not persisted in.

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

Appeal allowed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

BURNS AND LEWIS V. MACKAY ET AL (a).

Fraudulent preference—Intent to defraud necessary on both sides—Evidence of such intent.

The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor under R. S. O. c. 118, there must be a concurrence of intent so to do on the part of both debtor and creditor: and the rule of the Court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion.

Ivey v. *Knox*, 8 O. R. 648, not followed.

THIS was an action brought by Burns and Lewis, wholesale clothiers, suing on behalf of themselves and all other creditors of G. D. Mackay, against G. D. Mackay, John S. Mackay, and James Sutherland, in which they claimed that G. D. Mackay being at the time hopelessly insolvent and largely indebted to them, did on February 24th, 1885, make an assignment of all his estate and effects to the defendant Sutherland for the benefit of his creditors; that previously thereto and about February 19th, 1885, G. D. Mackay disposed of a certain business of his at Woodstock to one Muir for $1,360: that Muir in part payment offset the sum of $60 due to him by G. D. Mackay in respect of rent, and for the balance gave promissory notes: that the said notes were drawn, by arrangement between G. D. Mackay and the defendant, J. S. Mackay, payable to the order of J. S. Mackay, and were delivered to him by G. D. Mackay in satisfaction of an alleged indebtedness due by him to the former for $2,000 contracted upwards of a year prior to date: that the said notes were so delivered, with intent to defeat, defraud, delay, and hinder the plaintiffs and other creditors of G. D. Mackay in the recovery of their claims, and with intent to give the said J. S. Mackay a preference over the other creditors: and the plaintiffs claimed a

(a) See 48 Vic. c. 26, s. 2., which enactment, however, did not come into force until after the date of the transactions impeached in this action, and it was not contended that it had any application to this case.

declaration that the transfer and delivery of the notes to J. S. Mackay was fraudulent and void against the plaintiffs and other creditors of G. D. Mackay: an injunction against negotiation of the notes by the defendants: delivery up of the notes to Sutherland to be dealt with pursuant to the deed of assignment, and for further relief.

By separate statements of defence, G. D. Mackay stated that the delivery of the notes was made under pressure of J. S. Mackay and not voluntarily or with fraudulent intent as alleged: J. S. Mackay stated the same thing, and denied any intent on his part to obtain a preference, or any knowledge of G. D. Mackay being financially embarrassed: and J. Sutherland as trustee submitted his rights to the protection of the Court.

The action was tried at London, on September 30th, 1885, before Boyd, C.

G. C. Gibbons, for the plaintiffs, cited *Ivey* v. *Knox*, 8 O. R. 635; *Ex parte Hill—In re Bird*, 23 Ch. D. 695; *Ex parte Griffith*, *ib.*, 69; *Cook* v. *Rogers*, 7 Bing. 438.

R. M. Meredith, for the defendant J. S. Mackay, cited *Hepburn* v. *Park*, 6 O. R. 472; *Brown* v. *Sweet*, 7 A. R. 725; *Brayley* v. *Ellis*, 9 A. R. 565; *Ex parte Putnam*, *re Crawford*, 30 L. T. 335; *Ex parte Topham*, *In re Walker*, L. R. 8 Ch. 614; *Taylor* v. *Thompson*, Ir. R. 4 C. L. 139.

Mulkern, for the trustee, J. Sutherland.

October 14th, 1885. BOYD, C.—The weight of authority greatly preponderates in favour of the view, that in order to work a fraudulent preference of a creditor under R. S. O. ch. 118, there must be a concurrence of intent so to do on the part of both debtor and creditor. The views expressed by the Judges in *Hepburn* v. *Park*, 6 O. R. 472; *Brown* v. *Sweet*, 7 A. R. 725; *Brayley* v. *Ellis*, 9 A. R. 565, cited by Mr. Meredith, which have been acted on in

Lancey v. *The Merchants Bank*, by Cameron C. J., (*b*) (a decision which was brought to my notice by Meredith, Q. C., as *amicus curiæ*), must govern me as against the opposite view expressed in the case of *Ivey* v. *Knox*, 8 O. R. 635, cited by Mr. Gibbons. The only evidence given at the

(*b*) The case of *Lancey* v. *The Merchants Bank* which was an interpleader issue was tried at the Spring Assizes of 1885 at Sarnia. The facts sufficiently appear from the judgment which was given after reserving time for consideration and was as follows :

CAMERON, C. J.—I entertain a very strong suspicion that the chattel mortgage under which the plaintiff claims the goods and chattels involved in the interpleader issue was made by the debtor, Coryell, for the express purpose of giving to the plaintiff a preference over other creditors and of delaying such other creditors. There is no doubt of the insolvency of Coryell. He was not able to pay any more, according to his opinion, than twenty-five cents on the dollar of his indebtedness ; and the right of the execution creditors depends merely upon the insolvency of Coryell and his intention to prefer the plaintiff and delay his other creditors.

I should feel bound to decide against the plaintiff, but I think I am precluded by authority from holding this to be sufficient.

Knowledge of the debtor's insolvency or participation in the intent of Coryell to prefer him to the other creditors was not brought home to him by the evidence, though I strongly suspect, as I have said, he knew all about it. The fact deposed to by the plaintiff's solicitor Mr. Moncrieff, who was also the solicitor of the Federal Bank, that the bank had required the plaintiff to get security from his customers for their indebtedness to him, renders it probable that the plaintiff was requesting security from Coryell as he has stated. He, moreover, swore positively that he had no knowledge whatever of the insolvent circumstances of Coryell ; and there was no evidence to shew he had such knowledge. On the contrary, the evidence of the bookkeeper, English, who was quite as likely to know the condition of Coryell as the plaintiff, supports the plaintiff's want of knowledge, as he himself was quiet unaware of his involved and embarrassed position.

The demand of security made in good faith and yielded to by the debtor would seem, upon authority, to be sufficient to displace the intent of the debtor to prefer the plaintiff or delay other creditors, and take the present mortgage out of the ban of nullity pronounced by section 2 of R. S. O. Chap. 118, against any disposition of personal property having either of these effects.

In *Whitney* v. *Toby*, 6 O. R. 54, Mr. Justice Ferguson very fully reviewed the authorities upon the effect of pressure ; and determined that transfers made under pressure should not be considered as made with the intent mentioned in the statute.

In *Hepburn* v. *Park*, 6 O. R. 472 Mr. Justice Osler said, the case being similar in many respects to the present, " there is no doubt that a party

trial was that of the defendant—the creditor. Although suspicion might lead me to infer that he intended a fraudulent preference of himself, yet the rule of the Court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial

attacking a transaction of this kind must show that the person who received the chattel mortgage did so with the intent prohibited by the statute. It must be done with the intent of obtaining a preference. That is just as necessary to make out as that the debtor intended to prefer."

This very clear exposition of the law is fully borne out by the language of the learned Judges of the Court of Appeal delivering judgment in *Brown* v. *Sweet*, 7 A. R. 725, which he cited in support of his opinion.

While I have not been able, having regard to the language of section 2 of the Act respecting fraudulent preferences and the mischief or supposed mischief intended to be prevented thereby, to satisfy my own mind that an intent on the part of the creditor is necessary to avoid a transfer made by a debtor with intent to prefer such creditor, I have no doubt whatever that as far as the Courts of this Province are concerned the law is at rest, and not now open to be impeached. But I may, without impropriety, briefly state why it is my mind is not satisfied that the law of the Courts is the law of the Statute. The first section of the Act is directed against a person in insolvent circumstances, voluntarily or in collusion with a creditor giving such creditor a confession of judgment, cognovit actionem, or warrant of attorney to confess judgment with intent thereby to give one or more of his creditors a preference over his other creditors or one or more of such creditors. This clause I think assumes the existence of an honest debt due to the creditor preferred, and therefore, but for the statute, the giving of the instrument referred to would in no case be a fraud or an improper, but on the contrary, a just proceeding.

If there is pressure brought to bear by the creditor upon the debtor the latter would not act voluntarily but under force of the pressure, and if the pressure was the voluntary act of the creditor uninduced by the debtor himself the confession of judgment, cognovit, or warrant, would be valid as neither given by the voluntary act of the debtor or by collusion with the creditor.

To invalidate, therefore, any of the instruments referred to in this section one of the two things must exist; spontaneous voluntary action on the part of the debtor in giving the preference with the prohibited intent, or a collusive action with the creditor who may be the mover in obtaining the confession, cognovit, or warrant, under which he secures a preference under section 2, which would seem also as far as the provision relating to a preference of one creditor over another is concerned to assume or contemplate the existence of a debt due to the creditor preferred. Nothing

evidence leading to that conclusion. I think I should press the matter unduly against this defendant if I were to decide against him on this material element of the plaintiffs' case. But for this single point failing, I should have held against the defendant for the reasons which I expressed at the close of the evidence, and while I now feel compelled to dismiss the action I will do so without costs.

A. H. F. L.

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depends upon the action of the creditor except in so far as such action shall or may bear upon the intent with which the debtor makes the transfer or disposition of his property. This will work a preference in favour of such creditor over another.

It seems, to me, therefore, if it is established that the debtor makes the transfer with the object, that is, the intent of giving to his creditor a preference, he being at the time of transfer in insolvent circumstances, or Unable to pay his debts in full, or knowing himself to be on the eve of insolvency, the transfer is made void by the statute. In other words, it was the intention of the Legislature to make void all transfers of property amounting to payment of debt or security therefor that emanated from a debtor in such circumstances, with the intent in his mind of giving a preference to a particular creditor or class of creditors,

The circumstances existing to disentitle a debtor to do what he pleased with his own, any one dealing with him in respect of his personal property had to assume the risk involved in his having the intent in so dealing with it, to act in contravention of the Statute. The Act not having the beneficial operation of a bankruptcy or insolvency law it may be that the interpretation that the Courts have put upon it may much better serve the public interests than the one I have suggested as being in accordance with the intention of the Legislature. At all events I think I am upon authority precluded from deciding upon the evidence against the plaintiff.

I find that the property seized by the sheriff of the county of Lambton under the several executions in the within issue mentioned were the goods and chattels of the plaintiff as he has affirmed, as against the plaintiffs in the several executions mentioned; and I direct judgment to be entered for him.

[CHANCERY DIVISION.]

COLEMAN v. HILL ET AL.

Deed—Mortgage—Printed form—Proviso for redemption—Construction according to true intent—Inconsistency—Family arrangement.

W. H. conveyed his farm to his son, and took back from him a mortgage on it, with a proviso for redemption on payment of $4,000, without interest, in manner following: to pay W. H. and A. H. his wife, during their joint lives $300 a year, and to continue to make the said payments to the survivor during his or her life; and one year after the death of both to pay his brothers and sisters $300 each at the times therein mentioned, which words were inserted in writing, the rest of the instrument being in print. W. H. and A. H. died, and their administratrix brought this action to recover arrears, R. H. contending that in any event he was not to pay more than $4,000, which he had fully paid.

Held, that it being impossible to give literal effect to all the parts of the mortgage, the defeazance clause upon payment of $4,000, without interest, being quite irreconcilable with the particulars regarding the payments, the Court must regard the general scope and intent of the deed, and that evidently being to arrange the terms of an annuity for the joint lives of the father and mother, and of the survivor, the deed must be so construed, and that R. H., therefore, could not succeed in his present contention, that he was not in any event to pay more than $4,000.

THIS was an action brought by Sarah Coleman, as administratrix of the estate of William Hill, deceased, and also of Alice Hill, deceased, against Richard Hill and Andrew King, to enforce payment of what was due on a mortgage executed by Richard Hill on certain lands in the township of Clarke and county of Durham, afterwards sold by him to Andrew King, and in default of payment for a sale of the lands.

In her statement of claim she set out that William Hill died on July 15th, 1865, intestate, and Alice Hill, on March 20th, 1882, also intestate: that on October 19th, 1864, William Hill, having become infirm and unable to rent his farm, consisting of the lands in question, satisfactorily, and being also desirous of settling his affairs and making a fair disposition of his worldly estate among the several members of his family, sold and conveyed the said lands, of which he was seised in fee simple, to Richard Hill, by deed of that date; in consideration whereof and

in order to carry out the agreement in relation thereto, Richard Hill executed a mortgage bearing even date therewith, and being the mortgage sued on in this action the proviso for redemption in which was as follows:

"Provided always, and these presents are upon this express condition, that if the said Richard Hill, his heirs, &c., do and shall, well and truly pay or cause to be paid unto William Hill, his executors, &c., the just and full sum of £1,000 of lawful money of Canada with interest thereon, after the rate of no per cent. per annum, in the days and times and in manner following, that is to say: to pay to William Hill and his wife Alice Hill during their joint lives $300 a year at the end of each year from the date hereof, $100 thereof to be paid in money, and $200 in board, attendance, and necessaries as required by the said William Hill, and Alice Hill, and also to allow them to remain peaceably and quietly on the said premises, and to continue and make the said payments to the survivor after the death of either, during the life of the said survivor, to the same amount, and in the same way as if both lived. And one year after the death of both William Hill and Alice Hill to pay his brothers and sisters, if alive, $300 each, as follows; one year after the death of both to pay Sarah $300, two years after the death of both to pay John $300, three years after the death of both to pay Rolland $300, four years after the death of both to pay James $300, five years after the death of both to pay Alice $300, six years after the death of both to pay Mary $300, seven years after the death of both to pay William $300, and eight years after the death of both to pay Susannah $300, after all which this mortgage and everything therein contained shall cease, and come utterly to an end." (a)

The plaintiff went on to state that Richard Hill complied with his covenant for payment in the mortgage during the

(a) This mortgage was made between Richard Hill of the first part, and William Hill of the second part. It was on a printed form and had all the ordinary provisions, including a covenant for payment in accordance with the proviso for redemption. It was not a Short Form Mortgage.

life of William Hill, but failed to do so after his death, and during the life of Alice Hill, and a large sum that should have been paid to Alice Hill was still in arrear unpaid, and the payments to Sarah and John were also in arrear and unpaid; and that Richard Hill had sold and conveyed the land to Andrew King; and she claimed an account of what was due to Alice Hill, and an order for payment thereof against Richard Hill, and that he might also be ordered to pay the past due payments to Sarah and John with interest, or that in default the lands might be sold, and for further relief.

By his statement of defence Richard Hill alleged that for some time previous to October 19th, 1864, he was residing in New York, but yielding to his father's solicitations, he sold his property and returned to Canada, and thereupon his father in order to induce him to remain in Canada and take care of his parents, agreed to sell and convey the lands in question to him for the sum of £1,000, which was the full and fair value for the same: that the said sum of £1,000 was to be paid in the manner expressed in the proviso for redemption contained in the mortgage in question, during the joint lives of William and Alice Hill and the life of the survivor, and as to any surplus of the said £1,000 after the death of both of them, the same was to be paid to their children as expressed in the said proviso: that the agreement was carried out by the deed of October 19th, 1864, and the said consideration money of £1,000, was secured by the mortgage in question: that he had during the lives of William Hill and Alice Hill paid out such sums in maintenance and in money as aggregated the sum of £1,000; and he had fully complied with the provisions of the mortgage, and prayed the same might be delivered up and cancelled: that William Hill and Alice Hill were at the time of the execution of the deed and mortgage infirm in health and did not themselves expect to live for more than a few years and it was their intention and desire to provide for their children other than Richard Hill to the extent only of any surplus of the

said sum of £1,000, remaining after they themselves had been duly supported and maintained in accordance with the provisions in the said mortgage contained, and the amounts payable to the said other children by the said mortgage were intended to be limited solely to any such surplus: that if the mortgage appeared to require the payment of any larger sum than £1,000, it did not correctly express the true intent and meaning of William Hill and himself, or the agreement between them, and he prayed that it might be reformed to carry out the said agreement, and might be declared to form a charge on the lands solely for £1,000 without interest, and that all words inconsistent with such declaration might be struck out of it.

Andrew King also delivered a statement of the defence, in which he claimed indemnity from Richard Hill in case it should be found that anything was still due on the mortgage in question.

The action came on for trial at Whitby, on April 13th, 1885, before Boyd, C.

R. Armour, for the plaintiff.

C. Moss, Q. C., for the defendant Hill, cited *Mulholland* v. *Merriam*, 19 Gr. 288.

E. D. Armour, for the defendant King.

May 22nd, 1885. BOYD, C.—The mortgage sued upon, dated October 19th, 1864, is expressed to be in consideration of £1,000, and was part of a transaction by which the land covered by it was conveyed by the father to his son the defendant. The proviso is for payment of £1,000 in manner following (what I now quote being inserted in writing, the rest of the instrument being printed):

[The learned Chancellor here read the proviso for payment.]

It is impossible to give literal effect to all the parts of the mortgage in question. The defeasance clause upon payment of $4000 without interest is quite irreconcilable

with the particulars regarding the payments which the mortgage is made to secure. There was no evidence given upon which any Court could safely act in reforming the instrument, and the only use which I make of the testimony is to infer that $4000 would be, even in 1864, a very small price for the land (if the transaction was one of sale), and that $300 a year (as it was intended to be paid) might not be an unreasonably large sum, even regarded as in the nature of rent at that date. One part or other of the instrument has to yield to the exigencies of an intelligible construction, and according to the equitable canon laid down in *Arundell* v. *Arundell*, 1 M. & K. 316, the Court regards the general intent of the deed, and will give it such construction as supports that general intent, although a particular expression in the deed may be inconsistent therewith.

Judging from the intrinsic evidence supplied by the document itself, I would say that neither party was contracting upon the footing of paying or receiving the neat sum of $4000. The parties, father and son, were primarily and chiefly arranging the terms of an annuity for the joint lives of the father and mother and of the survivor of them. Incidentally the claims of the other members of the family (brothers and sisters) were under consideration.

I infer that $4,000 was mentioned as a good round sum to be expressed in the deed as the price of the land conveyed to the son; but it was in truth no more than the nominal consideration inserted for the sake of brevity, according to a not unusual practice among conveyancers when printed forms are used to keep down the expense. It is manifest that neither of the parties could have treated this as the real consideration, having regard to that written part of the mortgage which should, as a general rule, carry more weight than the printed part with the blanks formally filled up: *McKay* v. *Howard*, 6 O. R. 137. From the details of the transaction thus supplied by the written portion of the mortgage, it is evident that the pay-

ment or non-payment of the full $4,000 depended upon the contingencies of life and death. The parents and the survivor of them were to be provided for at the rate of $300 a year, but the $4,000 would be consumed at the end of thirteen years, and I should not construe the instrument as embodying such an imprudent arrangement as that no further maintenance was to be given in case either parent lived for (say) fifteen years afterwards. Again, on the other hand, if both parents died before a year had elapsed, as actually occurred in the father's case, and as seemed by no means improbable considering the mother's state of health, then the defendant would have secured this valuable homestead for a payment at the highest of $2,400, spread over a period of many years, to his brothers and sisters, and at the lowest for nothing, in case they all died before the payments fell due.

The conclusion seems to me irresistible that the defendant was willing to take his chances in this transaction; thereby gaining a good farm at small cost if death soon lightened his financial burden, and at any rate gaining it on reasonable terms even if the lives of his parents were prolonged, and his brothers and sisters all survived till the respective times of payment to them.

Such seems to me the general scope and intent of this instrument, and as such it must prevail in the plaintiff's favor, against the contention of the defendant that he was not in any event to pay more than $4000. This he says he has paid, but it is disputed by the plaintiff, and as to this the Master will have to take the accounts upon which further directions and subsequent costs will be reserved.

The plaintiff as one of the beneficiaries whose time for receiving the $300 intended for her has arrived is entitled to be paid this sum, and to realize it out of a sale of the land if not paid in a month, with interest and costs.

It will save expense if the parties consent to the next beneficiary, John, being added as a party since he is now entitled to receive his $300, The right of action, however, for this sum rests in him, and I do not see that the plaintiff

as personal representative of the father's estate can alone claim to recover it: *Mulholland* v. *Merriam*, 19 Gr. 288. If the defendant King to save the estate makes these payments he should be allowed to deduct them from his mortgage to his co-defendant, and in any event he is to be indemnified against them by his co-defendant, who is also to pay his costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

BRASSERT V. MCEWEN ET AL.

Sale of goods—Re-transfer—Statute of Frauds—Bailees—Practice—Setting down motion.

The plaintiff in England sold certain goods to M. & Co., at Toronto. After the arrival of the goods at Toronto, the plaintiff discovered that M. & Co. were insolvent, and he notified his agent to stop the goods; but it appeared that M. & Co. had paid the freight and duty and removed the goods into their warehouse. After negotiations between plaintiff's agent and M. & Co., the latter verbally agreed to hold the goods subject to plaintiff's order, and on the following day wrote plaintiff's agent to the same effect, but no written assent was made thereto. M. & Co. subsequently made an assignment for the benefit of their creditors to defendant, who took possession of the goods, and on demand refused to deliver them up to plaintiff, whereupon trover was brought.

Held, that the goods having become the property of M. & Co., and being of greater value than $40, in order to re-transfer them to the plaintiff, it was necessary that there should be a memorandum in writing, shewing the terms of the transfer, or some other act sufficient to take the case out of the Statute of Frauds: but, *Semble*, if any consideration had been stated between the plaintiff's agent and M. & Co., for the latter assuming the position of bailees of the goods, and holding them for the plaintiff's benefit, the transaction might have been supported as not coming within the statute.

An objection that a notice of motion given for a sittings of the Divisional Court, and served in time to be set down during that sittings, could not be set down in the following sittings, was overruled.

Per CAMERON, C. J.—Stoppage in transitu does not rescind a contract on the sale of goods, but merely gives the vendor a lien on the goods for their price.

THE statement of claim, after setting out the facts, alleged that the defendants John McClung and John T. Briggs, composing the firm of McClung, Briggs & Co., on the 8th of January, 1884, in pursuance of the plaintiff's demand for the goods, and in consideration that they had not paid for the said case of goods in question, agreed to hold the said case of goods subject to the order of the plaintiff, and the said case of goods thereupon revested in and became the property of the plaintiff: that shortly afterwards the defendants McClung and Briggs wrongfully delivered possession of the case of goods to the defendant McEwen without value or consideration, and in fraud of the plaintiff's rights, and the said McEwen received the same well knowing the plaintiff's rights; and the plaintiff demanded the goods from McEwen who refused to give them

up. And the plaintiff claimed a return of the goods, or payment of the value thereof, namely, about $500.

The defendant McEwen set up in his defence, that the plaintiff had no right or property in the goods; or, if he had, by accepting a dividend payable by the defendant, as the assignee of the estate of McClung, Briggs & Co., he forfeited and waived his right; and he, defendant, denied that he wrongfully detained any goods of the plaintiff.

The defendants McClung and Briggs, in their statement of defence, among other statements not necessary to be stated, alleged that they did not agree to hold the goods subject to the order of the plaintiff; but, on the contrary, alleged that there was no binding agreement between the plaintiff and the defendants, and the property in the goods did not revert to the plaintiff; and they did not wrongfully, in fraud of the plaintiff's rights, deliver possession of the goods to the said McEwen; but the delivery of the said goods to McEwen was rightful: that they were under no legal obligation to return the goods to the plaintiff; and the term of credit had not expired. And they alleged the waiver of plaintiff's right to the goods after accepting the dividend.

The case was tried at Toronto by Galt, J., without a jury, at the Spring Assizes of 1885.

The plaintiff, a merchant carrying on business at London, England, sold goods to the defendants John McClung and John T. Briggs, doing business at Toronto under the name and firm of McClung, Briggs & Co. Just after the arrival in Toronto of the goods the plaintiff learned that the firm of McClung, Briggs & Co., was in difficulties, and cabled an agent of his residing in Montreal to stop delivery of the goods by the carriers. The cable message was dated 5th January, 1884. The plaintiff's agent, trading under firm name of H. L. Smyth & Co., on the 7th day of January, 1884, requested the Grand Trunk Railway Company, who were the carriers of the goods from the ship to Toronto where McClung, Briggs & Co. carried on their business, not to deliver the goods. On enquiry it was found Mc-

Clung, Briggs & Co., had paid freight and duty on the goods and removed them into their warehouse, but had not entered them in their stock. The plaintiff's agent, Smyth, on the same day requested Mr. Alexander Robertson, of Toronto, to look after the plaintiff's interests. He called and saw Mr. McClung, who agreed to hold the goods subject to the plaintiff's order; and subsequently on the 8th January, 1884, wrote Mr. Smyth, as follows:

"Messrs. H. L. SMYTH, & Co., Montreal."

"GENTLEMEN,—Mr. Robertson asked me, under instructions from you, to write the freight agent of Grand Trunk Railway, to hold case 155, subject to your order. However, duty was paid on said case 155, along with some samples, on 31 December 1883, and it has been received into the warehouse, but not taken into stock. We will hold it subject to your order."

"Yours truly."

"McCLUNG, BRIGGS & Co."

Per C. W.

H. L. Smyth & Co., on 10th January, 1884, wrote to Messrs. McClung, Briggs & Co., simply, as far as the goods in question were concerned, acknowledging the receipt of their letter of the 8th January.

On the 26th January, 1884, McClung, Briggs & Co., made an assignment of all their assets to the defendant Donald McEwen for the benefit of their creditors generally without priority or preference.

After the execution of this assignment there were some negotiations between McClung, Briggs & Co., and their creditors for a settlement or compromise; and on the 11th February, 1884, H. L. Smyth wrote the defendant McClung:

"I understand you have got the stock of McClung, Briggs & Co. We have your letter saying case 155, E. Brassert, would be held on our account since which time early in January, I have no information from you. I may say this firm expects payment in full for this case. You received it on the 2nd and suspended on the 5th. * * An early reply will oblige."

On the 12th February, 1884, the defendant McEwen wrote H. L. Smyth & Co.:

"DEAR SIRS,—*In re* the goods about which you write, I would say that as assignee of the estate of Messrs. McClung, Briggs & Co., I cannot see my way clear to return them without further advice. The goods were here in stock when I got hold of the estate, and as the freight and charges were paid by McClung, Briggs & Co., I would be incurring grave responsibility in returning anything that was on the premises when I took possession. The stock is advertised for sale by auction on the 26th inst. In the meantime you can show cause why the goods referred to should not be sold at the same time.

"Yours very truly.

"D. MCEWEN, *Trustee.*"

On the 14th February, 1884, McClung wrote to H. L. Smyth:

"Yours of yesterday received. We have not yet got a settlement—the matter was not carried out. From the way our customers were meeting their paper under discount at the bank, we could not recommend an endorser to do as he agreed. Your goods we intend paying for in full, as well as all samples, and any goods purchased this season. On receiving your first letter, we placed your goods aside. Of course you are aware how we came to take them out of bond. Our samples were packed with them, and, as we understand it, all you have to do is to pay the duty we paid on them. We placed the matter before the trustees, and think you will have no trouble in getting them back. You had better have some one look after it at once. We will do anything we can in the matter for you. We have never taken them into stock—only the amount paid in duty and charges; and we think by your paying this you can get them."

On the 15th February, 1884, H. L. Smyth wrote to defendant McEwen:

"Regarding the case 155," &c., "about which we wrote you yesterday, we don't see that it would make much difference to the estate if same were given up to us. We are quite agreeable to pay the duties and charges on them. The stock will not likely realize more than 45c., so that the difference would be small."

On the 18th February, 1884, Messrs. Boswell & Eddis wrote to the defendant McEwen that they were instructed by H. L. Smyth & Co. to make a claim against him (McEwen) as trustee of McClung, Briggs & Co.'s estate, for the goods; to which Messrs. Kerr & Bull, on behalf of the defendant McEwen, replied on the 22nd February, 1884:

"* * We think these goods form part of McClung, Briggs & Co.'s estate in the hands of the trustee, to be administered under the trust deed; and we are instructed by Mr. McEwen to accept service of any process which you may see fit to issue on behalf of your clients."

On the 26th February, the defendant McEwen sold McClung, Briggs & Co.'s estate *en bloc* to John K. Fi ken, including in such sale the goods in question, at 50 cents on the $ on the liabilities; and on the 27th February, 1884, the defendant McEwen wrote to H. L. Smyth & Co. informing them of the sale, and adding:

"With reference to the goods here when I took possession, in which you are interested, I could not do otherwise than take them into stock, as the freight and duties were paid out of the estate. * * Your lawyers handed me a communication *in re* the matter, to which my solicitors replied. I regret that you did not get the goods back, as they are now sold with the other assets."

Subsequently the defendant McEwen sent to the address of the plaintiff, and payable to his order, a bill of exchange of the Bank of Toronto upon the City Bank, London, England, for £50 18s. 0d. sterling, the dividend payable by estate on his claim.

The bill of exchange was not returned, nor did it appear to have been used or acted on. It was dated 21st April, 1884; and on the 29th April, 1884, the plaintiff commenced this action.

The evidence at the trial did not present the case in any different shape from what it appears on the correspondence above set out.

The learned Judge found as follows:

"I find that the defendants McClung, Briggs & Co. purchased the goods in question from the plaintiff, and accepted and received the same, paying the duty and freight thereon.

"I find that before making the assignment to the defendant McEwen, the defendants McClung, Briggs & Co. expressed a readiness to return the goods to the plaintiffs upon being repaid the sum expended for duty and freight.

"I find that no offer was made by the plaintiff to repay the said sum before the assignment to the defendant McEwen was executed.

"I find that the property in the said goods passed to McEwen, as the assignment was a cancellation of the conditional agreement.

"I give judgment in favor of the defendant McEwen, with costs; and I give judgment in favor of the plaintiff against the defendants John McClung and John F. Briggs for the sum of $244, this being the balance due, after deducting the sum of £50 18s., remitted to the plaintiff, with costs."

In Hilary sittings, *Eddis* moved on notice to set aside the judgment found in favour of the defendant McEwen, and to enter judgment for the plaintiff for $244, with costs.

In the same sittings, *George Kerr*, on behalf of the defendants McClung and Briggs moved on notice to set aside the judgment entered against them, and to enter judgment in their favour.

During Easter sittings, May 28, 1885, *Eddis* supported the plaintiff's motion and shewed cause to the motion of the defendants McClung and Briggs. [*George Kerr*, Jr., for the defendants, raised a preliminary objection that the plaintiff's motion which was given in Hilary sittings, and was served in time to be set down during that sittings, could not be set down for argument in the following sittings. The Court overruled the objection without calling on the other side. The argument then proceeded.] In the first place there was no evidence that the goods were ever accepted by McClung, Briggs & Co. The evidence and the correspondence between H. L. Smyth & Co., and the plaintiff shew that they never intended to accept the goods or take them into stock. It is, however, not necessary for the plaintiff to shew non-acceptance. Admitting that the goods had been accepted, and the property in them passed to McClung, Briggs & Co., the effect of the agreement between them and Robertson, who represented the plaintiff, that they would hold the goods subject to plaintiff's order, and the letter of 8th January, 1884, confirming the same, was to rescind the contract and revest the property in the goods in the plaintiff: *Young* v. *Matthews*, L. R. 2 C. P. 127; *McMaster* v. *Garland*, 8 A. R. 1; *Meyerstein* v. *Barber*, L. R. 2 C. P. 38, at p. 52; *Mason* v. *Redpath*, 39 U. C. R. 157. The agreement or undertaking to hold

the goods "to the order" of the plaintiff, *primâ facie* imported that the goods were the property of the plaintiff, and McClung, Briggs & Co. were thereby estopped from afterwards denying the plaintiff's property therein: *Re Coleman*, 36 U. C. R. 559, at p. 576. The defendant McEwen could be in no better position than McClung, Briggs & Co. He took the goods subject to the rights of the plaintiff: *Lumsden* v. *Scott*, 4 O. R. 323; *Mason* v. *Redpath*, 39 U. C. R. 157. It is admitted that all the defendants are in the same position, and that unless the plaintiff is entitled to judgment against McEwen the judgment against the other defendants cannot be supported.

George Kerr, Jr., contra. The property in the goods passed to the defendants McClung and Briggs, who constituted the firm McClung, Briggs & Co., and there was no completed agreement in writing within the statute of frauds whereby the goods could be said to revest in the plaintiff. Even assuming that the case would not be within the statute, there is no agreement proved that was accepted by the plaintiff or his agents. The evidence shewed that Mr. Smyth expected to be paid in full in the event of a settlement; and his subsequent acts show that the intention of the parties was not to revest the goods. The letters written by McClung, Briggs & Co. subsequent to the assignment are no evidence against the assignee. The acceptance by the plaintiff of the dividend, and not returning the same, operated as an estoppel by election, and he could not keep the dividend and still claim the goods: *Beemer* v. *Oliver*, 3 O. R. 523; *Re Hercules Ins. Co., Brunton's Claim*, L. R. 19 Eq. 302. As to the judgment against McClung, Briggs & Co. They are not liable upon the debt for the price of the goods, as the period of credit had not expired when the action was commenced: and further the assignment to the defendant McEwen was made in good faith, and not with any fraudulent intent, and the property and possession of the goods having passed out of them trover would not lie against them.

Eddis, in reply. It is not necessary that an agreement to rescind a contract should be in writing: *Benjamin* on Sales, 3rd ed., p. 177. A verbal agreement was made with Robertson, and accepted by him, and this is sufficient. The letter from Smyth to McClung, Briggs, & Co., of the 10th January, might be construed as an acceptance, if a written agreement were necessary. There was no estoppel by keeping the dividend. It was not received till after action was commenced. McEwen was not prejudiced in any way, and his position was not changed, the property having been sold, and the proceeds distributed before the dividend was sent: *Biglow* on Estoppel, 3rd ed., 484. There is no doubt that all the defendants are equally liable as joint tort feasors if the plaintiff is entitled to succeed at all. The assignment from McClung, Briggs & Co. to McEwen was a conversion for which McClung, Briggs & Co. were responsible.

June 27, 1885. CAMERON, C. J.—The decision of this case, though depending on a single point, is not by any means easy of solution. The equity of the case is with the plaintiff. The course pursued by the defendants, while it has not benefited the estate of McClung, Briggs & Co. may have considerably prejudiced the plaintiff, as he might, if the defendant McEwen had not interfered, have got the invoice value of his goods; whereas, as it is, if he is not entitled to succeed in this action, the estate is not benefited, as the plaintiff's own goods have been virtually sold to pay him fifty cents in the dollar, and as that is all the goods realized, the estate has gained nothing.

It does not appear that the plaintiff's goods had anything to do with inducing the purchaser to offer and pay for the general stock fifty cents on the dollar, and thus the other creditors of the estate have not profited by the assignee keeping the plaintiff's goods, while if the defendants succeed he has his own goods applied to pay him 50 cents in the dollar, instead of being allowed to take them back in satisfaction of his claim against the estate.

The difficulty in determining in law the rights of the parties is caused by the absence of authority covering just such a case.

It is clear there was no right of stoppage in transitu, as that right was lost by the debtors McClung, Briggs & Co., having received the goods from the carriers and paid duties and freight on them before Mr. Robertson, acting for H. L. Smyth & Co., intervened on behalf of the plaintiff.

It is contended that the defendant McEwen, as representing the creditors, does not stand in any better position than the debtors McClung, Briggs & Co., as he is not a judgment creditor nor a purchaser of the goods; and therefore a bill of sale duly filed was not essential to make title in the plaintiff as against him any more than it would be as against the debtors. Had the plaintiff purchased the goods from the debtors and paid the price, or any part of it, or given anything, as the Statute of Frauds expresses it, as earnest to bind the bargain, the property passed, and the action would have been maintainable. There is a total absence of any express arrangement as to what the plaintiff was to do in exchange for the goods.

It was not agreed in terms that he should release the debtors from their liability to him in respect of those goods. If it had been, I should have said that was equivalent to the payment of the price; and the property in the goods would have passed, and all the defendants would be liable for their conversion.

The plaintiff's agent's instructions, as far as they are made to appear in evidence, were merely to stop the goods in transitu; and the effect of a stoppage in transitu would not be to cancel or put an end to the original bargain between the plaintiff and his debtors McClung, Briggs & Co., but only to give the plaintiff a lien on the goods for their price; and if they had risen in value the debtors might have tendered the plaintiff the invoice price, and have, if he refused to restore them, recovered the increased value in an action. It cannot then be said that the agents

Smyth or Robertson had any power to bind the plaintiff to any thing that he would not have been bound to do if the goods had only been stopped in transitu, even if they had expressly endeavoured to do more; but they did not by anything, that was said at all events, do more than ask the debtors to hold the goods subject to the plaintiff's order, which fell short of a repurchase at the original or any other price; and they did not attempt or offer in terms to release the plaintiff's claim.

Under these circumstances the goods having become the property of the debtors McClung, Briggs & Co., and being of a greater value than $40, to retransfer the property in them to the plaintiff it was necessary that there should have been some memorandum in writing shewing the terms of the transfer, or some other act sufficient to take the transaction out of the operation of the Statute of Frauds in order to revest the goods in the plaintiff.

In arriving at this conclusion I cannot say that my mind has been free from doubt as to whether the transaction is within the 17th section of the statute or not. As a resale it would clearly be so. But though clearly the goods were in the possession of McClung, Briggs & Co., it does not seem so plain that parties, situated as the plaintiff and Messrs, McClung, Briggs & Co., were, the latter could not be allowed to say, under the circumstances, "we do not wish to keep your goods; we cannot pay for them and wish you to take them back;" and the plaintiff assenting thereto, why from the time of such assent the former should not be deemed and treated as bailees of the goods, holding them for the plaintiff's benefit, without violating the said provisions of the Statute of Frauds.

Had any consideration been stated between the plaintiff's agent and McClung, Briggs & Co., for the latter assuming the position of bailees, I should have been disposed to adopt the view that the transaction was not within the Statute, and was valid.

In the absence of such evidence, I think I cannot say the judgment in favor of the defendant McEwen, entered at the trial, was wrong. It must, therefore, stand.

The statement of this conclusion, as the credit on the sale of the goods had not expired when the action was brought, makes it evident that the judgment against McClung and Briggs must be set aside, and judgment of dismissal of the action be entered in their favour also.

The authority for the position stated, that a stoppage in transitu does not rescind the contract, will be found in *Martindale* v. *Smith*, 1 Q. B. 389, where the effect of a stoppage in transitu was stated as follows, at p. 396: "The vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain."

ROSE, J.—I agree. I find no contract or agreement shown. If I were at liberty to make out a contract such as, in my opinion, the parties would have assented to if Robertson had made the proposal to McClung, it would be: that the plaintiff should be at liberty to take away the goods on payment of the amount paid by McClung for freight and duties, and receipting the account; and upon such terms the goods were held subject to his order.

This is the fair effect of the evidence of Robertson and McClung, as it seems to me.

There is, however, no evidence of any such agreement; but evidence is given of an undertaking to hold subject to the plaintiff's order, and before any order was given McClung assigned to the defendant McEwen.

Even if an oral agreement had been shewn, such as I have above suggested, it would seem clear, according to *Tempest* v. *Fitzgerald*, 3 B. & Al. 680, and similar cases cited in the last edition of *Addison* on Contracts, Book 2, ch. 7, p. 925, that there was no acceptance by the plaintiff, and that McClung held the goods subject to his lien for freight and duties, and the right to be discharged from all liability for the purchase money.

In *Tempest* v. *Fitzgerald*, there was an oral agreement in August to purchase a horse, then on the plaintiff's premises, and to fetch it away about the 27th of September.

The parties understood it was to be a ready money bargain. The defendant at the time was visiting at the plaintiff's house, and soon after left and returned on the 20th of September. He then ordered the horse to be taken out of the stable, he and his servant mounted, galloped and leaped the horse, and after they had so done his servant cleaned him, and the defendant himself gave directions that a roller should be taken off and a fresh one put, and that a strap should be put upon his neck, which was consequently done. He then asked the plaintiff's son if he would keep it for another week. He said that he would do it to oblige him. The defendant then said he would call and pay for the horse when he returned from the Doncaster Races, about the 26th or 27th September. He returned on the 27th with the intention of taking it away, but the horse having died on the 26th of September he refused to pay the price.

The learned Judge at the trial, Park, J., left it to the jury to say if the defendant had exercised acts of ownership; and, if so, to find for plaintiff, which they did.

On motion, the Court, Abbott, C.J., Bayley, Holroyd, and Best, JJ., held there had been no acceptance.

Abbott, C. J., said, that the defendant had no right of property in the horse until the price was paid; and that until then he could not exercise any right of ownership, and if he had at that time ridden away with the horse, the plaintiff might have maintained trover.

It seems to me that case was far stronger for the plaintiff than the present one; and that, in accordance with that decision, we must hold that the plaintiff here had no right of property in the goods by reason of what occurred; and accordingly could not maintain trover against these defendants.

GALT, J., concurred.

Judgment accordingly.

[CHANCERY DIVISION.]

McARTHUR V. THE QUEEN.

Application for timber license—Notice of acceptance—Assignment for value—Petition for issue of same—Demurrer—Laches—Rule as between subjects and as between Crown and subject.

McA. filed an application with the proper Government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the Commissioner of Crown Lands; but owing to a defective survey it was impossible then to convey the berths. Subsequently the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he having removed to the United States never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for $4,000. B. afterwards became entitled by subsequent assignments for value to all McA.'s interest, the assignments being duly filed in the Crown Lands Department. McA. and B., in 1884 joined, in a petition of right for the issue of the license, and the Attorney General demurred to the same,

Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would probably be, under ordinary circumstances, a defence to a claim for specific performance; but under the facts in this case a vendor would not be allowed to set up such a defence.

Held, also, that as the assignments were duly filed, and the Crown had the power of forfeiting the claim for non-payment, and did not do so, even were the rule between subjects to apply, it would not be a bar in this case.

Semble. It may be doubted whether the same rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited.

THIS was a petition of right filed by Peter Alexander McArthur and Alexander Barnett as suppliants, against Her Majesty The Queen as respondent.

The petition set out that in the year 1854 the Crown was seized in fee of certain lands as timber limits; that in the same year licenses were granted to cut timber thereon, subject to certain regulations of the year 1851, the chief of which were as follows: that applications were to be made to A. J. Russell, surveyor of Crown timber licenses: that applications were to be in writing describing the land for which a license was required: that a ground rent should be exacted in addition to the established duties:

that the ground rent should be doubled when the limit or berth had not been worked upon: that no limit should be forfeited for non-occupation if the increased ground rent was duly paid: that vacant berths were to be granted to the first applicants, ground rent received was to be returned to the applicant if the berth asked for could not be made good to him: that licentiates who had complied with all the regulations would be entitled to renewals: that when an application could not be decided upon until the result of some pending survey might be made the applicant was to be allowed a certain time (different in different districts) to take out a license after the notification of the result if in his favor had been sent to his address: that transfers of berths were to be in writing, and if not found objectionable by the Crown Land Department, or agent for granting of licenses, to be valid from the date on which they were deposited in the hands of the latter.

The petition also set other regulations prescribed in the years 1866 and 1869 respectively, but which are not material for the purposes of this report.

The petition also alleged that at the time of the application thereinafter mentioned, and up to the present time it was the custom of the Crown to grant renewals of licenses issued to applicants, and such custom was recognized, and as such licenses had been valuable assets for years past the hoour of the Crown was pledged to grant renewals of the licenses upon payment of the dues provided for by such licenses.

In the year 1854 Peter Alexander McArthur, at that time of the village of Bytown, in the province of Canada, duly made and filed an application with A. J. Russell, the proper official, for a license to cut, remove, and dispose of timber upon two timber berths containing about 100 square miles (fully described.)

At the time of making said application he paid £12 10s. being the ground rent, and fulfilled all other requirements and regulations.

The said application was duly forwarded to the Commissioner of Crown Lands, but it was then impossible to convey said berths because of the defective survey.

Subsequently that difficulty was removed, and in or about the year 1861 the then Superintendant of Woods and Forests, by the authority of the Crown Lands Department, accepted the application of the said McArthur for one berth containing fifty square miles (consideration of the application for the other berth being still deferred) and the Commissioner of Crown Lands notified the said A. J. Russell of the acceptance of such application, and instructed him to inform the applicant McArthur of the decision, and that a license would be granted to him for one berth on his completing payment of single ground rent from the date of his application within three months of the time of notification.

Shortly before the date of such acceptance the said McArthur had removed to and was residing in the United States of America, and the fact of such acceptance was never communicated to him and no license was issued.

In or about the year 1881 the said McArthur, for the first time, heard of the acceptance of his application as to one berth, and by instrument in writing, dated July 2, 1881, he sold, assigned, and transferred in consideration of $4,000 to Edward Selkirk Skead all his interest in the same.

In and by a certain other instrument in writing, dated August 5, 1885, the said Skead sold, assigned, and transferred in consideration of $8,000 to Robert Campbell all his interest in the same.

In and by a certain other instrument in writing, dated February 10, 1885, the said Campbell assigned all his interest in the same to the suppliant Barnett.

The assignments were duly filed in the Crown Lands Department, and the petition claimed the issue of a license to Barnett, and to be paid the value of timber and saw logs wrongfully cut and removed from said berth.

To this petition the Attorney-General demurred and the demurrer was argued on June 25th, 1885, before Proudfoot, J.

Irving, Q.C., for the demurrer. The Crown takes the position that as between vendor and vendee delay would be a defence, and here the delay has been so great that it amounts to an abandonment. In 1861 the application was accepted and nothing was done for twenty years: *VanWagner* v. *Terryberry*, 5 Gr. 324. The deposit made does not affect laches: *Lehmann* v. *McArthur*, L. R. 3 Ch. 496. The whole contract must be rescinded: *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221.

Lash, Q. C., and *Cassels*, Q. C., contra. The delay here cannot be relied on by the Crown, as it really arose through the neglect of the officers of the Crown in not notifying the applicant for the limits that his application had been accepted. The applicant's money has been retained, and the limits themselves have been held all these years ready to be handed over in accordance with the decision of the Department which should have been communicated to the applicant, the contract has thus been kept open. The applicant and the suppliants have shewn by their acts after the decision of the department was made known to them that there was no abandonment on their part, and it is too late for the Crown now to attempt to withdraw. The facts stated in the petition of right are of course admitted by the demurrer, and we contend that the Court cannot hold, as a matter of law, that the contract has been abandoned on the state of facts set forth in the petition.

September 3, 1885. PROUDFOOT, J.—Upon the statements in this petition I think the demurrer must be overruled. It is admitted, by demurring, that McArthur never received any notification of the acceptance of his application for one berth, and that he only became aware of the fact in 1881. It cannot be said that there was any laches in not enforcing a right which he did not know to exist, and for the same reason he could not be held to have abandoned it. The delay to be accounted for then is from 1881. That there was no intention by McArthur or his

assigns to abandon the right during that time is clear from their dealing with it as an asset and a valuable one, paying large sums for it.

As between subjects a delay of four years would probably be held in ordinary circumstances a defence to a claim for specific performance, but if the vendor were aware of the purchaser treating the right as existing, making sale of it, and it passing to successive purchasers for large sums of money, and making no objections, and giving no warning that he would not perform the agreement, I apprehend he would not be allowed to set up such a defence.

It is alleged that the assignments were made and filed in the Crown Lands Office as required by the regulations. The Crown must be taken to be acquainted with them. But the Commissioner makes no objection. He had the power of forfeiting the claim for non-payment; it does not appear that he did so, so that if the rule between subjects were to apply it would not be a bar here.

It may be doubted, however, whether the same rule should apply to the Crown, and whether the subject should not have the right to ask for the completion of the purchase at any time before it has been forfeited.

By overruling the demurrer I do not determine that the plaintiff is entitled to succeed. It may turn out that the statements of the petition are not facts, and other facts may be brought forward depriving the petitioner of his equity, and the ground of demurrer may be again argued at the hearing.

The Crown has leave to answer.

G. A. B.

NOTE.—This action was subsequently tried on October 17th, 1885, before PROUDFOOT, J., when a judgment was given in favour of the plaintiff.

[CHANCERY DIVISION.]

REGINA v. THE ST. CATHARINES MILLING AND LUMBER COMPANY.

Indian lands—Indian reserves—Title to Indian lands—Public lands—Constitutional law—B. N. A. Act, sec. 91, item 24, secs. 6, 92, item 5, secs. 109, 117.

The plaintiff sought to restrain the defendants cutting timber on certain lands within the territorial limits of Ontario. The defendants justified under a license from the Dominion Government, alleging that the district in question was until recently claimed by tribes of Indians: that such Indian claims were paramount to the claim of the Province of Ontario; and that the Dominion had by purchase acquired the said Indian title, and that by reason thereof as well as by inherent right the Dominion and not the Province was alone entitled to deal with the said timber limits.

Held, that the Indian title to the lands in question was extinguished by the Dominion treaty in 1873, known as the North-West Angle Treaty No. 3, and the extinction of title procured by and for the Dominion enured to the benefit of the Province as constitutional proprietor by title paramount, and it is not possible for the Dominion to preserve that title or transfer it in such wise as to oust the vested right of the Province to the land, as part of the public domain of Ontario.

The territorial jurisdiction of the Dominion extends only to lands *reserved* for Indians.

Before the appropriation of "reserves," the Indians have no proprietary right to the soil, but have merely a right of occupancy in their tribal character, and have no claim except upon the bounty and benevolence of the Crown. After the appropriation they become invested with a legally recognized tenure of defined lands in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians, which form the subject of legislation in the British North America Act, *i. e.*, lands upon which or by means of the proceeds of which after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. Lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the Public Lands, and are held as before Confederation by that Province under various sections of the British North America Act.

History of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to Provincial legislative control briefly sketched.

The Canadian policy upon Indian questions both before and after Confederation, discussed.

THIS was an action brought by Her Majesty the Queen, on the information of the Attorney General for the Province of Ontario against the St. Catharines Milling and Lumber Company, claiming amongst other things, an injunction restraining the cutting of timber by the defendants upon

certain lands lying south of Wabigoon Lake, in the district of Algoma.

In the statement of claim it was set out that during the season of the year 1883, the defendants without permission from the Crown or the Province of Ontario, entered upon certain lands situate in and the property of the Province of Ontario, lying south of Wabigoon Lake, in the district of Algoma, and cut pine timber from the said lands amounting to about 2,000,000 feet: that the Canadian Pacific Railway ran immediately north of the said Wabigoon Lake and adjacent thereto, and the defendants had removed about 500,000 feet of the said logs to the north side of the lake, alongside the railway, and intended to remove the same, with the object of having it cut into timber: that of the balance of 2,000,000 feet of pine, some lay on the north side and west side of Wabigoon Lake, the remainder being in the streams and small lakes south of and running into the said lake: that the lands upon which the timber was cut were lands of the Province of Ontario, and the defendants had no right, or title, or authority whatever entitling them to enter upon the said lands and cut the timber as aforesaid: and the plaintiff claimed a declaration that the defendants had no rights in respect of the timber cut on the said premises, and that the same might be delivered up to the plaintiff: that the defendants might be restrained by the order and injunction of the Court from further trespassing on the said lands, and from cutting timber thereon: that the defendants might be restrained from removing the timber already cut, and might be ordered to pay the damage sustained by the said wrongful acts, and the costs of the action.

By their statement of defence, the defendants alleged that they were a company incorporated under the provisions of the Canada Joint Stock Company Act, 1877, for the purpose of prosecuting a general lumber and milling business within the Dominion of Canada, and in the prosecution of such business, the defendants, during April, 1883, applied to the Government of the Dominion of Canada,

and upon payment of $4,125.52 obtained permission from the Government of Canada to enter upon a certain tract of timber lands situate on the south side of Wabigoon lake, in that portion of the Canadian territory, situated between Lake Superior and Eagle lake, which was the timber land referred to in the statement of claim: that pursuant to the leave and license then obtained during the lumbering season of 1883 and 1884, the defendants did cut about 2,000,000 feet of timber on the said tract of timber lands, intending to remove the same: that the said lands and the timber growing thereon were not the property of the Province of Ontario, but of the Dominion of Canada, and of the Crown as represented by the Dominion of Canada: that the Government of Canada acted within its power, and in pursuance of its rights in granting to them the permission and license to cut and remove the timber, and they, the defendants, had acted within their strict legal rights: that the tract of land in question, together with the growing timber thereon, was with other land in the said district or territory until recently claimed by the tribes of Indians who inhabited that part of the Dominion of Canada, and that the claims of such tribes of Indians had always been recognized, acknowledged, admitted, and acquiesced in by the various Governments of Canada and Ontario, and by the Crown, and that such Indian claims were as to the lands in question herein paramount to the claim of the Province of Ontario or of the Crown, as represented by the Government of Ontario, and that the Government of the Dominion of Canada in consideration of a large expenditure of money made for the benefit of the said Indian tribes, and of payment made to them from time to time, and for divers other considerations, had acquired the said Indian title to large tracts of lands in the said territory, including the lands in question in this action, and the timber thereon, and by reason of the acquisition of the said Indian title, as well as by reason of the inherent right of the Crown, as represented by the Government of Canada, the Dominion of Canada, and not

the Province of Ontario, had the right to deal with the said timber lands, and at the time of the granting of the said leave and license had, and still have full power and authority to confer upon the defendants the rights, powers, and privileges claimed by them as aforesaid: that long prior to the purchase by the defendants of the right to enter on the said lands and cut the timber, and at the time of such purchase, the Government of Canada had been and were exercising control over the said timber lands, and they, the defendants, made the aforesaid payments and incurred the cost of cutting the said timber in good faith, and the belief that they were acquiring a good and valid title thereto: and the defendants submitted that if the Court granted to the plaintiff the relief claimed, payment should be made to the defendants of the moneys so expended by them.

The plaintiff joined issue on the statement of defence.

The action was tried on May 18th, 1885, at Toronto, before Boyd, C.

The Attorney-General for Ontario for the plaintiff. We say that there is no Indian title at law or in equity. The claim of the Indians is simply moral and no more. They have no legal or equitable estate in the lands: *Bown* v. *West*, 1 O. S. 287; *Church* v. *Fenton*, 28 C. P. 384, 1 Cart. 831. See also *Kent's* Com., 12th ed., vol. 1, p. 257, as to Indian lands and titles, and *Johnston* v. *McIntosh*, 8 Wheat. 543. Indians have only a right of occupancy, subject to a right to extinguish the same by conquest or purchase. See *Washburn* on Real Property, vol. 3, p. 186. A deed from Indians simply extinguished, but did not transfer their claims. The United States, as a country, have a "right of pre-emption" as to these claims of Indians. That is not so with us. For the nature of Indian title see Appendix E. E. E. of Journals of the Legislative Council of Canada, Vol. 4, (1844-5). The question is

to whom do lands pass under the British North America Act in regard to which there was no treaty with Indians till after Confederation? If surrender took place before Confederation they would pass to the Province, and the same is the effect of surrender after Confederation: B. N. A. Act, secs. 108, 109, 117; *Attorney-General of Ontario* v. *Mercer*, L. R. 8 App. Cas. 767. If there is a trust or an interest in Indians, then by sec. 109 the lands goes subject to the trust or interest. The only provision of a contrary tendency is sec. 91, item 24: "Indians and lands reserved for Indians." But that does not help the defendants, because that relates to the jurisdiction of the Dominion Parliament in making laws; it does not touch ownership. The Dominion has passed no laws on this subject; there is only the executive act, not legislation. Compare the case of British Columbia and its admission into the Union: B. N. A. Act, sec. 146; Order in Council, Stats. of 1872, (D), p. lxxxiv *seq.* All executive action has not been withheld in the other Provinces, until Indian titles have been dealt with. This should be judicially recognized by the Court. Surrenders are not usual in Lower Canada: See App. T. of Journals of the Legislative Assembly of Canada, vol. 6, (1847.) In this Province, Indians are consulted only out of endeavour to satisfy the Indians. This, however, is mere matter of practice. The British Columbia Sessional Papers for 1876 collect Indian papers for British Columbia for a number of years. See at p. 11, by which it appears a fee in Indians was never acknowledged; their title is of a possessory nature, satisfied by allocating reserves. See also Revised Statutes of New Brunswick, 1854, ch. 85; New Brunswick Journals, 1837-1838; *Ib.* 1857-1858, at p. 483; *Ib.* 1868; Quebec Sessional Papers, vol. 1, No. 1, p. 69; Journals of the Legislative Assembly of Canada, vol. 16, appendix No. 21. See also the opinion given over two hundred years ago by English counsel: Documents relating to the Colonial History of the State of New York, vol. 13, p. 486 (*a*). There is a great distinction

(*a*) This opinion is set out *verbatim* in a footnote to the judgment *infra*.

between the interest of Indians in unsurrendered lands, and in reserves for Indians. In the latter they have an equitable interest, but have no power of alienation. For statutes, etc., mentioning "reserves," see C. S. C. ch. 9, secs. 10, 18; C. S. L. C. ch. 14, sec. 3; 27-28 Vic. ch. 68; 10 Geo. IV. ch. 3; Revised Statutes of Nova Scotia, 1851, ch. 28; Statutes of British Columbia, 38 Vic. No. 5, sec. 60; Journals of the House of Assembly of Upper Canada, 1828, p. 107; *Ib.* 1829, p. 47; *Ib.* 1836, p. 156. The Proclamation of 1763 was merely a provisional arrangement. It is expressly repealed by the Quebec Act of 1774, 14 Geo. III. ch. 83. This claim of the defendants is a new one recently set up; the claims of Ontario were recognized during the boundary disputes. See report of the Minister of Justice of June 3rd, 1874. See also Hans., vol. 2, p. 1456.

W. Cassels, Q. C., on the same side. United States Statutes Vol. 7 gives the Indian treaties. Many United States cases refer to reserved lands, and are not in point. Reference may be made to the treaty of August 9th, 1836: Appendix to the Journal of the House of Assembly of Upper Canada, Session 1837-1838, p. 180; 2 Vic. ch. 15; 31 Vic. ch. 42 (D.); 32-33 Vic. ch. 6 (D.); *Kent's* Comm. 12th ed. vol. 1, p. 259; *Fletcher* v. *Peck*, 6 Cranch S. C. U. S. 87, at p. 142; *Meigs* v. *McClung's Lessee*, 9 ib. 11; *Clark* v. *Smith*, 13 Pet (S. C. U. S.) 195; Sessional Papers of Dominion of Canada, vol. 9, session 1880-1, paper No. 86.

D. McCarthy, Q. C., for the defendants. The proclamation of the King after the session of Quebec dealt with the question of Indian title: Appendix T. of Sessional Papers, 1847. The proclamation did deal with the territory in question, because it is territory draining into the Atlantic ocean. The height of land forms the watershed between the two oceans. This has not been repealed so far as Indians are concerned. It is recited in the statute of 1774, and is varied only as to the Roman Catholic population. Nations and tribes of Indians under the protection of the British Crown have well defined and recognised rights. See 10 Geo. IV. ch. 3; 5 Will. IV. ch. 27; 7 Will. IV.

ch. 118. The distinction between Indian and public lands is this: Indian lands are those held by Indians, and not yet ceded or surrendered to the Crown: See the Map in Sessional Papers, 1847. When surrendered they become public lands. See 2 Vic. ch. 14; 12 Vic. ch. 9, and ch. 31; 13-14 Vic. ch. 42, ch. 74; 14-15 Vic. ch. 106; 16 Vic. ch. 159; 20 Vic. ch. 26; C. S. C. ch. 9, sec. 10; C. S. U. C. ch. 81, secs. 25, 33, 34; *Worcester* v. *State of Georgia*, 6 Pet. (S. C. U. S.) 515; *The Cherokee Nation* v. *The State of Georgia*, 5 ib. 1; *Minter* v. *Shirley*, 45 Miss. 376. I refer, also, to Professor Ellis's work on The Red Man and the White Man, p. 478 (*b*). England has always recognized the rights of Indians to possession and occupancy to the exclusion of every one, that is all rights except that of alienation. See *The United States* v. *Clarke*, 5 Pet. 168; *Fegan* v. *McLean*, 29 U. C. R. 202; *VanVleck* v. *Stewart*, 19 U. C. R. 489. At Confederation, the lands known as Indian lands formed no part of the assets of the Province. Indians held them, and might continue to hold for generations. When they parted with any portion of them from time to time, it was on the assumption that sufficient consideration would be paid to them for it. Sec. 91 of B. N. A. Act did not deal with Indian lands any more than with lands of private owners. The Provinces deal with the sale of public lands, but the right to deal with Indians and to accept their surrender is in the Dominion: *Church* v. *Fenton*, 5 S. C. R. 239. The Parliament of Canada alone has power to deal with the Indians, because they are wards of the Crown of England, represented by the Governor-General. This throws light on sec. 91 of B. N. A. Act. The Province should have the right to legislate about Indian reserves if they are provincial property, but this is not so by the very terms of the B. N. A. Act. Indian lands, when surrendered, cannot pass to the Province. The power to deal with Indians

(*b*) The Red Man and the White Man in North America, from its Discovery to the Present Time. By George E. Ellis. Little, Brown & Co., Boston.

rests with the Dominion authorities, and not the Provincial. The Dominion alone has a right to accept the surrender of Indian lands. The Dominion pays for it, and why should it not have it? In *Church* v. *Fenton*, the patent was in surrendered Indian lands, and was from the Dominion. See the Dominion Acts 31 Vic. ch. 42, secs. 5, 6; 36 Vic. ch. 4, secs. 1, 3; 39 Vic. ch. 18, secs. 2, 11: and the Hon. Alex. Morris's work on Indian Treaties, p. 299 (*c*).

Creelman, on the same side, referred to United States Statutes at large, vol. 7, p. 1 *seq.*, where the Indian treaties are to be found: *Story* on the Constitution, 4th ed., vol. 1, ch. 1, secs. 6, 7, 37, 38; *Gaines* v. *Nicholson*, 9 How. S. C. 356; *Fitch* v. *McCrimmon*, 30 C. P. 183; *Foran* v. *McIntyre*, 45 U. C. R. 288; *Wheeler* v. *Me-shing-go-me-sia*, 30 Ind. 402.

The Attorney-General, in reply. The territory now claimed as Indian reserves is practically equivalent to half the whole country. There is no inconsistency in letting the Dominion deal with Indians, and yet give the lands when surrendered to the particular Province. The question is as to "Indian Reserves," that is the term used and to be construed.

June 10th, 1885. BOYD, C.—The Province of Ontario seeks the intervention of the Court in order that the St. Catharines Milling and Lumber Company may be restrained from trespassing and cutting timber on lands claimed by the Province. The defendants justify under license obtained from the Government of Canada in April, 1883, by virtue of which they assert the right to cut over timber limits on the south side of Wabigoon (or Wabegon) Lake, in that portion of Canada situated between Lake Superior and Eagle Lake. The defendants further plead specially that the place in question forms part of a

(c) The Treaties of Canada with the Indians of Manitoba and the North-West Territories. By the Hon. ALEXANDER MORRIS, P. C., late Lieutenant-Governor of Manitoba, the North-West Territories, and Kee-wa-tin. Willing & Williamson, Toronto, 1880.

district till recently claimed by tribes of Indians, who inhabited that part of the Dominion, and that such claims have always been recognized by the various Governments of Canada and Ontario, and by the Crown; that such Indian claims were paramount to the claim of the Province of Ontario, and that the Dominion have by purchase acquired the said Indian title, and by reason thereof, as well as by inherent right, the Dominion and not the Province is alone entitled to deal with the said timber limits.

It is admitted that these timber lands are within the territorial limits of Ontario, as determined by the recent decision of the Privy Council. That decision finally ascertained the boundaries assigned to the old Province of Quebec by the Imperial Statute, 14 Geo. III., ch. 83, commonly called "The Quebec Act." By that Act, passed in 1774, it was intended to provide for the permanent government of the newly acquired domain, and to supersede the provisional system introduced by the Royal Proclamation of 1763. By the fourth article of the Treaty of Paris (February 10th, 1763) France ceded Canada with all its dependencies to the Crown of Great Britain. In October of the same year the King's Proclamation erected within part of the ceded territories, the new government of Quebec, the western extension of which was placed at the end of Lake Nipissing. It was speedily found that this boundary excluded a large extent of settled country which was left without civil government, as appears by the preamble to the Quebec Act, and this was cured by fixing the interior boundaries on the lines now established as the western limit of Ontario.

The legal and constitutional effect of the conquest of Quebec and the cession of Canada was to vest the soil and ownership of the public land in the Crown, and to subject the same to the Royal prerogative. The French and Indian populations that remained in the country became, by the terms of capitulation, the subjects of the King. So far as the latter were concerned, it was stipulated in the articles of capitulation concluded at Montreal (on Sept. 8th,

1760) between Major-General Amherst and the Marquis de Vaudreuil as follows: "Article xl: The Savages or Indian allies of His Most Christian Majesty shall be maintained in the lands they inhabit if they choose to remain there: they shall not be molested on any pretence whatsoever for having carried arms and served His Most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries. *Granted.*"

In 1791 the old Province of Quebec was divided into Upper Canada and Lower Canada by Imperial Statute 31 George III. ch. 31, which, while enlarging the rights of self government, made provision in section 43 for the reservation of all acts, "which shall, in any manner relate to, or affect the King's prerogative touching the granting the waste lands of the Crown within the said Provinces" in order that they might be submitted to the British Parliament before receiving the King's assent. The custody, control, and ownership of all public lands in Upper Canada was transferred to the Provincial Government in 1837 by the Act 7 Will. IV. ch. 118, to which, after being duly reserved, the royal assent was given. In 1840 the Imperial Parliament re-united the Provinces of Upper and Lower Canada as one Province by the name of Canada (see 3-4 Vic. ch. 35) a union which subsisted till superseded by the larger union accomplished by the British North America Act. There being a like reservation as to waste land in section 42 of the Union Act, it was by statute 4-5 Vic. ch. 100 of Canada declared that it was expedient to provide a law applicable to all parts of the Province for the disposal of public lands therein. Such a law was embodied in this enactment which received Her Majesty's assent on May 30th, 1842. The comprehensiveness of this Act is manifested by 12 Vic. ch. 31, which applies it to all lands of which the legal estate is in the Crown whether held by Her Majesty for the public uses of the Province, or in the nature of a trust for some charitable or other purpose (secs. 1 and 2.) Section 4 shews that it covers lands "purchased from the Indians," *e. g.*, the "Huron

tract." By another Act of the same year, (12 Vic. ch. 30,) provision is made for granting licenses to cut timber on the ungranted lands of the Province, elsewhere therein referred to as growing on the "public lands of the Province," and by section 7 these are enumerated as "Crown, clergy, school, or other public lands of the Province." This is consolidated in the Consolidated Statutes of Canada, ch. 23.

Such is a brief sketch of the history of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to provincial legislative control.

The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated "justly and graciously," as Lord Bacon advised, but no legal ownership of the land was ever attributed to them. The Attorney-General in his argument called my attention to a joint opinion given by a "multitude of counsellors," about 1675, touching land in New York, while yet a province under English rule. (*d*)

(*d*) The opinion referred to was as follows :

Councells opinions concerning Coll. Nicholls pattent and Indian purchases.

The land called N. York & other parts in America now called N. East Jersey, was first discovered by Sebastian Cobbitt a subject of England in King Henery ye 7th time about 180 years since & afterwards further by Sr Walter Raleigh in ye Reign of Queen Eliz. and after him by Henery Hudson in ye Reign of King James and also by the Lord Delaware and begun to be planted in ye year 1614 by Dutch & English ; the Dutch placed a Governour there but upon complaint made by the King of England to ye States of Holland the sd States Disown'd ye Bisness & Declared it was only a private Undertaking of ye West India Company of Amsterdam So ye King of England Granted a Comison to

I think it accurately states the constitutional law in these words :

"Though it hath been and still is the usual practice of all proprietors to give their Indians some recompense for their land, and so seem to purchase it of them. yet that is not done for want of sufficient title from the King or Prince who hath the right of Discovery, but out of prudence and Christian charity least otherwise the Indians might have destroyed the first planters (who are usually too few to defend themselves) or refuse all Commerce and

Sr Edward Layden to plant these parts calling them New Albion & ye Dutch Submitted themselves to ye English Govermt. but in King Charles ye 1st Reign ye troubles in England breaking forth the English not minding to promote these New plantations because of ye troubles ye Dutch pretended to Establish a Gover't there again untill ye year 1660 when afterwards it was reduced under ye English Govermt & included & Ratified in ye peace made between England & Holland then it was granted to ye Duke of York 1664 who ye same year Granted it to ye Ld Barckley & Sr George Cartrett betwixt ye Dukes Grant to ye Ld Barckley & Sr George Cartrett and notice there of in America Several persons took Grants of Land from Coll. Nicholis ye Dukes Govenr: Severall of ye planters have purchased of ye Indians but Refuse to pay any acknowledgement to ye Kings Grantees.

Q 1st Wither ye Grants made by Coll. Nicholls are good agt the Assigns of ye Ld Berckley & Sr. George Cartrett.

Q 2nd Wither the Grants from ye Indians be sufficient to any planter without a Grant from ye King or his Assignes.

Ans. 1st. To ye first Question the Authority by which Coll. Nicholls Acted Determined by ye Dukes Grant to ye Ld Berckley & Sr George Cartrett & all Grants made by him Afterwards (tho according to ye Comison) are void for ye Delegated power wch Coll. Nicholls had of making Grantes of ye Land could last no Longer then his Master's Interest who gave him yt power & ye having or not having notice of ye Dukes Grant to ye Lord Berckley & Sr George Cartrett makes no difference in ye Law but ye want of Notice makes it Great Equity yt ye present propritrs Should Confirm Such Grants to ye people who will submitt to the Comissions & payments of the present proprietors Quitt rents other wise they may Look Upon them as Desseizers & treat them as such.

Answ. To the 2d Question by ye Law of Nations if any people make Discovery of any Country of Barbarians the Prince of yt people who make ye Discovery hath ye Right of ye Soyle & [Govermt of yt place & no people can plant there without ye Consent of ye Prince or of such persons to whom his rights is Devoulved & Conveyed the Practice of all Plantations has been according to this & no people have been Suffered to take

Conversation with the planters, and thereby all hopes of converting them to the Christian faith would be lost. In this the Common law of England and the Civil law doth agree. * * * Though some planters have purchased from the Indians yet having done so without the Consent of the Proprietors for the time being, the title is good against the Indians but not against the Proprietors without a confirmation from them upon the usual terms of other Plantations."—Vol. xiii. "Documents relating to Colonial History of the State of New York," p. 486.

up Land but by ye Consent & Lycence of ye Govr or proprietors under ye princes title whose people made ye First Discovery & upon their Submition to ye Laws of ye Place & Contribution to ye Publick Charge of the place & ye payment of Such Rent & other Value for ye Soile as ye Proprietrs for ye time being Require and tho it hath been & Still is ye Usuall Practice of all Proprietrs to give their Indians Some Recompence for their Land & Seem to Purchase it of them yet yt is not done for want of Sufficient title from ye King or Prince who hath ye Right of Discovery but out of Prudence & Christian Charity Least otherwise the Indians might have destroyed ye first planters (who are usually to few to Defend themselves) or Refus[illegible]ll Commerce and Conversation With ye planters & thereby all hopes of Converting them to ye Christian faith would be Lost. In this the Common Law of England and ye Civill Law doth agree and if any [illegible]nter be Refractory & will insist on his Indian Purchase and not Submit to this Law of Plantations ye Proprirs who have Ye title Under Ye Prince may deny them ye benefit of Ye Law & Prohibit[t] Comerce with them as Opposers & Enemys to Ye Public peace. Besides tis Observable Yt no man can goe from England to plant in an English Plantation without leave from Ye Govermt & therefore in all Patents & grants of Plantations from Ye King a Particular Lycence to Carry Over Planters is incerted Wch Power in Prohibitting is now in Ye Propriers As Ye Kings Assigns, and therefore tho some Planters have purchased from Ye Indians yett having done soe without Ye Consent of Ye Proprietrs for Ye time being Ye title is good against the Indians but not against the Proprietrs without a Confirmation from them upon the usuall terms of Other Plantations.

	Wm Leck	Jo. Holt
	Wm Williams	Wm Thomson
A true Coppy.	Jo. Holles	Richd Wallop
Garvin Lawrie.	John Hoyle	Hen. Pollexfen
Robt West		

The above printed extract is from Vol. xiii. of "Documents relating to the Colonial History of the State of New York," p. 486.

Of the six counsel who sign this opinion, one (Richard Wallop) became Cursitor Baron of the Exchequer; another (Henry Pollexfen) became Chief Justice of the Common Pleas, and a third (Holt) was afterwards Chief Justice of England.

In a classical judgment, Marshall, C. J., has concisely stated the same law of the mother-country which the United States inherited and applied with such modifications as were necessitated by the change of government to their dealings with the Indians. I quote passages from *Johnson* v. *McIntosh*, 8 Wheat., p. 595, &c.:

"According to the theory of the British constitution, all vacant lands are vested in the Crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative. * * This principle was as fully recognized in America as in the island of Great Britain. * * So far as respected the authority of the Crown no distinction was taken between vacant lands and lands occupied by the Indians. * * The title, subject to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title." At p. 588: "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right."

This right of occupancy attached to the Indians in their tribal character. They were incapacitated from transferring it to any stranger, though it was susceptible of being extinguished. The exclusive power to procure its extinguishment was vested in the Crown, a power which as a rule was exercised only on just and equitable terms. If this title was sought to be acquired by others than the Crown, the attempted transfer passed nothing, and could operate only as an extinguishment of the Indian right for the benefit of the title paramount. See judgment of Burns, J., in *Doe d. Sheldon* v. *Ramsay*, 9 U. C. R. at p. 133.

Many parliamentary recognitions of these principles might be cited, but let one or two suffice. There is to be

found an affirmance of the established doctrine, that the ungranted and waste lands of the country are vested in the Crown, for the public, subject to the Indian title which is capable of being dealt with by way of extinguishment only, and not by way of transfer, in the Dominion Statute, 33 Vic. ch. 3, secs. 30, 31 and 32. There is also a very emphatic declaration of the customary Indian lands policy to be found in the address to Her Majesty from the Senate and House of Commons of Canada in December, 1867, praying for the extension of the Dominion to the shores of the Pacific, in which it is represented that upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. Following this up, the same legislative bodies in May, 1869, resolved that upon the transference above mentioned, "it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer." This being embodied in the address subsequently presented to the Queen, the transfer was consummated by Imperial Order in Council of June 23rd, 1870, Article 14 of which stipulated that "any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government:" 35 Vic. (D.) p. lxiii.

At the time of the conquest, the Indian population of Lower Canada was, as a body, Christianized, and in possession of villages and settlements, known as the "Indian Country." By the terms of capitulation they were guaranteed the enjoyment of these territorial rights in such lands which, in course of time, became distinctively and technically called "Reserves." By a Quebec ordinance of Guy Carleton of 1777, (17 George III. ch. 7, sec. 3,) it was declared unlawful for any person to settle in the Indian

country within that Province without a written license from the Governor, and no person was allowed to trade without license in any part of the Province upon lands not granted by His Majesty.

But in Upper Canada the native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration and protect both red and white subjects so that their contact in the interior might not become collision. A *modus vivendi* had to be adjusted. The course of civilized colonization in the North-West at this day presents, in its essential features, a counterpart of what was going on in the now thickly-populated parts of Upper Canada at the beginning of this century. And the manner of dealing with the rude red-men of the North-West, in the way of negotiating treaties for the surrender of their lands, and conciliating them in the presence of an ever-advancing tide of European and Canadian civilization, is but a reproduction, or rather a continuation and an expansion of the system which had commended itself as the most efficient in Old Canada. The inevitable problem in view of the necessary territorial constriction of the Indian occupants of those vast expanses over which they and their forefathers have fished and hunted and trapped from time immemorial was and is this: how best to subserve the welfare of the whole community and the state, how best to protect and encourage the individual settler, and how best to train and restrain the Indian so that being delivered by degrees from dependency and pupillage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship. These three considerations, mainly, have shaped the policy of the Government in the past as in the present. For an admirable *resumé* of what has been done in the earlier history of Canada, I will avail myself of some passages to be found in a joint report of Messrs. Rawson, Davidson & Hepburn, on Indian affairs prepared in 1844, and printed among the Journals of the Legislative Council of Canada, vol. 4, as

appendix EEE of the session 1844-1845, and the Journals of the Legislative Assembly of Canada, appendix to vol. 6, as appendix T of the session of 1847. I may, at this poin t also mention how greatly I have been indebted to another joint report of Vice-Chancellor Jameson, Mr. Justice Macaulay, and this same Mr. Hepburn, of 1840, which is printed as a supplement to the later report of 1844: Journals of the Legislative Assembly of Canada, appendix to vol. 6, appendix No. 1 to appendix T. These two papers form a compendium of valuable knowledge and research not readily accessible elsewhere.

"Since 1763, the Government adhering to the Royal Proclamation of that year have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them, and rendering them some compensation. For a considerable time after the conquest of Canada, the whole of the western part of the Upper Province, with the exception of a few military posts on the frontier, and a great extent of the eastern part, was in their occupation. As the settlement of the country advanced, and the land was required for new occupants, or the predatory and revengeful habits of the Indians rendered their removal desirable, the British Government made successive agreements with them for the surrender of portions of their lands. * * If the Government had not made arrangements for the voluntary surrender of the lands, the white settlers would gradually have taken possession of them, without offering any compensation whatever; it would at that time have been as impossible to resist the natural laws of society and to guard the Indian territory against encroachment of the whites, as it would have been impolitic to have attempted to check the tide of emigration. The Government therefore adopted the most humane and most just course in inducing the Indians, by offers of compensation to remove quietly to more distant hunting grounds, or to confine themselves within more limited reserves, instead of leaving them and the white settlers exposed to the horrors of a protracted struggle for ownership. * * In every case the Indians had either the opportunity of retreating to more distant hunting grounds, or they were left on part of their wild possessions with a reserve supposed at the time to be adequate to all their wants, and greatly exceeding their requirements as cultivators of the soil at the present day, to which were added the range of their old haunts, until they became actually occupied by settlers, and, in many cases, an annuity to themselves and their descendants forever, which was equivalent at least to any benefit they derived from the possession of the lands:" Journals of the Legislative Council of Canada, vol. 4, appendix EEE.

"In Upper Canada where at the time of the conquest the Indians were the chief occupants of the territory where they were all pagans and

uncivilized, it became necessary as the settlement of the country advanced to make successive agreements with them for the peaceable surrender of portions of their hunting grounds. The terms were sometimes for a certain quantity of presents, once delivered, or for an annual payment in perpetuity. * * These agreements * * sometimes contain reservations of a part of the land surrendered for the future occupation of the tribe. In other cases separate agreements for such reservations have been made, or the reservations have been established by their being omitted from the surrender, and in those instances consequently the Indians hold upon their original title of occupancy:" Journals of the Legislative Assembly of Canada, appendix to vol. 6, appendix T.

I may just notice in passing that this last clause is not expressed with sufficient fullness or precision; where the reserve is omitted from the surrender the title (so called) by occupancy to that no doubt continues; but, coupled with the exclusive and legally recognized rights thereto which attach to a reserve. Some of these rights the report proceeds to point out in these words:

"Among the consequences of the peculiar title under which the Indians hold their lands, are their exclusion from the political franchise, and their immunity from statutory labour, the exemption of their lands from taxation, from seizure from debt, and the exclusion of the white settlers from their reserves:" *Ib.* The reserves were held and occupied in common by the tribe as general property, but any member or family, by arrangement with the Chief, could mark off and cultivate a particular plot. These Indian lands could not be alienated or dealt with in the way of transfer, except by being surrendered to the Crown. This was frequently done for the purpose of having parts they did not desire to retain sold for the benefit of the tribes concerned. Such reserves and the proceeds of such reserves, when surrendered and sold, were held by the Crown as a Royal Trustee for the Indians. (*Bastien* v. *Hoffman*, 17 L. C. R. 238, Drummond, J.)

On this footing, then, have been negotiated all the treaties between commissioners for the Government and the respective tribes or nations of Indians found existing upon the different tracts covered by the treaties. As characteristic of all, the particular treaty which embraces the land

now in dispute may be epitomized. It is called the "North-West Angle Treaty, No. 3," (see Sessional Papers of the Dominion, 1875, Vol. 8, No. 7, paper No. 8, at p. 19,) from having been entered into at a meeting convened at the north-west angle of the lake of the Woods (which is a notable point on the international boundary between Canada and the States), and because of the series of treaties affecting lands between the great lakes and the Rocky Mountains made since Confederation it is third in chronological order. It purports to be between Her Most Gracious Majesty by her commissioners, the Hon. Alexander Morris, Lieutenant-Governor of the Province of Manitoba, and the North-West Territories, Joseph Albert Norbert Provencher, and Simon James Dawson, of the one part, and the Saulteaux tribe of Ojibbeway Indians inhabiting the country defined in the body of the treaty, by their chiefs, of the other part.

It recites that it is the desire of Her Majesty to open up for settlement, immigration, and such other purposes as to Her may seem meet, the tract of country described, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

By the operative part, the Saulteaux tribe do thereby cede, release, surrender, and yield up to the Government of the Dominion of Canada for Her Majesty, &c., all their rights, titles, and privileges whatsoever, to the lands included in the limits therein described.

The Queen then agrees and undertakes to lay aside reserves for farming lands (due respect being had to lands then cultivated by the Indians), and also to lay aside and reserve for the benefit of the said Indians to be administered and dealt with for them by the Government of the Dominion, other reserves of land in the ceded territory, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for

each band or bands of Indians by the officers of the Government after conference had with the Indians: Provided that such reserve whether for farming or other purposes shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families; it being understood, however, that if there were any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to Indians; and provided also, that the said reserves of lands, or any interest or right therein, or appurtenant thereto, may be sold, leased, or otherwise disposed of by the said Government for the use and benefit of the said Indians, with their consent first had and obtained.

Her Majesty then agrees to maintain schools for instruction on the reserves when desired by the Indians.

Next is a prohibition of the sale of intoxicating liquors within the boundary of the reserves.

The Queen then agrees that the Indians shall have the right to pursue their avocations of hunting and fishing throughout the tract so surrendered, saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering, or other purposes by the Government of the Dominion, or by any of her subjects duly authorized therefor by the said Government.

If any portion of the reserves is required for public works due compensation is to made therefor.

Provision is then made for the taking of a census of the Indians inhabiting the tract, and an agreement to pay to each Indian the sum of $5 per head yearly.

Then follow further agreements that $1,500 yearly shall be expended by the Queen for the purchase of twine and nets for the Indians, and for the supply of tools and agricultural implements, cattle, and seed, &c., &c., the particulars of which need not now be given.

The liberal treatment of the Indians, and the solicitude for their well-being everywhere manifested throughout this treaty, are the outgrowth of that benevolent policy

which before Confederation attained its highest excellence in Upper Canada. In Nova Scotia and New Brunswick the Micmacs and other tribes appear to have been comparatively neglected, so that we find that the Hon. Joseph Howe (a competent witness), in submitting the report for Indian affairs in 1873, (Sess. Papers Dom., 1873, vol. 6, No. 5, Paper No. 23,) when referring to the manner of dealing with the Indians in the Maritime Provinces, gives a decided preference to the system pursued in Ontario and Quebec, and proceeds, enthusiastically, to declare that the crowning glory of "Canadian policy in all times, and under all administrations, has been the treatment of Indians." In the report of the Hon. D. Laird for 1876, (Sess. Papers Dom., 1876, vol. 9, No. 7, Paper 9,) he thus adverts to this point: "In some of the Provinces the Indian policy may have been partially shaped before they came under the British Crown, but as there was sufficient opportunity after the cession to have adopted a more liberal policy, it is not very apparent why the Indians were more liberally treated in Upper Canada than in any of the other old Provinces. It is a matter of gratulation that a policy so liberal as that adopted in Ontario is being pursued in the North-West territories, and that the Indians there, provided they turn to the cultivation of their extensive resources, or the raising of stock, may become prosperous and contented."

I have adverted to this aspect of the matter, in order to shew that the characteristic Canadian policy upon Indian questions, both before and after Confederation, is to be sought and studied in the records of Upper Canadian affairs, and this affords assistance (if assistance on this head be required) in order to the construction and interpretation of the provisions of the British North America Act applicable to the present controversy.

In 1801 an Act was passed in Upper Canada, 41 Geo. III. ch. 8, making it unlawful to sell liquors to Moravian Indians inhabiting a tract of land on each side of the river Thames. In 1829 the Upper Canada Act, 10 Geo. IV. ch. 3, recited

the sale and surrender by the Mississaga Indians to His Majesty of large tracts of land, reserving for themselves and their posterity a certain parcel on the river Credit, containing 4000 acres, and restrained any one from hunting or fishing thereon without the consent of the Indians. By section 2 it was declared that nothing therein contained should diminish their common law rights of having their lands protected from trespass or waste in the same manner as other subjects of His Majesty. In 1839, an Act was introduced by Hagerman, A. G., 2 Vic. ch. 15, which contained this recital "whereas the lands appropriated for the residence of certain Indian tribes in this Province, as well as the unsurveyed lands and lands of the Crown ungranted," and not under location, have been trespassed upon from time to time. It then directed the appointment of commissioners to enquire into complaints against any person who illegally possesses himself of any of the aforesaid lands "for the cession of which, to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto." This statute is referred to in the report of 1840, (*e*) (the joint production of Vice-Chancellor Jameson, Mr. Justice Macaulay, and Mr. Robert Hepburn,) as "an Act for the protection of the Indian reserves." I have not noticed an earlier employment of this term in the public acts and documents of Upper Canada, though it must have been long in colloquial use. As thus used "Reserves" meant lands appropriated for the residence of Indian tribes for the cession of which, to the Crown, no agreement had been made with the Indians who occupied the same.

This statute was amended so as to be of more comprehensive scope in pursuance of a suggestion to that effect in the subsequent report by Messrs. Rawson, Davidson, and Hepburn already mentioned. (*f*) The amending statute is

(*e*) Printed as App. 1 to App. T. in App. to vol. 6 of the Journals of the Legislative Assembly of Canada.

(*f*) Printed in part as App. E. E. E. in Journals of Legislative Council of Canada, vol. 4: and in part as App. T. in App. to vol. 6 of the Journals of the Legislative Assembly of Canada.

12 Vic. ch. 9, (1849,) and extends the Act of 1839 to all lands in that part of the Province called Upper Canada, whether such lands be surveyed or unsurveyed, for which no grant, &c., has issued from the proper department of the Provincial Government, and "whether such land be part of those usually known as Crown reserves, clergy reserves, school lands, or Indian lands, or by or under any other denomination whatsoever, and whether the same be held in trust or in the nature of a trust for the use of the Indians or of any other parties whomsoever." (These two Acts are consolidated in C. S. U. C., ch. 81.)

At this time Upper and Lower Canada had been re-united and the control of the public and waste lands of the Crown had passed to the Provincial Government. The Act of 12 Vic., read in connection with the report on which it was based, shews that the expression "Indian lands" is used as synonymous with "Indian reserves," and that the Act was intended to deal with and protect such "reserves," whether held by the tribes or by them surrendered to the Crown for sale or other purposes.

A further outcome of the elaborate report published in 1847, was an Act "for the protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury:" 13-14 Vic. ch. 74 (1850.) In that report the term "Indian lands" is uniformly employed to signify tracts of land appropriated for the exclusive use of the Indians, and is used interchangeably with the term "Indian reserves." Such is its meaning throughout this Act. By section 1, any purchase or contract for the sale of lands made with the Indians or any of them is not valid without the consent of the Crown. By section 4 no taxes are to be assessed upon Indian lands nor upon any Indian so long as he resides on "Indian lands not ceded to the Crown, or which, having been so ceded, may have been again set apart by the Crown for the occupation of Indians." By section 10, for the purpose of affording better protection to the Indians in the unmolested possession and enjoyment of their lands, it is

enacted that none but Indians shall settle, reside upon, or occupy any lands belonging to, or occupied by any portion or tribe of Indians within Upper Canada.

Section 1 of this Act was, no doubt, suggested by a case of *Bown* v. *West*, which came before Jameson, V. C., in 1845, 1 O. S. 288. That was a bill to rescind a contract for the sale of Indian lands. The Court dismissed the bill because, among other reasons, the whole title, legal and equitable, was in the Crown. This decision was affirmed in appeal, the judgment of the Court being pronounced by Robinson, C. J., 1 E. & A. 117. The Vice-Chancellor stated that the bill presented this state of facts only: that one party sells and the other purchases the right to the possession of Indian, that is of Crown lands, such right of possession never having been out of the Crown, but specially appropriated to the use of the Six Nation Indians, under the proclamation of Governor Haldimand. The nature of this tenure, he says, by the Indians and their incapacity, either collectively or individually, to alienate or confer title to any portion of such lands might have been sufficiently plain, even though not decided in *Doe ex dem. Jackson* v. *Wilkes*, 4 O. S. 142, (E. T. 5 Wm. IV.) The whole tenour of this decision shews that "Indian lands" or "the Indian title" were expressions used in reference to Crown lands which had been specifically set apart and reserved for the exclusive use of the Indians. Such, indeed, is the express language of the Chief Justice in Appeal, 1 E. & A., at p. 118.

The term "Indian lands," with like meaning is next found in 16 Vic. ch. 159, sec. 15 (1853), which refers to that class of lands as being under the management of the Chief Superintendent of Indian affairs.

The next advance in legislation was by 20 Vic. ch. 26 (1857), an Act to encourage the gradual civilization of the Indian tribes of Canada, the preamble of which declared that it was desirable to encourage the progress of civilization among the Indian tribes, and the gradual removal of all legal distinctions between them and Her Majesty's

other Canadian subjects, and to facilitate the acquisition of property, and of the rights accompanying it by such individual members of the said tribes as shall be found to desire such encouragement, and to have deserved it. That and the other Acts are consolidated in C. S. C. ch. 9, sec. 1 of which defines "Indian" to mean only 'Indians or persons of Indian blood, or intermarried with Indians acknowledged as members of Indian tribes or bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or are then reserved for the use of any tribe or band of Indians in common), and who themselves reside upon such land.' Section 18 of the consolidated Act borrowing from 20 Vic. ch. 26, sec. 15, provides that "Indian reserves" may be attached by any municipal council, on application of the Superintendent General of Indian affairs, to a neighbouring school section.

In the Act of 1860, 23 Vic. ch. 2, respecting sale and management of public lands, it is declared by sec. 38 that the term public lands shall be held to apply to lands theretofore designated as Crown lands, school lands, clergy lands, and ordnance lands, and by section 9, it is provided that the Governor in Council may declare the provisions of that Act to apply to "Indian lands" under the management of the Chief Superintendent of Indian Affairs. As to all ungranted lands, the title to which is in the Crown, this Act applies the designation "public lands," with the sole exception of "Indian lands," which are unique and subject to the special supervision of an officer who represents the guardianship of the Crown. The Legislature of Canada, in the Statute 27-28 Vic. ch. 68, has interpreted "Indian lands" to mean an "Indian reservation." Act 69 of the same session refers to the reserve of the Huron Indians at Lorette, commonly known as the "*Quarante Arpents.*"

As a deduction from all this legislation, I am induced to believe that the expressions "Indian reserves," or "lands reserved for Indians," had a well recognized conventional

and perhaps technical meaning before and at the date of Confederation.

"Lands reserved for the Indians" is used in the B.N.A. Act as a well understood term, and that it was so is further demonstrated when one looks at the results of previous legislation in the various confederated Provinces other than Upper Canada, as to which sufficient has been quoted and said.

Chapter 10 of the Revised Statutes of Prince Edward Island (1856) is an Act relating to the Indians in which it is declared that it is found necessary and expedient to protect the Indians in the possession of any lands now belonging to them, or which may hereafter be granted or given to them. Section 3 provides that commissioners shall take the supervision and management of all lands that may have been, are now, or may hereafter be set apart as Indian reservations, or for the use of Indians, and shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians.

From the sessional papers I learn that nearly all the reserves in this island have been provided for the Indians by the liberality of private persons, and through the medium of the Aborigines Protection Society of London.

In the Revised Statutes of Nova Scotia (1851), ch. 28 relates to Crown lands of which section 5 reads, "The Governor may reserve for the use of the Indians of this Province such portions of the lands as may be deemed advisable, and make a free grant thereof for the purposes for which they were reserved." Opposite this the marginal compendium is "Indian reserves and free grants." Chapter 58 is entitled "of Indians," and section 3 provides that the commissioners shall take the supervision and management of all lands that are now, or may hereafter be set apart as Indian reservations for the use of Indians; they shall ascertain and define their boundaries and report to the Governor all cases of intrusion, or of the transfer or sale of such lands, or of the use or possession thereof by the Indians, and generally shall protect such lands from

encroachment and alienation, and shall preserve them for the use of the Indians. Section 5 provides for prosecution by information in the name of Her Majesty in case of encroachment, notwithstanding the legal title may not be vested in the Crown.

In the Revised Statutes of New Brunswick (1854), Title xiii. relates to "Indian reserves." Section 1 authorizes surveys of these reserves. Section 3 is as to the appointment of commissioners to protect the interests of the Indians. Section 7 provides that proceeds of all sales and leases of the reserve shall be applied for the exclusive benefit of the Indians. Section 10 provides for laying off any tract of such reserves into villages or town plots for the exclusive profit of the Indians of that country.

In the Consolidated Statutes of Lower Canada (1861) ch. 14 is headed "an Act respecting Indians and Indian lands." Section 3, "No person shall settle in any Indian village, or in any Indian country in Lower Canada, without a license in writing from the Governor, &c." Section 7, "The Governor may from time to time appoint a commissioner of Indian lands for Lower Canada in whom * * all lands or property in Lower Canada appropriated for the use of any tribe or body of Indians shall be vested in trust for such tribe or body," &c.

Section 7 extends to any lands in Lower Canada held by the Crown in trust for, or for the benefit of any such tribe or body of Indians, but shall not extend to any lands vested in any corporation or community legally established, &c., although held in trust for or for the benefit of any such tribe or body.

By section 12, tracts of land in Lower Canada not exceeding in the whole 230,000 acres may be described, surveyed, and set out by the Commissioner of Crown Lands, and such tracts of land shall be respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, as directed by Order-in-Council.

[This provision is taken from 14-15 Vic. ch. 106, sec. 1, and is probably intended to remedy the condition of many tribes whose occupation of lands had been disturbed, without compensation being made therefor, and to provide them a means of living in return for what they had thus been deprived of.]

Consolidated Statutes Lower Canada, ch. 24, sec. 54, is headed "roads through Indian reserves," and provides that municipal councils may cause roads to be opened through any part of an Indian reserve, and the compensation therefor shall be paid to the Superintendent-General of Indian affairs for the use of the tribe of Indians for which such land is held in trust.

The legislation of Canada, since Confederation, also reflects very clear light upon what was understood by the Indian reserves. For instance, in 1868 it is declared that "all lands reserved for Indians, * * or held in trust for their benefit shall be deemed to be reserved and held for the same purposes as before the passing of this Act, * * and no such lands shall be sold, alienated, or leased until they have been released or surrendered to the Crown," &c. (See sec. 6 of 31 Vic. ch. 42.) By section 10, "No release or surrender of any such lands" (reserved for the use of the Indians) "to any party other than the Crown, shall be valid." Section 15 refers to land appropriated to the use of the Indians in which the Indians are interested. Section 37 provides for protection and management of Indian lands in Canada, whether surrendered for sale or reserved, or set apart for the Indians. Again, in 1869, 32-33 Vic. ch. 6, provides for the locating of lots to Indians on reserves which have been sub-divided by survey with a view to their ultimate proprietorship, and consequent enfranchisement of the owner. And in 1876, 39 Vict. ch. 18, sec. 3, we find a valuable set of definitions in which occurs for the first time a differentiation in meaning between the theretofore equivalent terms: "Indian Reserves" and "Indian Lands." (See *Totten* v. *Watson*, 15 U. C. R. at p. 395.) By that Act

"Reserve" is declared to mean "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees," &c., whereas "Indian Lands" is to mean "any reserve or portion of a reserve which has been surrendered to the Crown."

"Special Reserves" includes lands set apart for the Indians, the legal estate to which is out-standing in trustees other than the Crown, (as *e. g.*, in Prince Edward Island and Quebec.) These definitions are all repeated in the last statute of 1880, 43 Vic. ch. 28 (D.)

The words "lands reserved for the Indians" in the British North America Act have been the subject of judicial consideration in *Church* v. *Fenton*, 28 C. P. 384, in which the judgment of the Court was delivered by Mr. Justice Gwynne. It is on this account of great value, because he was charged with the duty of reporting upon various matters of difficulty and importance in connection with the Indian department at the time of the union of the Provinces in 1840. A reference to his name and services frequently appears in the reports of the commissioners from which I have so largely drawn. To understand some expressions in his judgment, it is essential to remember that the land then in dispute formed part of an original Indian reserve situate in the Saugeen Peninsula, which had been surrendered in 1854 for the purposes of sale in the usual way, out of which larger reserve surrendered, the Indians retained three smaller reserves for their special occupation. That decision was in 1878, and the learned Judge adopts the definitions given in the Act of 1876, whereby "Indian lands" were distinguished as well from "public lands," as from "Indian reserves." Referring to the 24th item of the 91st section of the Constitutional Act for Canada "lands reserved for the Indians," he thus proceeds, at p. 399: "That is an expression appropriate to the unsurrendered lands reserved for the use of the Indians described in different

Acts of Parliament as "Indian reserves," and not to lands, in which, as here, the Indian title has been wholly extinguished." *Church* v. *Fenton* was affirmed in Appeal, 4 A. R., 159, and by the Supreme Court, 5 S. C. R. 239, though not on this precise point. If "lands reserved for Indians," and "Indian reserves" are of co-extensive import, it is plain that the territory now in dispute cannot be called "land reserved for Indians."

But it is argued for the defendants that the key to unlock the meaning of the Act of 1867 must be sought in the Royal Proclamation of 1763.

The scope and object of that instrument, therefore, require to be considered. The primary intent of the proclamation was to provide, temporarily, for the orderly conduct of affairs in the settled parts of all the territory newly acquired in America, which was for that purpose subdivided into the four Governments of Quebec, East Florida, West Florida, and Grenada, and to encourage further settlement by the promise of the immediate enjoyment of English law. Power was conferred upon the governors and councils of the three colonies on the continent to grant such lands as were then or thereafter should be in the power of the Crown to dispose of, on such terms and conditions as might be necessary and expedient for the advantage of the grantees, and the improvement and settlement of the colonies. So far as lands lay without the limits of these colonies, the governors were forbidden to grant patents, or to deal with them, and this chiefly on account of the several nations or tribes of Indians who were living under British protection. That prohibition was to last only "for the present, and till the King's further pleasure" should be known, and it is preceded by a recital that it is just, and reasonable, and essential to our interest, and the security of our colonies, that such Indians with whom we are connected, and who live under our protection should not be molested or disturbed in the possession of such parts of our dominions and territories, as not having been ceded to or purchased

by us, are reserved for them or any of them, as their hunting-grounds.

The proclamation next proceeds to deal with that part of the country which would then embrace the land now in question as follows: "And we do further declare it to be our Royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion for the use of the said Indians all the lands and territories not included * * within the limits of the territory granted to the Hudson's Bay Company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the West and North-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatsoever, or taking possesssion of any of the lands above reserved without our especial leave and license for that purpose first obtained; and we do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which not having been ceded to, or purchased by us are still reserved to the said Indians, as aforesaid, forthwith, to remove themselves from such settlements."

The proclamation then forbids private persons from presuming to make any purchases from the Indians of any lands reserved to the said Indians "within those parts of our colonies where we have thought proper to allow settlement," and directs that if at any time the Indians shall be inclined to dispose of the said lands, the same shall be purchased for us at some public meeting of the Indians to be held for that purpose by the Governor of the colony within which they shall lie.

This proclamation has frequently been referred to, and by the Indians themselves, as the charter of their rights, and the last clause I have condensed relating to the manner of dealing with them in respect to lands they occupy at large, or as a reserve, has always been scrupulously observed in such transactions.

This provisional arrangement for the government of the country was superseded by the Quebec Act. The effect of that Act upon the proclamation was two-fold; by the enlargement of the boundaries of Quebec, the district now in litigation was brought within colonial limits and subjected to the control and jurisdiction of the Governor: it was taken out of the vague region called "The Indian Territories" in 43 Geo. III. ch. 138 (Imp. Stat. 1803) and was made part and parcel of the Province of Quebec. The next effect was, that inasmuch as the governmental arrangements made for Quebec by the proclamation were declared inapplicable to its state and circumstances, all its provisions, so far as related to that Province, were revoked, annulled, and made void: (Sec. 4 of 14 Geo. III. ch. 83.) New machinery of civil goverment was provided which, however, was not to interfere with the tenure of land as by the laws of England or the King's prerogative. (See secs. 4, 8, 9, and *Doe ex dem. Jackson* v. *Wilkes*, 4 O. S. at p. 147.) The proclamation, no doubt, remained operative as a declaration of sound principles which then and thereafter guided the Executive in disposing of Indian claims, but as indicating for this century the scope of the Indian reservations, or the intent with which they have been created under provincial rule, it must be regarded as obsolete. If the proclamation of 1763 and the Constitutional Act of 1867 are to be read as *in pari materiâ*, and all the intervening years of progress, material, legislative and political, overlooked, then the 40,000 square miles claimed by Ontario being part of what is covered by the North-West Angle Treaty is an "Indian Reserve." But in order to emphasize this *reductio ad absurdum* aspect of the case, let what little is known of the people in this remote region be recalled: when the treaty was made, the land it deals with formed the traditional hunting and fishing ground of scattered bands of Ojibbeways, most of them presenting a more than usually degraded Indian type. They belonged to the Saulteaux (*i. e.*, Fallsmen) tribe of the Ojibbeway branch of the great and wide-spread

Algonquin stock. Divided into thirty bands, they numbered, all told, some 2,600 or 2,700 souls. These only remained as representatives of the primitive possessors of the whole 55,000 square miles of territory, whose claim of occupancy thereon was extinguished by the treaty. If the whole is to be accounted a reserve this would represent an average of over 9,200 acres to each individual, as against 92 acres which was actually reserved by the treaty—the difference being one thousand fold. If the whole is a "reserve" then what was surrendered should be sold for the benefit of the Indians, according to the well understood practice in old Canada, but this was never contemplated. So far from this land being held as reserved for the Indians the parliamentary as well as the popular view in modern days is well illustrated by the C. S. U. C., ch. 128, which relates to unorganized tracts of country bordering on and adjacent to Lakes Superior and Huron which belong to this Province, and they are thus denominated, though section 104 speaks of Indians and half-breeds as frequenting and residing in the same.

There is an essential difference in meaning between the "reservations" spoken of in the Royal Proclamation, and the like term in the B. N. A. Act. The proclamation views the Indians in their wild state, and leaves them there in undisturbed and unlimited possession of all their hunting ranges, whereas the Act, though giving jurisdiction to the Dominion over all Indians, wild or settled, does not transfer to that government all public or waste lands of the Provinces on which they may be found at large.

The territorial jurisdiction of the Dominion extends only to lands *reserved* for them. Now it is evident from the history of "the reserves," that the Indians there are regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization. The object of the system is to segregate the red from the white population, in order that the former may be trained up to a level with the latter. The key-note of the whole movement was struck unmistakably in 1838, by Lord

Glenelg, in his instructions to Sir Francis Bond Head: (Appendix to Journals of Assembly, 1837-8, p. 180.) He wrote thus: "The first step to the real improvement of the Indians is to gain them over from a wandering to a settled life, and for this purpose it is essential that they should have a sense of permanency in the locations assigned to them; that they should be attached to the soil by being taught to regard it as reserved for them and their children by the strongest securities." The distinctive feature of the system in Canada was the grouping of the separate tribes for the purposes of exclusive and permanent residence within circumscribed limits. Those limits were almost invariably allocated at their usual centres of settlement, and within the ambit of their respective hunting ranges as recognized among themselves. Contrasted with this is the plan chiefly followed in the United States, where the main object has been to mass all the Indian nations and tribes in one vast district called "The Indian Territory," which comprises an area of about 70,000 square miles. But in Canada, the bounds of the separate reserves being ascertained by survey or otherwise, the various communities betake themselves thereto as their "local habitation." Here they are furnished with appliances and opportunities to make themselves independent of the precarious subsistence procured from the chase; they are encouraged to advance from a nomadic to an agricultural or pastoral life, and thus to acquire ideas of separate property, and of the value of individual rights to which, in their erratic tribal condition, they are utter strangers, so that, ultimately, they may be led to settle down into the industrious and peaceful habits of a civilized people.

Again: The relations between the Government and the Indians change upon the establishment of reserves. While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the set-

tlement and development of the country, and so, sooner or later, to displace them. If, however, they elect to treat they then become, in a special sense, wards of the State, are surrounded by its protection while under pupillage, and have their rights assured in perpetuity to the usual land reserve. In regard to this reserve the tribe enjoy practically all the advantages and safeguards of private resident proprietors: *Bastien* v. *Hoffman*, 17 L. C. R. 238. Before the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation, they become invested with a legally recognized tenure of defined lands; in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians which form the subject of legislation in the B. N. A. Act, *i. e.*, lands upon which or by means of the proceeds of which, after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. It follows that lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the public lands, and are held as before Confederation by that Province under various sections of the B. N. A. Act. [See secs. 92 (item 5), also secs. 6, 109 and 117.] Such a class of public lands are appropriately alluded to in section 109 as lands belonging to the Province in which the Indians have an interest, *i. e.*, their possessory interest. When this interest is dealt with by being extinguished, and by way of compensation in part, reserves are allocated, then the jurisdiction of the Dominion attaches to those reserves. But the rest of the land in which "the Indian title" so called has not been extinguished remains with its character unchanged as the public property of the Province.

The Indian title was, in this case extinguished by the Dominion treaty in 1873, during a dispute with the Province as to the true western boundary of Ontario. (See Dom. Sess. Papers, 1875, vol. 8, No. 7, Paper 8, p. 19.) It

was proposed in 1872, on behalf of the Dominion, that both Governments should agree upon some provisional arrangement and boundary in order that both might proceed with the granting of land, and the issuing of licenses in distinct parts of this disputed territory, pending the definite settlement of the true line. (See Sess. Papers, Ont., 1873, vol. 5, part 3, Paper 44, pp. 6-20.) This arrangement was not carried out till 1874, at which time a provisional boundary line was adopted. The delay arose from the desire of the Dominion to effectuate this treaty. The Minister of the Interior, in his official report of June, 1874, (see Dom. Sess. Papers, 1875, vol. 8, No. 7, Paper 8,) states that as the Indian title to a considerable part of the territory in dispute had not been extinguished in 1872, it was thought desirable to postpone the negotiations for a conventional arrangement under which the territory might be opened for sale or settlement, until a treaty was concluded with the Indians (*g*).

The boundary dispute having been referred to arbitration, an award was made in favour of Ontario in August, 1878, after which, in December, 1879, the Provincial Government notified the other Government that the provisional arrangement was at an end. (See Sess. Papers Ont., 1880, No. 46, p. 2.) This appears to have been acceded to by the Dominion in January, 1882, (see Dom. Sess. Papers, 1883, vol. 16, No. 12, Paper 95, p. 3,) and both were then understood to be left to assert their respective rights in reference to all questions involved. A declaration of right to this territory was made in March, 1882, by the Legislature of Ontario, (see Journals of Legislative Assembly Ont., 1882, vol. 15, pp. 154-161,) and after this the defendants procured the license to cut timber, which is now the subject

(*g*) All papers, treaties, &c., relating to this boundary dispute may be found either in the volume entitled "Ontario Boundaries before Privy Council," contained in Osgoode Hall Library, or in the volume entitled Correspondence, Papers, and Documents of dates from 1856 to 1882, inclusive, relating to the Northerly and Westerly Boundaries of the Province of Ontario, printed by order of the Legislative Assembly, by C. Blackett Robinson, Toronto, 1882.

of litigation. It appears to me that the diplomatic attitude of both Governments during this transaction, favours the view that both understood the British North America Act to mean that which I now decide it does mean, as to "Public Lands" and "Reserves" and "Indian Title."

So also the inter-state, dealings which took place upon and after the admission of British Columbia into the Confederation, cast a light upon the whole subject I have been discussing, which is favorable to the conclusions at which I have otherwise arrived. Provision is made in sec. 146 of the "British North America Act" for the reception of other colonies into the Canadian union, "subject to the provisions of that Act," and based upon that the negotiations I am about to mention proceeded.

British Columbia, when a Crown colony pursued a policy, more or less definite with reference to the comparatively settled Indian population there resident, the object of which was to distribute the Indians to a greater extent among the white inhabitants than was deemed desirable by the Government of old Canada. That policy however, involved the setting apart of tracts of land as reserves for the use of most of the tribes, and these, as an invariable rule, embraced the village sites, settlements, and cultivated lands of the Indians, and of late years it was considered that a reservation in the proportion of ten acres for each family, (five being regarded as the family unit,) to be held as the joint and common property of the several tribes for their exclusive use and benefit, was a sufficient provision by way of compensation for all their claims upon the rest of the Crown lands. After this colony joined the Canadian union, discontent arose among the Indians, and it was deemed necessary to devise a scheme for the re-adjustment of the system of Indian land reserves so as to conform, as far as possible, to the customary policy and practice of the older Provinces which had been adopted by the Dominion. The thirteenth article of the terms of union of 1871 (*h*) provided as follows: "The charge of the

(*h*) See Statutes of 1872, D.

Indians and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the union. To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall, from time to time, be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government," and in case of disagreement respecting the quantity, the matter was to be referred to the Secretary of State for the Colonies.

The policy and practice of old Canada being to concentrate the Indians upon reserves, and to allot land for such purpose in the proportion of at least eighty acres for each family of five, it was contended on the part of the Pacific Province that such a policy should not be extended to the granting of future reserves, and that the previously existing reserves should not be disturbed. It was alleged that this policy of extensive land reserves however suitable to the Plain and Mountain Indians of the North-West, was not adapted to the wants and habits of the Maritime Indians. The Provincial and Dominion Governments at last agreed upon a scheme for the settlement of the matters in difference, and for the adjustment of the reserves upon these among other terms:

Three commissioners were to be appointed who, after enquiry on the spot, should fix and determine for each nation separately, the number, extent, and locality of the reserve or reserves to be allotted to it; no basis of acreage was to be fixed, but each nation should be dealt with separately.

In the event of any material increase or decrease thereafter of the numbers of a nation occupying a reserve, such reserve was to be enlarged or diminished as the case might be. "The extra land required by any

reserve shall be allotted from Crown lands, and any land taken off a reserve shall revert to the Province."

In a large part of the unsettled domain of British Columbia, as I gather from the blue books, the Indian title had not been extinguished. The last provision I have above quoted, was inserted in consequence of the contention of the Dominion that the quantity of land proposed to be assigned by the Local Government was inadequate even for the present necessities of the tribes, and that when land matters were involved the claims of the red-men were entirely subordinated to those of the whites.

Several deductions, I think, may be fairly made from these transactions: (1), that the term "reserves" had the same well defined scope and meaning in British Columbia, as in the other members of the union; (2), that the lands from which the reserves were to be set apart by the Province, on the application of the Dominion, were Crown or public lands, though inhabited at large by Indians; (3), that when the purposes of the reserve were satisfied by the diminution, or absorption or disappearance of the Indians, the land freed from that trust was to revert from the Dominion to the Province, and be dealt with thereafter as ordinary public land; (4), underlying the whole there is an affirmance of the constitutional propositions that the claim of the Indians by virtue of their original occupation is not such as to give any title to the land itself, but only serves to commend them to the consideration and liberality of the Government upon their displacement; that the surrender to the Crown by the Indians of any territory adds nothing in law to the strength of the title paramount, and that in the case of reserves created after Confederation, when the purposes are ended for which the appropriation of the land was made, the title, legal and equitable, reverts from the Dominion, whose trusteeship has thus ceased, to the proper constitutional owner, *i. e.*, the Province wherein the lands are territorially situate.

As the Dominion claimed this territory at the time of the North-West angle treaty, that treaty was concluded

ex parte so far as Ontario is concerned. But as in the case of British Columbia, when the Province is the owner of the public lands, and for the purposes of settlement it is needful to extinguish the Indian title and allot reserves, it may well require the co-operation of both the General and the Local Governments in order properly to adjust the terms and details. It would seem unreasonable that the Dominion Government should be burdened with large annual payments to the tribes without having a sufficiency of land to answer, presently or prospectively, the expenditure, and it would also seem unreasonable to allot reserves in the absence of the Province, whose schemes for opening up the country might be prejudiced by the reserves being unsuitably placed. However that may be, in the present case, my judgment is, that the extinction of title procured by and for the Dominion, enures to the benefit of the Province as constitutional proprietor by title paramount, and that it is not possible to preserve that title or transfer it in such wise as to oust the vested right of the Province to this as part of the public domain of Ontario.

Whatever equities—I use this word for want of a more suitable—may exist between the two Governments in regard to the consideration given and to be given to the tribes, that is a matter not agitated on this record.

I have thought it fitting because of the magnitude of the interests at stake, and because of the earnest and elaborate arguments on both sides to give, at perhaps unnecessary length, the reasons which have induced me to decide as I do.

Judgment will be entered for the plaintiff, with costs, and in terms as prayed.

A. H. F. L.

[COMMON PLEAS DIVISION.]

GORING v. THE LONDON MUTUAL FIRE INSURANCE COMPANY.

Insurance—Title and incumbrances—Misrepresentation—Materiality—Statutory conditions, 1, 13, 15.

The plaintiff effected an insurance on buildings and the chattels therein, specific amounts being placed on each. By the application in answer to questions to that effect, the plaintiff stated that the premises were held in fee simple and were unencumbered; and at the end thereof there was a provision that where property was heavily incumbered, or the value of buildings as compared with the amount insured on ordinary contents was small, the manager, &c., was authorized to insert the two-third's clause. The application was made part of the policy, which contained the statement that the premises were represented in the application as being held in fee simple and unencumbered. It was also so stated in the proofs of loss. By the 1st statutory condition, if the insured misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be of no force as respects the property misrepresented, &c. The property herein had been conveyed to the plaintiff by his father in consideration of natural love and affection, but subject to a charge to support the father and a brother and to other charges, and on default the plaintiff was to stand seized to the use of the father of the land, which should immediately revest in him as before.

Held, that under the 1st statutory condition, in order to cause the misrepresentation as to the property to avoid the policy, it must be material, which was a question for the jury to decide; and that the misrepresentation only applied to the buildings, and not to the chattels.

Held, also, that the fifteenth statutory condition which provides that "all fraud or false swearing in relation to any of the above particulars, shall vitiate the claim," did not apply to the statements as to title or incumbrances, for it referred to the particulars contained in the 13th statutory condition, items (*a*) to (*e*) which had no relation whatever to such statements.

The learned Judge at the trial having entered a verdict for the defendants, on the ground that the misrepresentation itself avoided the policy, a new trial was directed.

THE plaintiff by his statement of claim set forth that by policy No. 207,279 of the defendants, dated the 31st January, 1882, he effected an insurance against loss by fire with the defendants on his dwelling house No. 2, barns, sheds and stables, driving house, and ordinary contents of barn, shed, driving house and stable, for the total sum of $1,700, during the term of three years, commencing at noon on the 4th February, 1882; the following

being the particulars of the properties so insured with the amounts of the respective insurance upon each property: On dwelling house No. 2, $100; barn No. 1, shed, and stable $600; driving house $200; ordinary contents of barn, shed, driving house, and stable $800, situate on lot one concession nine, township of Grantham: that the insurance was effected on the terms and conditions in the policy contained, and was to continue in force until the 4th of February, 1885.

That by a certain other policy of insurance, No. 123,105, dated the 28th February, 1883, the plaintiff duly effected an insurance against loss by fire with the defendants, on his dwelling house, ordinary contents thereof, printed books therein, organ therein, and pictures and paintings therein, for the total sum of $3,500, during the term of three years, commencing at noon on the 19th February, 1883, the following being the particulars of the properties so insured, with the amounts of insurance upon each respectively: On his dwelling house, $2,500; ordinary contents thereof, $850; printed books therein, $50; organ therein, $80; pictures and paintings therein, $20; situated on said lot 1. The said last mentioned insurance was affected on the terms and conditions in the policy contained; and it was thereby provided that the same should continue in force until the 19th February, 1886. That on the 3rd August, 1884, while the said policies were in force, a fire broke out in the barn mentioned in policy No. 207,279, and destroyed all the buildings and property insured by the said policies, excepting the building mentioned in policy No. 207,279 as dwelling house No. 2: that the plaintiff at the times of making said policies, and thence until the happening of the said fire, was interested in the said buildings, goods, and things so insured to the amount insured.

The defendants in their statement of defence denied all the statements in the plaintiff's statement of claim.

They also set up by paragraphs 9 and 11, that the policies were in respect of the matters hereinafter referred to,

subject to the statutory conditions in the Fire Insurance Policy Act, except as thereinafter mentioned, which statutory conditions were duly endorsed thereon: that the policies of insurance had a statutory condition thereon to the effect, that if the insured should misrepresent or omit to communicate to the defendants any circumstance material to be made known to them in order to enable them to judge of the risk they undertook, such insurance should be of no force in respect of the property in regard to which the misrepresentation or omission is made: that by his applications, dated the 31st January, 1882, No. 207,279, and 19th February, 1883, No. 123,105, the plaintiff misrepresented to the defendants that there were no incumbrances upon the said insured properties upon the premises wherein the same were situated, and the said defendants subscribed and granted the said policies confiding in the said statement of the plaintiff, nevertheless the said properties were charged with certain encumbrances, particularly set out in a certain agreement, dated the 8th January, 1881, and made between the plaintiff and Harmon H. Goring, and registered in the registry office for the county of Lincoln, in book 8 for Grantham, as number 3,424, which was a circumstance material to be made known to the defendants to enable them to judge of the risk they undertook, whereby the said insurances became of no force, value, or effect.

The plaintiff joined issue on the defendants' statement of defence.

The cause was tried before Galt, J., and a jury, at St. Catharines, at the Spring Assizes of 1885.

The plaintiff put in the two policies of insurance in the statement of claim mentioned, in each of which, after describing the property insured, was this provision: "For a more particular description, and as forming part of this policy, reference being had to the application of the insured" (giving the numbers of the above applications) "in file in the office of the company. * * The above insured property being represented in the said application

as otherwise uninsured, and the premises aforesaid as being held in fee simple, and as being unincumbered."

Among the conditions endorsed on the policies was the first statutory condition:—"If any person or persons insures his or their buildings or goods, and causes the same to be described otherwise than as they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made."

The applications which were put in by the defendants were signed by the plaintiff, and contained the following questions and answers: Q. 24. "Applicant's title held in fee simple, or how?" A. "Fee simple." Q. 27. "Is the property encumbered? If so, state full particulars?" A. "No."

At the end of the application was the memorandum: "Memo—Where property is heavily encumbered, or the value of buildings as compared with amount insured on ordinary contents relatively small, the manager, or other officer of said company, is authorized to insert the two-thirds clause in policy."

It also appeared by the evidence that Harmon H. Goring, father of the plaintiff, was before and on the 8th January, 1881, owner of the real estate; and by indenture, bearing date 8th January, 1881, and made between the said Harmon H. Goring of the first part, and the plaintiff, of the second part, the said Harmon H. Goring, in consideration of natural love and affection, granted, released, and quitted claim unto the plaintiff his heirs and assigns, all his estate, right, title, and interest in the said premises.

This conveyance contained the following provisions: "subject nevertheless to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown; and also subject to the provisions, stipulations and conditions contained and expressed in a certain

agreement bearing even date with these presents by and between the said Harmon H. Goring and Albert E. Goring," (the plaintiff.) "It is hereby understood and agreed by and between the parties hereto, and it is a condition of the grant herein contained, that if the said party of the second part" (the plaintiff) "shall at any time hereafter fail or make default in the performance or observance of the covenants, provisoes and stipulations, or any of them, made or contained in a certain agreement, bearing even date with these presents, and executed by and between the parties of the first and second parts, then from and after such default as aforesaid, the party of the second part shall be and stand seized of the said lands to and for the sole and only use of the said party of the first part, his heirs and assigns forever."

The agreement referred to in the indenture in manner aforesaid, contained a covenant on the part of the plaintiff, during the life of his father, to provide whenever demanded a comfortable home with him, the plaintiff, and to maintain and support his father in as good and comfortable a manner as the said Harmon H. Goring had been used to; also to support and maintain the plaintiff's brother, Solomon Goring, until the said Solomon Goring attained the age of twenty-one years; and after he attained that age, either to support him or pay him for his support and maintenance during his life the sum of $125 per annum in quarterly payments in case the said Solomon Goring should not see fit to live with the plaintiff. The said obligation to cease when the plaintiff should sell the said lands, or a sufficient portion thereof to raise the sum of $2,500, and should deposit the said sum in the agency of the Canadian Bank of Commerce at St. Catharines, to the credit of the said Harmon H. Goring, the grantor, or if the said Harmon H. Goring should not then be living, to the credit of the plaintiff, as trustee for the said Solomon Goring; such money, or the income thereof, to be expended for the proper support and maintenance of the said Solomon Goring; also upon the death of the said Harmon H. Goring, or whenever the plaintiff should sell the said lands, or enough to realize the sum of $100, which ever

should first happen, the plaintiff should pay to Charlotte E. McNaught, wife of Archibald McNaught, the sum of $100; also to allow his mother Mary J. Goring to use and occupy the house at the south end of the Granthan lot, with the orchard, being two acres. The agreement then provided that upon default in the performance or observance of the covenants, &c., contained in the agreement the plaintiff should stand seized of the lands for the sole and only use of the said Harmon H. Goring, his heirs and assigns, and the same should immediately revest in the said Harmon H. Goring, his heirs and assigns, as before the said grant.

In the proofs of loss, in the seventh paragraph of the plaintiff's statutory declaration, the plaintiff declared that the land on which the insured buildings were situated, "was unencumbered at the time of the fire, whether by mortgage, judgment, or by any amount due or yet to become due, as part of the purchase money." And in the ninth paragraph: "that no other person or persons at the time of the fire had any legal or equitable interest in any part of the property, real or personal, herein charged for."

The buildings, except dwelling house No. 2, with contents, were destroyed by fire on Sunday the 3rd August, 1884. And the plaintiff, in his said proofs of claim, alleged the total value of the real property destroyed was: dwelling house $5,000, barn, shed and stable $1,500, driving house $200, and of the personal property $1,341.10; and he claimed to be paid in respect of moveables $1,002.70, and of buildings $3,300; total claim $4,302.70.

On the 3rd October, 1884, the company notified the plaintiff of an assessment of $22.97 in respect of premium note on policy No. 123,105, which amount the plaintiff sent to the defendants, but it was returned by them in a letter stating the notice of assessment of the plaintiff was a mistake.

In his evidence the plaintiff swore that he was not asked the question "is the property encumbered?" when

he signed the application, but admitted that he signed the application.

A correspondence took place between the plaintiff's solicitors and the company, and among the letters from the former addressed to the secretary was one of the 1st September, 1884, wherein they said: "We forwarded to your company on the 13th ult. proofs of claim under the above policies. Our client has informed us that since then your inspector has attended at the premises and made the usual inspection, and while there requested him to make a declaration that the lands are incumbered, which he refused to do. When filling in the proofs of loss sent by you, it did not occur to us that the word 'incumbrance' there mentioned comprised the annuity payable by the claimant to his mother and brother; and we thought it only referred to mortgages and charges which would entitle the holders thereof to an interest in the amount payable under these policies. However, we will forward to you all the papers in connection with the matter, if you wish to see them."

Subsequently the papers, including the deed and agreement between the plaintiff and his father and mother, were sent to the company for inspection.

There was not, in the applications or in the policies, any stipulation or declaration that any untrue statement made by the insured in answering the questions should avoid the policies, except those contained in the statutory conditions; and on the face of the policies it is expressly stated, that the policy is made and accepted subject to, and in reference to the terms, conditions, and explanations, stated hereunder, and in the variations in conditions printed in red ink, which are to be used and resorted to to explain or ascertain the rights and obligations of the parties in all cases not otherwise provided for.

At the close of the case *Rykert*, for the defendants moved to dismiss the action, on the grounds that the property insured was encumbered by reason of the agreement between the plaintiff and his father, and the provisions of

the deed under which the plaintiff held the property from his father; also on account of the false swearing in the statutory declaration made by the plaintiff in his proofs of loss furnished under the condition in the policy in that behalf, in alleging that the property was not encumbered; and that no other person or persons at the time of the fire had any legal or equitable interest in any part of the property, real or personal, charged for.

Osler, Q. C., for the plaintiff, contended that the encumbrance was not necessarily material to the risk; and whether it was or was not material was a question of fact and not of law, and should be submitted to the jury: that the objection was taken under the first statutory condition, and that it was not set up in the statement of defence by way of warranty in the application, or in the policy; and as to the proofs of loss no irregularity therein could be used as an objection, not having been stated in reply to the letter of the plaintiff's solicitors, asking if the proofs were sufficient; and as to the question whether there was false swearing therein, that was one of fact on which the opinion of the jury must be taken; and there was in fact only one question to be tried, and that is, was the family arrangement a concealment of a fact which would have caused the insurance company to charge a higher rate, or refuse the risk; in other words did it increase the physical or moral hazard.

The learned Judge delivered the following judgment:

"The observations I am about to make apply to both policies, because in both the application is the same.

"In answer to the questions contained in the application the plaintiff represents that he is the owner in fee of the property, and that it is unincumbered. The statements in the applications are made part of the policy, because by the policy special reference is made to the application, and also to the fact contained in that application, that the plaintiff held the premises in fee simple, and that they were unincumbered.

"In my opinion this would have amounted to a warranty, but the defence is not pleaded.

"The defendants however, by the 9th and 11th paragraphs of their statement of defence, rely on the first statutory condition. It is evident that the defendants did rely on the circumstances as to the property being held in fee simple and as being unencumbered; and it has been shewn that the property is encumbered.

"In my opinion the plaintiff is not entitled to recover.

"I give judgment for the defendants."

In Easter sittings, May 21, 1885, *Osler*, Q. C., obtained an order *nisi* to calling on the defendants to shew cause why the judgment for the defendants should not be set aside and a new trial had between the parties, on the ground that there was evidence to go to the jury on the plaintiff's claim and the questions were questions of fact for the jury and not questions of law to be ruled upon by the Judge as more fully set forth in the short hand notes at the trial.

During the same sittings, June 6, 1885, *Osler*, Q. C., supported the order *nisi*, and referred to *Nicholson* v. *Phœnix Ins. Co.*, 45 U. C. R. 359; *Peck* v. *Phœnix Mutual Ins. Co.*, 45 U. C. R. 620; *Quinlan* v. *Union Fire Ins. Co.*, 8 A. R. 376; *Sands* v. *Standard Ins. Co.*, 27 Gr. 167.

Moss, Q. C., contra, referred to *May* on Insurance, 2nd ed., secs. 183-5; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 487, 503-4; *Thomson* v. *Weems*, 9 App. Cas. 671; *Graham* v. *Fireman's Ins. Co.*, 41 Amer. R. 349; *Behn* v. *Burness*, 3 B. & S. 751, 754.

June 27, 1885. CAMERON, C. J.—It is strange that with all the care insurance companies take to protect themselves from being unduly practised upon, and to make truth the basis of the contracts they enter into, new questions are continually being presented from the way in which they frame their applications and policies.

In the present case the evidence abundantly establishes that the defendants considered it material that they should be informed of the condition of the plaintiff's title to the

buildings that they were insuring, and whether such title was encumbered in any way. The questions in the plaintiff's application made on the printed form of the defendants, and the reference in the policies to the fact that the plaintiff alleged his title was one in fee simple, and was unencumbered, make this exceedingly clear; but they have not provided that a false statement in respect thereto shall avoid the policy unless such false statement was material to be made known to them in order to enable them to judge of the risk.

Whether the condition of the title or the incumbrance is material or not would seem to be one of fact upon which the jury are the tribunal that must decide in the absence of a warranty or a stipulation as to what is material.

Lord Chancellor Cransworth, in *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, at p. 503, thus puts the difference between a warranty and a representation:—"The learned Judges who decided that the direction actually given was good, proceeded upon the well-known rule of law, that there is a great distinction between that which amounts to what is called a warranty and that which is merely a representation inducing a party to enter into a contract. Thus if a person effecting a policy of insurance says, 'I warrant such and such things which are here stated,' and that is part of the contract, then, whether they are material or not is quite unimportant,—the party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bonâ fide*, unless it is material, it does not signify whether it is false or not false."

Mr. Moss very forcibly presented the argument that the questions and answers in the plaintiff's application having been made a part of the policies, though those answers were not in terms made warranties or material, became material whether they were in fact so or not; and it was not competent to the plaintiff to shew that whether true or false the state of the title or incumbrance did not affect

the risk. The contention is supported by his reference to *May* on Insurance, 2nd. ed., sec. 185; and the authorities there cited from decisions of the Courts in several of the states of the neighbouring republic, seem to accord with the text. There is not, however, in those states any law restricting insurance companies from setting up any defence, condition or rule of law that may exempt the companies from liabilities, while here they are restricted and are only permitted to rely upon certain statutory conditions to shield them from what may be unjust claims.

The condition that the defendants have upon the policies now in question applicable to the defences set up, is the first, which renders the policy void if the insured misrepresents or omits to communicate any circumstance which is material to be made known to the company in order to enable the company to judge of the risk.

This is different from a condition which in terms makes the company the judge of the materiality, and leaves it open to have the materiality enquired into in the ordinary way in which such questions are determined in courts of justice, that is to say as questions of fact and not of law, by the jury, or the Judge, if tried without a jury. To hold that this would not be a question for the jury, is to determine that any and every incumbrance no matter what its character or extent avoids the policy. Thus a policy on a building worth $10,000, for $5,000, would be vacated if there was a rent charge of say $10 on the land, though without the building worth $10,000, by an erroneous answer that the land was unencumbered, though such encumbrance would not in reason influence the company in accepting or declining the risk, or in any way affect the physical or moral hazard.

I have no doubt, however, that the untrue answer in the present case is a very serious matter and it may be that, notwithstanding the oftentimes very unreasonable leaning of juries against insurance companies, the plaintiff may derive no benefit from a new trial as far as the insurance on the buildings is concerned.

This leads to the consideration of the question whether the misrepresentation as to title or incumbrances affects the plaintiff's right to recover in respect of the chattels which were covered by the policies and destroyed.

In *Phillips* v. *Grand River Mutual Fire Ins. Co.*, 46 U. C. R. 334, I had occasion to consider the question, and came to the conclusion that by the express terms of the first condition, misrepresentation only affected the insurance and avoided the policy as to the insured property to which the misrepresentation applied; and, if right in this view, there would have to be a new trial to enable the plaintiff to establish his claim, if he has one, in respect of the chattels even though we must have held the insurance upon the buildings vacated. If the misrepresentation was such as to avoid the contract altogether, it would be otherwise but no such question is presented on the pleadings, the defence being based upon the first condition which, as I have said, in terms confines its destructive effect to the insurance upon the buildings.

I have not overlooked the defence set up in the seventh and eighth paragraphs of the statement of defence presenting the alleged false swearing in the proofs of loss furnished after the fire.

There was no evidence that the property destroyed was not of the value alleged in such proofs of loss given under the seventh paragraph, and the false swearing set up in the eighth paragraph had relation to the title to the land and the encumbrance, as to which false swearing would not vitiate the policy.

The condition under which the defence is raised is the fifteenth, which is "all fraud or false swearing in relation to any of the above particulars shall vitiate the claim." The above particulars are contained in the 13th condition items (*a*) to (*e*), and have no relation whatever to statements as to title or encumbrances.

The evidence undoubtedly established false swearing in the proofs of loss in relation to the title and encumbrances, but under the language of the condition, false swearing

except in respect of the matters specially referred to, can have no effect upon the policy.

The new trial must be had on the whole case, and with costs to abide the event.

GALT and ROSE, JJ., concurred.

Order absolute for new trial.

[COMMON PLEAS DIVISION.]

GRAHAM v. LANG.

Landlord and tenant—Forfeiture of term and rent due on assignment—Distress.

The defendant made a lease under seal to R., dated the 8th November, 1884, for five years from the 12th November. at the rent of $400, payable half yearly in advance on the 12th November, and May in each year. The lease contained a covenant that, "if the lessee shall make any assignment for the benefit of creditors, * * the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable." R. paid the first half year's rent On the 5th May, 1885, R. made an assignment for the benefit of creditors; and on the 8th May, the defendant, claiming to do so under the above covenant, distrained for the half year's rent, which, in the regular course of time, would have been payable in advance on the 12th May.

Held, that the distress was valid; for that under the above covenant it might be held that the money reserved as rent accrued due at the same instant as the lease terminated, and not thereafter; but, even if that construction could not be given to it, the distress would nevertheless be valid, although made for money claimed for rent falling due after the expiration of the term, by reason of the lessee's express personal covenant declaring and constituting the sum as rent; and the covenant which was binding on the tenant was equally binding on the plaintiff as his assignee.

THIS was an action, brought by the plaintiff as trustee for creditors under an assignment made to him by John H. Ruddy, dated 5th May, 1885, against the defendant for distraining when no rent was due.

The defendant by his statement of defence well avowed the taking of the goods and chattels, setting up an indenture of lease dated 8th November, 1884, and made be-

tween the defendant and the said Ruddy, whereby Ruddy became tenant to the defendant of certain premises for five years from the 12th November, at the yearly rent of $400, payable half yearly in advance on the 12th of November and May in each year; and alleged that Ruddy paid the half year's rent due on 12th November, 1884: that the lease contained a covenant by Ruddy, that if he should make any assignment for the benefit of creditors the full amount of the current yearly rent should be at once due and payable: that by virtue of the assignment to the plaintiff so much of the then current year's rent of the premises as was then unpaid, namely, the sum of $200, became at once due and payable to the defendant: that the rent became so due and payable as aforesaid to the defendant so soon as such assignment for the benefit of creditors came to his knowledge, namely, on or about the 8th May, 1885; and while the goods were in and upon the premises demised by him to the said Ruddy under the lease the defendant seized and took the goods as and for a distress for arrears of rent, &c.

The plaintiff replied that the covenant mentioned in statement of defence was not truly set forth, as it provided that should the said John H. Ruddy make any assignment for the benefit of his creditors the term should immediately become forfeited and void; and at the time the goods were distrained the term was forfeited and void, as it was only on account of such forfeiture that the alleged rent became payable, all rent secured by the lease, and payable during the existence of the term, having been previously paid.

The defendant by way of rejoinder set out the covenant, namely, that "if the lessee shall make any assignment for the benefit of creditors * * the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable;" and alleged that at the making of the distress the defendant had not done any act, matter or thing whereby the term had been terminated or brought to an end; and

that at the making of the distress neither the plaintiff nor Ruddy had done any act, matter or thing whereby the term had been, or might or could be brought to an end, save and except the making of the assignment.

To this rejoinder the plaintiff demurred on the ground, that it showed no defence to the action, because the lease was by the terms of it forfeited and void, and the alleged rent only became due after the termination of the term; and by reason of such termination having already occurred no right of distress existed; and such distress was therefore illegal.

On October 6th, the demurrer was argued.

Watson, in support of demurrer.
Marsh, contra.

November 6, 1885. WILSON, C. J.—Action for distraining where no rent due.

There was a covenant in the lease that, "if the lessee shall make any assignment for the benefit of creditors, * * the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable."

The defendant made a lease by deed to one Ruddy on the 8th of November, 1884, for five years from the 12th of November, at $400 rent per annum, payable half yearly in advance, on the 12th of November and the 12th of May, in each year. Ruddy paid the first half year's rent. The second half year's rent would by the regular course of time (payable in advance) be due on the 12th of May, 1885. Ruddy made an assignment to the plaintiff on the 5th of May, 1885, for the benefit of creditors; and on the 8th of May, the defendant distrained for the half year's rent, which would have been payable in advance on the 12th of May, under that provision in the lease, that if Ruddy made an assignment for the benefit of creditors the term should immediately become forfeited, "*and the*

full amount of the current yearly rent shall be at once due and payable."

The plaintiff has treated the defendant as a wrong-doer in distraining.

Mr. Marsh for the demurrer to the defendant's justification, contended that the assignment of the lessee made the rent, which would have been due by course of time on the 12th of May, due as a matter of contract on the 5th of May, on the making of the assignment; but that the lease was not forfeited by the making of the assignment, and could not be forfeited until the defendant as landlord did some act which shewed expressly he had elected to treat the assignment as a forfeiture. And that the distress upon the 8th of May, though before the rent would in due course of time have fallen due, was not such an act which shewed the landlord's intention to treat the term as forfeited; and therefore the distress upon the 8th of May was a wrongful seizure and distress.

The cases cited were *Griffith* v. *Brown*, 21 C. P. 12, *Young* v. *Smith*, 29 C. P. 109; *Roberts* v. *Davey*, 4 B. & Ad. 664; *Davenport* v. *The Queen*, 3 App. Cas. 115, 128, and *Nuttall* v. *Staunton* 4 B. & C. 51, 56.

Upon the facts appearing on the pleadings the tenant Ruddy did an act on the 5th of May by making an assignment for the benefit of creditors, which subjected the lease to forfeiture, if the defendant as landlord elected to treat it as an act of for feiture.

The defendant did, on the 8th of May distrain for the remaining half year's rent of that current year of the term before it could, but for that assignment, have been rightly enforced.

Was the distress made on the 8th of May, an act of election by the defendant as landlord to treat the assignment for creditors as an act of forfeiture of the term?

Such an assignment it is declared shall have a two fold operation. 1st, the *term* shall immediately become forfeited; and 2nd, the full amount of the *current yearly rent* shall at once become due and payable.

Might not the landlord claim this immediate payment of what was unpaid of the then yearly current rent without forfeiting the term? That provision might have been to secure the landlord by giving him an immediate right of distress, and a priority over the other creditors, and it might not nevertheless, even for the tenant or those claiming under him, be desirable to put an end to the lease.

If the lease were not determined by the distress made on the 8th of May, there can be no doubt the distress was rightfully made.

If the right of distress upon that day was justified only because the term had become forfeited, what was the order of the two events which were to follow the making of the assignment?

The lease says the term shall be immediately forfeited, and the unpaid part of the rent for the then current year shall at once become due and payable. The mere written order in which these events are said shall follow the forfeiture, does not make that the order necessarily in which they shall be construed as actually following it. It was argued by the plaintiff's counsel that the rent became due by reason of the forfeiture of the term, and therefore after the determination of the term, and so no distress could be made for any rent which fell due after the term was ended; and the case of *Griffith* v. *Brown*, 21 C. P. 12, was referred to on that point.

I do not think that to be the correct statement of the case.

If that which is called rent became due after the expiration of the term, then it is not properly a rent but a sum in gross—it is not a rent, for it is not connected with or dependent upon any tenure or service—and that is manifestly against the intent of the parties. It was never intended the nature of the yearly sum should be changed from what it was up to the very time of the forfeiture of the tenure, and be converted then into something else.

In order therefore to avoid any such prejudice arising to the landlord, and to give effect to the intent of the par-

ties, there can be no difficulty in holding that the money reserved as rent accrued due, when only it could accrue due as rent, with and upon the termination of the lease, and not after the term had ended. Just as the last yearly payment of rent, reserved to fall due upon the expiration of the lease at the full end of the term, would be held to fall due within and not outside of the time.

But if that construction cannot be given to this lease, the distress is nevertheless valid, although made for money claimed as rent falling due after the expiration of the term, by reason of the express personal covenant of the lessee, declaring and constituting this sum as rent; and it may be so considered, for it is a sum accruing due in respect of tenure and service—as between landlord and tenant—and the covenant which is binding on the tenant is binding equally on the plaintiff as his assignee for creditors, and who may be for anything which appears upon the pleadings a mere voluntary assignee, for it is not shewn that any creditor of the tenant, either the assignee or another, is a party to the assignment, or has at any time assented to it.

I give judgment upon the demurrer for the defendant, with costs.

Judgment for the defendant.

[COMMON PLEAS DIVISION.]

REGINA v. RYAN.

Canada Temperance Act of 1878—32 & 33 Vic. ch. 31, (D.)—Summons—Non-personal service—Proceeding ex parte—Quashing conviction—Improper conduct of defendant—Costs.

For the offence of selling liquor contrary to the provisions of the "Canada Temperance Act of 1878," a summons was issued under 32 & 33 Vic. ch. 31, (D.,) made applicable to prosecutions for such an offence, but which was not personally served on the defendant, being merely left at his place of abode. The defendant did not appear before the magistrate at the time and place mentioned in the summons, whereupon the magistrate proceeded *ex parte* and convicted him.

Held, that the conviction must be quashed; and, as it appeared that the defendant had attempted to tamper with the informant, without costs.

THIS was a motion to make absolute an order *nisi* to quash a conviction by the Police Magistrate at Orangeville, for selling intoxicating liquor contrary to the provisions of the "Canada Temperance Act of 1878," it being amongst other things urged that there was no jurisdiction to enter upon the hearing, the defendant not having been served with any summons or apprehended on any warrant, and not having been present at the hearing.

Under section 107 of the "Canada Temperance Act of 1878," 41 Vic. ch. 16, (D.,) the provisions of 32 & 33 Vic. ch. 31, (D.,) are made applicable to prosecutions for offences under the second part of the first named Act, namely, for trafficking in intoxicating liquors.

By section 2 of 32 & 33 Vic. ch. 31, (D.,) "Every such summons shall be served by a constable or other peace officer, or other person to whom the same may be delivered, upon the person to whom it is directed, by delivering the same to the party personally, or by leaving it with some person for him at his last or most usual place of abode."

By section 6, "If the person served with a summons does not appear before the Justice or Justices at the time and place mentioned in the summons, and it be made to appear to the Justice or Justices by oath or affirmation, that the summons was duly served what the Justice or Justices deem a reasonable time before the time therein appointed

for appearing to the same, then the Justice or Justices, upon oath or affirmation being made before him or them, substantiating the matter of the information or complaint to his or their satisfaction, may, if he or they think fit, issue his or their warrant (B) to apprehend the party so summoned, and to bring him before the same Justice or Justices," &c., "to answer to the said information or complaint, and to be further dealt with according to law," &c.

By section 7, "If where a summons has been issued, and upon the day and at the place therein appointed for the appearance of the party summoned, the party fails to appear in obedience to the summons, then, if it be proved upon oath or affirmation to the Justice or Justices present, that a summons was duly served upon the party a reasonable time before the time appointed for his appearance, the Justice or Justices of the Peace may proceed *ex parte* to the hearing of the information or complaint, and adjudicate thereon, as fully and effectually to all intents and purposes as if the party had personally appeared before him or them in obedience to the summons."

In this case the summons was not served personally, but was left at the defendant's place of abode. On the return of the summons the defendant did not appear, and the magistrate proceeded *ex parte*, and convicted him.

On December 8, 1885, *Aylesworth* supported the motion.
E. F. B. Johnston, contra.

December, 9, 1885. ROSE, J.—If there was no service and the defendant did not appear, the magistrate had no jurisdiction, and the *certiorari* was properly issued. See *Regina* v. *Wallace*, 4 O. R. 127, especially p. 140, where the learned Chief Justice said: "We have to see that the inferior tribunal acted strictly within the authority of the Act, duly heard the case, and gave its decision upon the evidence duly laid before him."

In *Mitchell* v. *Foster*, 12 A. & E, 472, where the conviction shewed on its face that the party was convicted

ex parte on default of appearance to a summons appointing too early a day, such conviction was no defence to an action of trespass for enforcing it. Lord Denman, C. J., said, at p. 475: "There is a clear want of jurisdiction apparent on the face of the proceedings."

See, also, *Ex parte Jones*, 1 L. M. & P. 357.

Ex parte Hopwood, 15 Q. B. 121, cited by Mr. Johnston, is clearly distinguishable. There the only question was whether the notice was reasonable, and in that case the defendant's attorney appeared.

In the case I am considering Mr. Johnston did not contend there had been service in accordance with the provisions of the Act.

The magistrate seemed to think that leaving the summons with some person for the defendant at the defendant's "last or most usual place of abode," under sec. 2 of 32 & 33 Vic. ch. 31, (D.,) gave him a right to proceed *ex parte* under section 7. This is clearly not so. To proceed under section 7 is only justifiable where the "summons was duly served *upon the party* a reasonable time before the time appointed for his appearance."

If service is attempted under section 2, and the defendant does not appear, then the magistrate to entitle him to proceed, must issue his warrant as provided by section 6, giving the defendant a *reasonable time.*

The evidence before me shews undue haste, and want of proper judgment. Parties charged must have full and fair opportunity for defence, if the administration of justice is to be respected.

On the other hand there was evidence before the magistrate of most improper conduct on the part of the defendant, he having offered five dollars to the informant to stifle the prosecution. This remains unanswered, and, apart from any liability to punishment under the provisions of sections 110, 112, and 113 of the Canada Temperance Act, clearly disentitles him to any consideration. Even if on other grounds I could have awarded costs against the informant, I certainly would not do so on this evidence.

The conviction must be quashed, without costs; the magistrate is entitled to the usual certificate protecting him against any action for trespass.

Conviction quashed.

[COMMON PLEAS DIVISION.]

BICKFORD V. THE CORPORATION OF THE TOWN OF CHATHAM.

Railways—Bonus—Trustees, necessity for—By-law—Compliance with conditions of—Separate agreement—Necessity to comply with before issue of debentures—Action for damages—R S. O. ch. 174, sec. 559, sub-sec. 4, 36 Vic. ch. 70, O.—Construction of.

Under a by-law to grant aid by way of bonus by the issue of debentures to a railway company, no issue or delivery thereof was to take place until certain conditions and stipulations contained in the by-law were performed, amongst others, the completion of the road, and obtaining the certificate of the Government engineer. By an agreement entered into before the final passing of the by-law, the company covenanted to perform certain other acts, amongst which was the location of a station "at or near" the corner of certain named streets.

By the Municipal Act, R. S. O. ch. 174, sec. 559, sub-sec. 4, authority is given to grant bonuses and issue debentures in aid of a railway company, payable at such times, &c., as the municipal council may think meet. By the defendants special Act of incorporation, 36 Vic. ch. 70, O., the debentures were to be issued and delivered to trustees within six months after the passing of the by-law, who were to receive and convert the same into money, and deposit the proceeds in a chartered bank, and pay the same out on the certificate of the chief engineer of the railway company.

Held, on the evidence that the station, though not located at the corner of the said streets, was not so far therefrom as to prevent its location being by reasonable intendment within the meaning of the word "near;" at all events non-compliance with the terms of the agreement not covered by the conditions, &c., of the by-law would not prevent the accruing of the plaintiff's title to the debentures; but that the defendants' remedy must be for damages for breach of covenant.

Held, also, that a compliance with the terms of the general Act was sufficient, for that the provisions of the special Act, were not restrictive, but enabling and enlarging the powers under the general Act; and that under the circumstances the appointment of trustees would have been useless.

THIS was an action brought by the plaintiff as assignee of the Erie and Huron Railway Company, whereby he claimed the right to receive from the defendants deben-

tures to the amount of $30,000, under a by-law of the defendants, entitled "A By-law to assist the Erie and Huron Railway Company by giving a bonus thereto"; and for a mandamus.

The cause was tried before Cameron, C. J., without a jury, at Chatham, at the Fall Assizes of 1885.

The by-law provided that on (1) the construction and completion for running of the track and road from Chatham to the Canada Southern Railway on or before the 30th of September, 1883; (2) the completion of the whole track and road with stations and freight house and platform of stipulated dimensions at the Canada Southern crossing; (3) the construction and completion of a bridge and footway over the Thames, with the necessary approaches; (4) the completion of the road in other respects, supplied with all necessary rolling stock and materials so as to connect the town of Chatham with certain places named, to the satisfaction of the Commissioner of Public Works, or an engineer appointed by him; and (5), the company *bonâ fide* thereafter running the said road with all necessary accommodation for the public, and with connection at the track of the Canada Southern Railway for one week, the defendants should issue debentures to the amount of $30,000, and when so issued, should forthwith declare the said debentures to be, and the same should become and be the property of the railway company.

The by-law received the assent of the electors, and was duly passed by the council.

Before the by-law was voted on by the electors, an agreement was entered into between the railway company and the defendants, whereby the company covenanted to complete the road as in the by-law set forth; and upon such completion and continuously thereafter to run the said road for at least ten years from the completion thereof; and not to make arrangements with the Grand Trunk Railway, without the consent of the council of the defendants; and to erect workshops and repairing houses or

sheds for said company and the whole road thereof, and to establish the same within the town of Chatham; and to construct at or near the corner of Colborne and William streets, in the said town, a freight and passenger station, with all necessary accommodation connected by switches, sidings, or otherwise with the said road of the company, upon the council of the said town, within three months from the final passing of the said by-law, passing another by-law empowering the said company to make its road and lay its rails along a highway or highways in the said town to the said corner from where the said road would be if the construction thereof were completed in a direct line through the town, or upon the council procuring for and giving to the said company a right of way along the northerly side of McGregor's creek (one half in the water) for the road of the said company to or near the said corner.

After the passing of the bonus by-law, the defendants passed another by-law on the 20th of March, 1883, authorizing the railway company to make its road and lay its rails for one single track or train along the northerly side of Colborne street from the main line to William street, in the said town, and for two tracks, or a double track between Adelaide and William streets, provided that the said road and tracks should be at least eight feet from the middle line of the said street.

Amongst other objections taken at the trial, not necessary to be set out, the defendants objected that the by-law was *ultra vires* of the defendants, because the terms of their special Act governed and had not been complied with.

Cassels, Q. C., and *Douglas*, Q. C., for the plaintiff.

Robinson, Q. C., and *Wilson* of (Chatham,) for the defendants.

[The learned CHIEF JUSTICE delivered judgment, setting out the by-law, agreement, and evidence, and holding that the conditions and stipulations of the by-law and agreement were substantially complied with; and that the by-law was not *ultra vires*.]

The only parts of the judgment deemed necessary to report are the following:

CAMERON, C. J.—There was conflicting evidence as to whether the station could be put nearer to William street so as to be convenient and useful to the public and the company, so there was not a strict compliance with the terms of the plaintiff's agreement, unless the distance between the station and William street was not so great as to prevent it coming within by reasonable intendment, the meaning of the word "near."

I think I must hold the distance is not too great to prevent the location of the station in its present position being a complete compliance with the agreement. But were it otherwise, I do not think this station was an essential to the completion of the road in accordance with the by-law, and would not prevent the accruing of the plaintiff's title to the debentures, which does not depend upon the performance of the requirements of the agreement not provided for by the by-law. For a breach of the plaintiff's agreement, so far as the stipulations therein are not covered by the conditions of the by-law are concerned, the defendants' remedy would be under the counter-claim for such damages as the defendants could show they have sustained by the breach complained of.

[The learned Chief Justice then proceeded to discuss the conditions and stipulations of the by-law, holding, as before stated, that they had been complied with; and continued.]

The plaintiff Bickford is, therefore, entitled to the debentures, and the writ of mandamus, as prayed, to enforce his rights, unless the contention of the defendants as put forward by counsel, that the by-law is *ultra vires* and void, is entitled to prevail.

If I correctly understand Mr. Robinson's objection, it is that the manner in which the by-law assumes to aid the railway company is unauthorized by the charter of the company; and there being a special charter with special provisions as to municipal aid, this overrides the provisions of the Municipal Act with respect to aid to railways.

By section 19 of 36 Vic. ch. 70, O, the Act incorporating the railway company, it is made lawful for a municipality or any portion of a municipality interested in securing the construction of the railway, "to aid and assist the company by loaning, or guaranteeing or giving money by way of bonus or other means to the company, or issuing municipal bonds to, or in aid of the company and otherwise in such manner and to such extent as such municipalities or any of them shall think expedient."

By section 22, within one month after the passing of the by-law, the debentures are to be issued and delivered to trustees appointed or to be appointed under the Act.

By section 28, when the bonus is granted to aid the company "in the making, equipping and completion of their railway, the debentures shall, within six weeks after the passing of the by-law, * * be delivered to three trustees," to be appointed as in the section provided.

By section 31. "The said trustees shall receive the debentures in trust; firstly, to convert the same into money; secondly, to deposit the amount realized from the sale of such debentures in some of the chartered banks * * in the name of 'The Erie and Huron Railway municipal trust account,' and to pay the same out to the said company from time to time on the certificate of the Chief Engineer of the said railway," in the form given in the schedule B to the Act.

It is clear if these provisions restrict the aid to be given to the manner mentioned in the sections referred to, the method pointed out has not been followed. No trustees were appointed, and the engineer of the railway company was not the officer chosen to certify.

But by section 559, sub-secs. 3, 4, of the Municipal Act, R. S. O. ch. 174, the Municipal Act in force when the by-law in question was passed, the councils of the municipalities mentioned, including towns, were authorized to pass by-laws "for granting bonuses to any railway company in aid of such railway, and for issuing debentures," &c., "payable at such times, and for such sums respectively, not less

than twenty dollars, and bearing or not bearing interest as the municipal council thinks meet."

This affords ample warrant and authority for passing the by-law; and I cannot adopt Mr. Robinson's contention that by the terms of the special Act of incorporation this general provision was restricted and modified.

The provisions of the special Act are not restrictive, but enabling and enlarging the powers of the municipality under the Municipal Act. Section 19 enabling portions of of a municipality to aid the railway, and the directory provisions of that Act were wholly unnecessary for the protection of the municipality, when no money was to be paid or debentures delivered till the road was completed according to the condition of the by-law. The services of trustees were wholly useless; and unless it could be said that a municipality could not protect itself by any stipulations other than those contained in the Act of incorporation, it would be impossible to deny it the right of saying this bonus shall not be available till the company had performed the conditions on which such bonus was to be granted.

The object being within the power conferred on the municipality, it cannot be said it has acted *ultra vires* in attaching a condition to the aid intended not inconsistent with the object, but rather in furtherance of it.

The cases cited by Mr. Robinson do not go the length he contends for. I am not prepared to say that I would follow the American decision in *Gould* v. *Town of Sterling*, 23 N. Y. 439, 458, cited by him, if in point. It is, however, quite distinguishable. It decides that a municipality having the right to borrow and to give its bonds to the lender for the purpose of aiding a railway company, is not at liberty, instead of borrowing the authorized amount and handing it over to the company, to deliver its bonds direct to the company which was obliged to sell them at a sacrifice. Thus there was no analogy to the present case, and it cannot be said to be an authority against the by-law which ensures the intended aid going direct to the company

undiminished in amount, but not through the medium of trustees which, where applicable, is the medium of delivery under the Act of incorporation of the company. See *Bank of Toronto* v. *Cobourg, Peterborough, and Marmora R. W. Co.*, 7 O. R. 1, in which it was held by Boyd, C., that under a by-law authorizing the issuing of debentures and their negotiation from time to time as the proceeds should be required for the purposes of the company, the delivery of the debentures to a creditor of the company as security for a debt, was a valid negotiation within the meaning of the by-law, which may not be quite reconcilable with the decision of the late Chief Justice of Ontario in *Bank of Toronto* v. *Beaver Mutual Ins. Co.* 28 Gr. 87.

I incline to the opinion that in all such transactions the substance rather than the form should be considered; and if in substance the matter is *intra vires*, it should not on account of defective form, be held *ultra vires* unless the form used is prohibited by the enabling statute or by, law.

Judgment accordingly.

[CHANCERY DIVISION.]

In Re The Queen City Refining Company of Toronto (Limited.)

Winding-up proceedings—Contributories—Stockholders by subscription or allotment—R. S. O. c. 150.

In the winding-up proceedings of the Q. C. R. Co., the Master placed the subscribers to the stock book upon the list of contributories. The contributories appealed upon the ground that although they were subscribers for stock still no stock had been allotted to them by the directors.

Held, that the Master was right, that the contract signed was an unqualified taking of shares and that the Act R. S. O. c. 150, contemplates two modes of acquiring stock, one by subscription and the other by allotment.

This was an appeal by Alexander Campbell and several other persons from a certificate of the Master-in-Ordinary naming them as contributories or stockholders in the Queen City Refining Company of Toronto.

The company was in process of liquidation under a winding up order made by the Court, and dated December 16th. 1884.

The stock subscription book was produced before the Master, signed by the appellants, and headed in these words:

"We whose names are hereunto subscribed, agree to become stockholders in the Queen City Refining Company of Toronto, and to take the number of shares set opposite to our respective names, and we severally each for himself, his heirs, executors, and administrators, and not jointly the one for the other, bind ourselves to make payments thereon, and to all other matters and things in relation to the same as may be required by the Board of Directors of the said company."

It appeared in evidence that certain debts had been incurred on behalf of the company, but that it had never gone into operation in the line of business for which it had been started, and no allotment of any stock had ever been made by the directors to the subscribers for the stock.

The appellants' main ground of appeal was that their

subscriptions had never been accepted, or any stock allotted to them, or notice of acceptance or allotment given.

The appeal was argued on the 30th day of October, 1885, before Boyd, C.

A. Hoskin, Q. C., and *Foster*, Q. C., for the appeal. The company was incorporated under "The Ontario Joint Stock Companies' Letters Patent Act," R. S. O. ch. 150. The charter is dated October 7th, 1881, and is in the usual form. Before this company was incorporated, subscriptions for stock were obtained in a stock subscription book headed (read as set out above.) Our contention before the Master was that no allotment of stock was ever made to the subscribers. The Master held that no allotment was necessary, and that the subscription was sufficient. The liquidator contended that even if allotment was necessary the subsequent notices of calls given were enough. The by-law under which the calls were made, is bad and no notice of it is proved. Section 34 of the statute provides that if no allotment of the stock is made by the letters patent, that it shall be done by the directors by by-law; and section 35 provides that "no by-law for the allotment or sale of stock * * shall be valid or acted upon until the same has been confirmed at a general meeting." The evidence shows that no allotment was made and no by-law passed. The stock subscription list is a mere offer to take stock. The Master proceeded on the law laid down in *Lake Superior Navigation Co.* v. *Morrison*, 22 C. P. 217. [BOYD, C.—I think I tried a case at Ottawa of *The National Ins. Co.* v. *Eagleson*, where the point was argued.] [*Blake*, Q. C.—That case is reported in 29 Gr. 406.] *The Lake Superior Navigation Co.* v. *Morrison*, was decided under 27 & 28 Vict. ch. 23, and amendments, in which statutes there is no such provision in respect to allotment, as there is in the Ontario Statute. *Nasmith* v. *Manning*, 5 A. R. 126, was decided under the Toronto, Grey and Bruce Railway Act, 31 Vict. ch. 40 (O.), and there is no such provision in that Act either. The

language of the Ontario Statute is imperative, and the subscription is, therefore, a mere offer to take the stock. Section 34 is intended as a protection to shareholders, so that subscribers cannot get stock if they are worthless, and the directors must use a discretion, and judge who are to be shareholders. The interpretation clause of the Act defines "shareholder" as a "subscriber to the stock," but subscriber there means a subscriber whose subscription has been accepted or concurred in by allotment. See judgment of Henry, J., in *Nasmith* v. *Manning*, 5 S. C. R. 440.

S. H. Blake, Q. C., and *Meyer*, for the liquidator. The argument of the appellants cannot apply to the charter members or those who subscribed for stock before the issue of the charter. Section 29 is merely permissive as to the regulation of the allotment of stock by by-law. The directors may pass such a by-law if they wish, and if they do they cannot deal with the stock in opposition to it. We refer to *Re Standard Ins. Co.—Kelly's Case*, 7 O. R. 204; *National Ins. Co.* v. *Eagleson*, 29 Gr. 406; *European and North American R W. Co.* v. *McLeod*, 3 Pugsley, N. B. 40; *In re General Provident Assurance Co.—Bridger's Case*, L. R. 5 Ch. 305; *East Gloucester R. W. Co.* v. *Bartholomew*, L. R. 3 Ex. 15. An action could be brought against subscribers for stock. The Master was therefore right in making them contributories.

A. Hoskin, Q. C., in reply. The fact of a person being an applicant for the charter does not make him a shareholder, as such an act is only equivalent to a subscription to articles of association in England. A person being named in a charter is not sufficient, there must be an allotment. The other directors might not give him the stock. Even an attendance at a directors' meeting is not sufficient: *In re Columbia, &c., Works—Hewitt's Case*, 25 Ch. D. 283. See also *In re Denham & Co.* 25 Ch. D. 752; *Re Llanharry Hematite Iron Ore Co.*, 12 W. R. 814; *In re Electric, &c. Co.—Carmichael & Hewitt's Case*, 30 W. R. 742.

October 30, 1885. BOYD, C.—I think the Master was right in making these parties contributories. They signed the stock subscription book in which they agreed to take the number of shares set opposite their names, and they affixed their seals to the contract. This contract is in terms an unqualified taking of the shares. I do not think that section 29 of the Act affects this, as I read it. The Act really contemplates two modes of acquiring stock, one by subscription and the other by allotment.

G. A. B.

[CHANCERY DIVISION.]

ROBERTSON V. PATTERSON.

Specific performance—Agreement to give covenant to build—Refusal to execute.

In an agreement for the sale of land from R. to P., the terms were inserted in these words: "Price $1,000, $200 cash, and balance in five yearly payments, interest at the rate of seven per cent., and covenant of P. to build house worth not less than $4,000, to be commenced in a year from date and finally completed in two years * * *." The $200 was paid down, and R's solicitor prepared and tendered the deed (in which was inserted a covenant to build) and the mortgage to P. for execution. P. refused to execute them and R. brought an action for specific performance, which P. defended on the ground that the covenant to build was too vague and would not be enforced by the Court.

Held, that the plaintiff was clearly entitled to the performance of the defendant's agreement to give a covenant to build a house of a certain value within a specified time.

Wood v. *Silcock*, 50 L. T. N. S. 251, distinguished.

THIS was an action brought by Arthur Keith Stewart McAlpine Robertson against Henry Albert Patterson for the specific performance of an agreement.

The agreement was in these words:

"CHATHAM, 1st Dec., 1884.

"A. R. K. McA. Robertson agrees to sell and Henry Albert Patterson agrees to buy lots 68 and 69 on plan 244, of part of Raleigh, lot 23, con.

1 (now Chatham) registered in the registry office of the county of Kent. Price $1,000, $200 cash and balance in five yearly payments, interest at seven per cent., and covenant of Patterson to build house worth not less than $4,000, to be commenced in year from date and finally completed in two years.

"Purchaser to search title at his own expense. Vendor to produce only such abstracts, title deeds, copies, &c., as are in his possession and to be at liberty to rescind if any objection made, which he is unable or unwilling to remove.

"Measurements of lots 186 feet on King street, 266 feet on Inshes avenue, and 394 feet on W. limit of lot 69.

(Signed), "A. K. S. McA. Robertson.
"H. A. Patterson."

The $200 mentioned in the agreement was paid down and the plaintiff's solicitor prepared and tendered a deed containing a covenant to build and also the mortgage to the defendant for execution, which, however, the defendant refused to execute.

The principal defences set up by the defendant were that the writing signed was not intended as a binding agreement but only as a memorandum of the terms upon which the plaintiff was willing to sell, and that the agreement to build was vague and indefinite, and would not be specifically enforced by the Court.

The action was tried at the sittings at Toronto on October 27, 1885, before Proudfoot, J.

The first defence as to the writing not being an agreement was found in favour of the plaintiff upon the evidence, and the point as to the covenant being too vague was argued.

Moss, Q. C., for the plaintiff. The statement of defence does not allege any mistake or misunderstanding. The plaintiff is therefore entitled to the covenant as demanded when the deeds were tendered. No objection was taken by defendant as to its form, and if he had objected to the form it could have been settled by the Court, under the Vendor and Purchaser Act, R. S. O. c. 109. Even if the old rule of this Court was to refuse specific performance of such a covenant after it was given, the covenantee

would be left to and had his remedy at law, but now this Court has both jurisdictions. The evidence here has not made it plain that the defendant *bonâ fide* and reasonably made a mistake: *McDonell* v. *McDonell*, 21 Gr. 342, 345. The Court is not asked to oversee the erection of the building. It is not to be assumed that the defendant will not carry out his contract.

S. H. Blake, Q.C., and *Wilson*, for the defendant. The defendant sets out the agreement and contends that it comes within the class of cases that the Court will not order to be specifically enforced. The contract is too vague: *The Desjardins Canal Co.* v. *The Great Western R. W. Co.*, 2 E. & A. 330; *Brace* v. *Wehnert*, 25 Beav. 348; *Wood* v. *Silcock*, 50 L. J. N. S. 251; *Story's* Equity Jurisprudence, 1st Eng. ed. (1884) sec. 725; *Richards* v. *Swansea, &c., Co.*, 9 Ch. D. 425. The plaintiff asks to have specific performance in a particular way and defendant is at liberty to shew that he never meant to build a house in that way: *Wycombe R. W. Co.* v. *Donnington Hospital*, L. R. 1 Ch. 273; *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182; *Payett* v. *Marshall*, 28 Ch. D. 255; *Preston* v. *Luck*, 27 Ch. D. 497; *Bernard* v. *Meara*, 12 Ir. Ch. R. 389; *Greenhill* v. *Isle of Wight R. W. Co.*, 19 W. R. 345; *Flint* v. *Brandon*, 8 Ves. 159; *McLaughlin* v. *Whiteside*, 7 Gr. 573; *Dickson* v. *Covert*, 17 Gr. 321. As to damages see *Hipgrave* v. *Case*, 28 Ch. D. 356.

Moss, Q.C., in reply. The plaintiff does not ask specific performance of the covenant now. What he wants is, the covenant, and he is entitled to that as well as the mortgage to secure the balance of the purchase money. The Court can enforce a covenant to spend a specific sum in erecting a building. *Wells* v. *Maxwell*, 32 Beav, 408 is precisely in point. See also *Cubitt* v. *Smith*, 10 Jur. N. S. Pt. 1, 1123; *Colton* v. *Rookledge*, 19 Gr. 121. House means dwelling-house at least: Judgment of Brett, L. J., in *Richards* v. *Swansea, &c., Co.*, 9 Ch. D. 425, 434; *Surman* v. *Darley*, 14 M. & W. 185.

November 4, 1885. PROUDFOOT, J.—This is an action for the specific performance of an agreement made 1st December, 1884, by which the plaintiff agreed to sell to the defendant, and the defendant agreed to buy two lots, 68 and 69, in Chatham, on plan 244 registered. Price $1,000, $200 cash and the balance in five yearly payments, interest at seven per cent., and covenant of defendant to build a house worth not less than $4,000, to be commenced in one year from date and finally completed in two years.

A number of defences were set up which I disposed of at the hearing in favor of the plaintiff, except one, viz., whether this contract was one of which the Court would enforce specific performance.

It was objected that the agreement in regard to the house was vague and indefinite, not to build according to a plan, neither size nor material being specified, and that specific performance could not be enforced. In *Brace* v. *Wehnert*, 25 Beav. 351, Lord Romilly says: "An agreement for building a house of a certain value is not one which this Court will direct to be specifically performed." But the agreement in that case was to build according to a plan to be submitted to and approved of by the plaintiff. The plaintiff had never approved of a plan, and the Court could not compel him to approve of a plan if submitted to him by the defendant.

In a later case, *Wells* v. *Maxwell* (No. 1) 32 Beav. 408. Lord Romilly decreed specific performance of an agreement by which the plaintiff agreed to sell to the defendant a piece of land on which the plaintiff was to make a new road of which the defendant was to have the use, and the defendant was to expend £3,000 in building a house on the property. It was argued there that the Court cannot compel the defendant to build a house or the plaintiff to make a road. The Master of the Rolls was of opinion that it was perfectly distinct from a simple tradesman's contract between A. B. and a builder to build him a house, or as between A. B. and a roadmaker to make him a road which rest upon totally different considerations.

And Mr. Waterman, in his book on Specific Performance, p. 29, cites that case as marking the distinction between a contract to build a house and a contract of sale with a stipulation to erect a building or do certain work.

If the present case were the simple agreement to build a house of a certain value that authority would shew that it might be enforced. But that is not precisely the case here. The plaintiff seeks performance of the defendant's agreement to give a covenant to build of a certain value within a specified time, and to this I think him clearly entitled. The size, the plan, and the materials are probably in the discretion of the defendant.

The case *Wood* v. *Silcock*, 50 L. T. N. S. 251, which was much relied on by the defendant appears to me to decide nothing contrary to what I propose to do. Bacon V. C., held that the agreement to build houses was not a concluded one, but merely preliminary to something to be agreed upon at a future time, the plaintiff stating, when examined, that he had plans when the agreement was prepared but the defendant objected to them, and it was then agreed that plans which should make clear the agreement should afterwards be prepared, and there was no agreement, as here, to build of a certain value.

There will be the usual decree for specific performance. The plaintiff to convey the lot, the defendant to execute a mortgage and to enter into a covenant to build.

The plaintiff to have costs to the hearing, further directions, and subsequent costs reserved.

G. A. B.

[CHANCERY DIVISION.]

HARGRAFT ET AL. v. KEEGAN ET AL.

Will—Devise—Illegitimate child as legatee—Death of illegitimate child during life of testator leaving legitimate issue—Lapse of legacy—R. S. O. c. 106, sec. 35.

R. B. by his will devised his property to executors upon trust as follows: "Fifthly, in trust to pay to each of my two surviving children F. B. and M. A. B. the sum of $1,000," and the residue after the payment of his debts, &c., &c., and the said legacies and an allowance to his executors, to his four sisters.

F. B. and M. A. B. were illegitimate children, and M. A. B. married and died during the lifetime of the testator leaving children surviving.

In a suit for administration and construction of the will it was

Held, that the words "child or other issue" in R. S. O. c. 106, sec. 35, mean legitimate child or other legitimate issue and do not apply to an illegitimate child, and that the legacy to M. A. B. lapsed.

THIS was an action brought by William Hargraft and Asa Allworth Burnham as executors of the last will and testament of one Roger Bates, for the construction of his will and administration of his estate, to which all the parties interested therein were made parties.

The usual administration accounts were taken, and the Master reported that a certain legacy of $1,000 to one Margaret Amelia Brock, was still unpaid.

The clauses in the will which affected this legacy were, after a general devise to executors, as follows:

"Fifthly, in trust to pay to each of my two surviving children Frederick Bates and Margaret Amelia Brock, the sum of one thousand dollars.

"Sixthly, in trust after the payment of the said debts, funeral and testamentary expenses, and the said legacies, to pay to my four sisters (naming them) and their female heirs respectively, equally share and share alike, all the rest, residue, and remainder of the moneys arising from the sale of my said estate, save and except the sum of two hundred dollars hereinafter bequeathed to my said executors."

Margaret Amelia Brock was an illegitimate child of the testator, and had married, had children, and died during the lifetime of the testator.

The executors were desirous of having the opinion of the Court as to whether the legacy to Margaret Amelia Brock lapsed, or whether her children took it, and the point was argued when the action was heard on further directions on September 16th, 1885, before Ferguson, J.

J. Hoskin, Q. C., for the infants. Roger Bates died, leaving two illegitimate children, one of whom was Margaret Amelia Brock. If she had been a legitimate child there would be no doubt that the legacy did not lapse, and I contend that even in this case there is no lapse: R. S. O. c. 106, s. 35. The cases are collected in *Theobald* on Wills, 2nd ed., 226. The general rule is that the words child, son, or issue, mean legitimate child, son, or issue. The exceptions are then given at p. 227. Illegitimate children may take if they have acquired the reputation of being the children of the testator, and the will describes them as the testator's children. If they were mentioned as the children of A., and the testator defined who he meant they would take: *Theobald*, 2nd ed., 231. That was what was done in this case. The policy of the Act is shewn in English cases. It was intended to prevent a portion given by a testator to a child going from the estate of such child, and his family from being left portionless, by reason only of the death of the child under certain circumstances, a consequence of law which the common feelings of mankind declared to be a disappointment of the intention of the father: *Winter* v. *Winter*, 5 Ha. 313. The legatee is considered to be living at the time of the testator's death, so her children should take in her place. See also *Regina* v. *Maude*, 2 Dowl. P. C. N. S. 58; *The King* v. *Hodnett*, 1 T. R. 96; *Regina* v. *Brighton*, 1. B. & S. 447.

Riddell, for the residuary legatees. There was a lapse in this case. The cases cited by my learned friend were cases for the interpretation of wills, this is a case for the interpretation of a statute. At the common law there would be a lapse, so the statute must govern. If child, means legitimate child, then issue, must mean legitimate

issue. A bastard child has been held not to mean child under 32 Henry VIII. c. 1: *Thornton's Case*, Dyer 345*a*, see *Bacon's* Abridgment—Title Bastardy. 43 Eliz., c. 2, is interpreted in *King* v. *Reve*, 2 Bulstrod 344; *Westminster* v. *Gerrard*, 2 Bulstrod 346. Child in a will without more means legitimate child: *Dorin* v. *Dorin*, L. R. 7 H. L. 568. A bastard child was held not to be entitled to maintain an action under Lord Campbell's Act: *Dickenson* v. *North Eastern R. W. Co.*, 2 H. & C. 735. I refer also to *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658; *Sleeman* v. *Wilson*, L. R. 13 Eq. 36; *Ward* v. *St. Paul*, 2 Bro. C, C. 583; *Peckham* v. *Peckham*, 2 C. C. C. 46; *The Queen* v. *Birmingham*, 8 Q. B, 410, at p. 424; *The King* v. *Hodnett*, 1 T. R. 96 has been overruled in *Regina* v. *Maude*, *supra*; *The King* v. *Cornforth*, is not an authority against my clients for the version cited in a note to *Priestly* v. *Hughes*, 11 East 1, shews that that case went off on a different point.

Porteous, appeared for the executors.

September 7th, 1885. FERGUSON, J.—The plaintiffs are the executors of the last will and testament of the late Roger Bates, who died on or about the 4th day of April, 1884. The will gave the real and personal estate to the executors on the trusts declared in it.

The action is for an interpretation of the will, and a declaration as to who are entitled to the residue under the sixth paragraph of the same, and for an administration of the real and personal estate.

The fifth and sixth clauses of the will are as follows:—

The learned Judge then read the fifth and sixth clauses of the will set out *supra*.

Margaret Amelia Brock was an illegitimate child of the testator, and she died before the death of the testator, leaving legitimate children living at the time of the death of the testator.

The question, and the only question argued before me was, as to whether or not the legacy to Margaret Amelia Brock lapsed by reason of her death before the death of

the testator, or went to her children, they being legitimate children of hers by reason of the provisions of the 30th section of the Wills Act of 1873. The will bears date the 2nd day of October, 1877. This section is introduced into the Revised Statutes of Ontario as section 35 of chapter 106. So far as I can see the words are identical. excepting the word "dies" is substituted for the words "shall die." The section is as follows:

"Where any person, being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless the contrary intention appears by the will." It was not asserted that any intention one way or the other appeared by the will.

Margaret Amelia Brock, as has already been stated, died during the lifetime of the testator, leaving issue, that is lawful issue.

The question is, whether or not she, Margaret Amelia Brock, being an illegitimate daughter of the testator, fell within the proper meaning of the words in the section above set forth. "Any person being a child or other issue of the testator," for if she did the legacy to her, I think, did not lapse. If, on the other hand, she did not fall within the proper meaning of these words, there would be a lapse of the legacy. The argument was confined solely to this question.

Counsel for the infants relied upon the cases collected in *Theobald* on Wills, 2nd ed., 226, 227, 231, and *Maxwell* on the Interpretation of Statutes, pp. 27, 73, 74, and the cases there referred to, as well as *Winter* v. *Winter*, 5 Ha. 313; *Regina* v. *Maude*, 2 Dowl. P. C. N. S. 58; *The King* v. *Hodnett*, 1 T. R. 96; *Regina* v. *Brighton*, 1 B. & S. 447, and some other authorities.

Counsel for the residuary legatees referred to a very large number of authorities in support of his contention that there had been a lapse of the legacy in question. No argument took place as to the meaning that should be given to the words "or other issue" that immediately follow the word child in the first line of the section referred to. The argument was confined to the meaning that should be given to the word "child" in that line of the section, and I apprehend that it was not necessary otherwise to argue the matter.

After a perusal of the many authorities referred to, I have arrived at the conclusion that the contention of the counsel for the infants cannot prevail. I do not think the cases to which he referred as authorities really apply to the case.

In *Theobald* on Wills, 2nd ed., p. 226, it is stated that the description child, son, issue, every word of that species must be taken *primâ facie* to mean legitimate child, son, or issue—referring to Lord Eldon in the case *Wilkinson* v. *Adam*, 1 V. & B. 422. The exceptions in which the word child has been held to mean and include illegitimate child, are professedly given in the following pages, none of which seem to me to be, or comprehend a case of this character. These cases refer of course to the construction of wills rather than of statutes. On this subject the case *Dorin* v. *Dorin*, L. R. 7 H. L. 568, may be looked at, where it is said that the word children in a will means *primâ facie* legitimate "children" as much so as if the word "legitimate" had been introduced before it.

The instances are numerous in which it has been held that where a Legislature used the word "child," they meant legitimate child, and I do not think the case *The King* v. *Hodnett*, 1 T. R. 96, referred to by Justice Wightman in the case, *Regina* v. *Maude*, 2 Dowl. P. C. N. S. at p. 63, or this case itself helps the contention that "child or other issue" in the Act mean or comprehend anything more than legitimate child or other legitimate issue, and I am of the opinion that they do not mean, or comprehend in their meaning anything more than this.

Now, the children of Margaret Amelia Brock who were living at the death of the testator, though legitimate children of her, were neither legitimate children nor legitimate issue of the testator. I think this section of the Act does not apply to the case, and I am of the opinion that there was a lapse of the legacy in question. There will therefore be a declaration that the legacy of $1,000, to Margaret Amelia Brock lapsed by reason of her death during the lifetime of the testator, and this being the only question in contention, I need not say more. The costs of all parties may, I think, be paid out of the estate.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

BEATTY v. HALDAN.

Solicitor and client—Costs—One city solicitor doing work for another on agency terms—Lost voucher—Secondary evidence.

In a certain suit D. acted generally as solicitor for H. who had been appointed administrator *pendente lite*. In certain matters, however, in connection with the proceedings, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect to these matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges of which he rendered D. an account. D. made up one bill of costs and rendered it to H. which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill with these charges to D.

Held, that the Master, on taking H.'s accounts with respect to the estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction.

On the above reference H. sought to use a certain bill of costs as a voucher of moneys properly expended by him in legal proceedings, and it was shewn that the said bill had been properly brought into the Master's office on a former reference and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office.

Held, that the Master should have admitted secondary evidence of its contents, and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it.

THIS was an appeal from the Master's report made pursuant to an order of this Court dated February 29th, 1884, and made upon the petition of one John Haldan, whereby it was amongst other things referred to the Master-in-Ordinary to ascertain and state "what amount (if any) is properly chargeable by the petitioner John Haldan against the estate of Thomas Wilson, deceased, in respect of legal proceedings taken by the said John Haldan, administrator *pendente lite* of the said estate in the Courts or otherwise."

The suit out of which the said petition arose was one brought by Charles Beatty and James Wilson against the present petitioner John Haldan, Joseph Aloysius Donovan, and Mary Ellen Wilson, to open up and retake the

accounts of the petitioner, who was, as above mentioned, administrator *pendente lite* of the estate of Thomas Wilson, deceased, the result of which was that the accounts were accordingly retaken and a large balance found due from Haldan to the said estate. (See the report of the case in 4 A. R. 239.)

Haldan, however, in the present petition, pursuant to a suggestion of the Court of Appeal in *Wilson* v. *Beatty*, 9 A. R. 149, asked among other things to have the accounts again re-taken in the manner now directed by the order made thereupon on February 29th, 1884.

The Master's report was dated March 18th, 1885, and the second ground of the present appeal, which was by John Haldan, was that the Master had disallowed certain bills of costs although they were proved to have been paid, and were vouchers put in by the said John Haldan in discharge of the amount due by him to the estate of Thomas Wilson, and as to the said Wilson estate the said bills of costs were properly incurred and properly paid, and should have been allowed to him.

The grounds on which the Master disallowed these bills of costs, as well as a certain bill incurred in the suit of *Wilson* v. *Wilson* (*b*), are sufficiently stated in the judgment of the learned Judge, *infra*.

It is only necessary to add that, as stated in the present petition, after the petitioner's appointment as administrator as aforesaid, J. A. Donovan, who was the solicitor of the said estate, continued to act as such solicitor, and to advise and guide the petitioner professionally as regards his duties with reference to the said estate.

The appeal came on for argument on September 21st, 23rd, and 24th, 1885, before Ferguson, J.

Moss, Q. C., for the appellant.

O'Donohoe, Q. C., for the plaintiffs.

(*b*) This case of *Wilson* v. *Wilson* is reported 22 Gr. 39, 26 Gr. 377, it was during the pendency of it that Haldan was appointed administrator *pendente lite*. It was a suit to set aside the will of the above-mentioned Thomas Wilson.

October 5th, 1885. FERGUSON, J.—[After disposing of the first ground of appeal, as to which no report is deemed necessary.]

As to the items mentioned in the second ground of appeal being those also mentioned in what has been called the second special finding of the learned Master, and known as numbers four, five, six, and seven, the Master says: "On the evidence I find that these bills of costs, though endorsed in the name of another firm of solicitors, were made up in the office of Mr. Donovan, and that the charges in each of them are his. Mr. Donovan acted as solicitor for Mrs. Wilson, and taxed bills for her on each of the motions to which these relate. He said, in cross-examination, 'I did the work and charged two sets of costs.'"

It is not denied that Mr. Haldan, the administrator, was represented on each of the motions on which these bills of costs were incurred respectively, nor is it denied that he was charged only one bill in respect of each such motion.

He was not represented by Mr. Donovan but by another solicitor. This other solicitor made a memorandum of his charges and sent it to Mr. Donovan, who, it appears, made up bills and charged them against the administrator, no doubt in each case claiming by the bill a larger sum than he was paying to the other solicitor. The other solicitor says that he did not charge full fees, and that by doing the work on what are known as and called "agency terms," he intended a benefit to Mr. Donovan and not to the estate.

The appeal in respect to these bills or items is on the ground that they were proved to have been paid, and were vouchers put in by the administrator in discharge of the amount due by him to the estate, and that as to him the bills of costs were properly incurred and paid, and should have been allowed to him.

In *Cordery's* Law of Solicitors, at p. 88, it is said: "In friendly actions to obtain the opinion of the Courts on a will or the like, it is common for one solicitor to appear for all parties, and there is no objection to it." "When the same solicitor acts for both parties, no fees are

allowed for delivery of pleadings, services, or notices unless necessary for the purpose of making an affidavit of service, nor for perusals." This last, however, seems to depend upon a rule or rules of Court. Remarks of the same character are found in other works upon the law of solicitors. That, however, is not the present case, but it seems to shew that there are cases in which an amount greater than the sum of one set of costs may be allowed to a solicitor without objection.

The present case seems to me to be very simple, looking at it in this way: The solicitor is acting generally for the administrator. A time arrives at which he thinks that owing to his having to act for another party, he cannot properly appear for the administrator, and he so advises. The administrator being so advised, retains another solicitor. The situation happens to be known to both solicitors, and the solicitor so retained chooses to benefit the other by working for agency charges only, sends a memorandum of such charges and permits the other solicitor to have the benefit of the difference between those and full charges. The full amount of proper charges are collected from and paid by the administrator, the same amount that he would have had to pay any solicitor for the same services, no more nor no less. Now, I do not perceive the iniquity in all this, if any there is, and with great respect for the statements and opinions of the learned Master expressed in a general way in his second special finding, I cannot arrive at the conclusion that he is right, on the contrary, I think that his conclusion is erroneous, and I am of the opinion that he should have taken those bills into consideration on the reference to him, and that he should not have disallowed them as he did. I think the appeal on this ground should be allowed, with costs.

The third ground of appeal is in respect to the disallowance of a bill of costs in the suit *Wilson* v. *Wilson*, costs of the administrator. This is number sixteen of the bills of costs. This had been brought into the office of the former Master-in-Ordinary, but it could not be found.

The Master says that he cannot say that a proper search had been made for it, and besides the solicitor had not delivered any bill of costs to the administrator, &c., &c. As to the search for this bill, it was found that it had been brought into the former Master's office, it was properly brought there and properly left there amongst the papers in a proceeding there, and it was shown that search was made in that office and that it was not found. There was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion on which it would probably have been removed from the office. I think that ordinarily all this would be considered sufficient to let in secondary evidence of the contents of a document as one that had been lost. The administrator's case is this: "This bill was one of my vouchers: I brought it into the Master's office and filed or left it there upon a proceeding in which it was proper that I should do so. It cannot now be found. I want secondary evidence taken in regard to its contents, and proceedings taken in respect to it as nearly as may be the same as if I were able to produce it." This contention was, I think, correct. The paper in the hands of the administrator was simply a voucher for moneys that he had paid or allowed, and as to him it should have been treated as any other kind of voucher.

The ground of appeal says that in respect to this item the administrator should have been allowed $239.17, or some greater or lesser sum. The bill was originally $264.12. It had been taxed by what was called the original taxation at $239.17. Upon what is called the re-taxation the amount of it was disallowed altogether, but this appears to have been upon what must now be considered an erroneous principle. I think the Master was in error in rejecting *in toto* the claim made for which this bill was the voucher, and that he should have taken the matter into consideration upon the reference and dealt with it as best he could in the absence of the voucher which should have been looked upon as a lost paper. The matter must be

referred back to the Master. What I have said above will serve as directions so far as any directions may be necessary.

As to the first ground the appeal, as I have already said, will be dismissed with costs.

As to the second and third grounds the appeal will be allowed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

WICKSTEED V. MUNRO.

Life insurance for benefit of wives and children—Death of beneficiary in lifetime of insured—Estate of insured entitled.

A. M. M. insured his life under 29 Vic. ch. 17, for the benefit of his daughter H. M. M., in the year 1868. H. M. M. married the plaintiff in 1879, and died during her father's lifetime in 1882, leaving a daughter for whose benefit she, by her will, devised all her interest in the said insurance to the plaintiff. A. M., M's first wife, having died, he married the defendant M. A. M. in 1877, and died intestate in 1884, leaving the defendant his widow and one child by his second marriage him surviving, and without having made any other disposition of the said insurance policy, or the moneys secured thereby.

In an action by the executor of H. M. M., the beneficiary against M. A. M., the second wife, as administratrix of A. M. M., to have it declared who was entitled to the insurance money. It was

Held, that H. M. M. having died in the lifetime of the insured, sec. 14 of R. S. O., ch. 129, applied, and the policy devolved upon the administratrix of A. M. M., and judgment was given in her favour.

THIS was an action brought by Henry King Wicksteed against Mary Anne Munro, to try the right to certain insurance money, which was the proceeds of a policy on the life of one Alexander Maitland Munro.

The facts as stated in the plaintiff's statement of claim, and which are fully set out in the judgment, were shortly these:

Alexander Maitland Munro insured his life under 29 Vic. ch. 17, for the benefit of his daughter, Helen Mary

Munro, in 1868: Helen Mary Munro married the plaintiff in 1879, and died during her father's lifetime, in 1882, leaving a daughter for whose benefit she, by her will, (in which she recited that she had paid premiums which her father had failed to pay, and had so kept up the policy for several years) devised all her interest in the said policy and insurance money to her husband. Alexander Maitland Munro's first wife having died, he married the defendant, Mary Anne Munro, in 1877, and died intestate in 1884, leaving the defendant, his widow, and one child by his second marriage, him surviving, and without having made any other disposition of the said policy or moneys secured thereby.

The question to be decided in this suit was, whether the plaintiff, as executor of his wife, the beneficiary Helen Mary Munro, or the defendant, as administratrix of the estate of her husband, the insured, Alexander Maitland Munro, was entitled to the insurance money.

The defendant demurred to the plaintiff's statement of claim, and the demurrer was argued on September 30th 1885, before Ferguson, J.

W. N. Miller, Q. C., for the demurrer. The plaintiff contends that as soon as the insurance was effected, Helen Mary Munro had a vested right to the proceeds. I contend that no interest vested in her under the insurance, and even if it did, it became divested on her death, which happened during the lifetime of her father. The statute shows that her interest depended upon her living until after the death of her father. The preamble to the statute under which the policy was effected, 29 Vic. ch. 17, is confined to wives and children, and does not speak of their representatives. Section 4 of the Act refers to children living at the death of the insured. The terms of the policy, which is the contract, make the funds of the company liable *to the daughter*. 29 Vict. ch. 17 is amended by 33 Vict. ch. 21, (O.), and section 6 of that Act, carried into the Revised Statutes as sec. 14 of ch. 129, provides

that if any of the parties for whom the insurance has been effected, die in the lifetime of the insured, the survivors take, and if the survivors die, then it goes to the executor or administrator of the insured. Whenever executors are to take as trustees, the Act points it out and provides for it. The wording of section 4 of 35 Vict. ch. 16, (O.), also shows that it was not intended that anyone but the beneficiary should take, when it makes the insurance a trust for the wife and children, and provides that it shall not be subject to the control of the husband or his creditors *so long as any object of the trust remains*. The wording of 36 Vict. ch. 20, sec. 4, (O.) also assumes that on the death of the beneficiaries, they have no further interest, and provides for a re-allotment. I refer also to R. S. O. ch. 129 secs. 3, 9, 10, 14 and 16.

Maclennan, Q. C., contra. The plaintiff should be entitled to this money. The policy was effected in 1868, after the first Act was passed securing the insurance for the benefit of wives and children. The policy recites that "the capital stock of the company shall be liable," &c. This was the contract made with the father, and the terms of it were to pay £400 for the benefit of the daughter on two conditions, the payment of the premiums, and the death of the father. That was an absolute contract on those terms, there is not a word about the beneficiary surviving, and not a word of the money being held for anyone else, if the daughter did not survive the father. The insured has not made it so, and the Court cannot make it for him. The policy gave the daughter the whole benefit, and whatever that was, passed to her representative on her death in the same way as the benefit of any other contract would pass: *Williams* on Executors, 8th ed. p. 891, *et seq.* It was a transmissible interest, and her will deals with it. If the father did not pay the premiums in her lifetime, she might have paid them herself, or got some one else to pay them for her. Before her death, the policy was a valuable security. No less than fourteen premiums being paid; she could raise money on it, or sell

it out and out. The father could not control or assign it in any way; so how can his executor or administratrix take it now: *Fortescue* v. *Barnett*, 3 My. & C. 36; *Ellison* v. *Ellison*, 1 Wh. & Tud. Lg. Cas., 5th ed. 301. The equitable assignment there created a perfect trust. [FERGUSON, J.—It does not seem that this case is within the category of imperfect gifts.] See *Pearson* v. *Amicable, Ass'n. Office*, 27 Beav. 229. There are no cases on all fours with this in the English Courts but there are some in the United States. In *Continental Fire Ins. Co.* v. *Palmer*, 42 Conn. 60, it was held that a transmissible interest vested on effecting the policy: that was the effect of the contract outside of the statute, per Carpenter, J., at p. 66. The moment this policy was executed and delivered, it became property, and the title to it vested in some one. Choses in action pass: *Williams* on Executors, 7th ed. 786-7-9, 876, 925; *Keller* v. *Gaylor*, 40 Conn. 343; *Libby* v. *Libby*, 37 Maine 359; *Burroughs* v. *The State &c. Assurance Co. of Worcester*, 97 Mass. 359; *Swan* v. *Snow*, 11 Allen 224; *May* on Insurance, § 390. The interest having become the property of the daughter as soon as the policy was made and having descended to her daughter, the question then is: Has the statute made any difference? There is no doubt that the father or settlor could make certain changes, such as allotment, and on certain deaths could make certain changes in the family taking, &c. He, the settlor, did nothing of the kind, neither when he married a second time, nor when his daughter married, nor when she had a child, nor when she died, so if it has gone back to his estate it is by virtue of the statute. The Act of 1865, 29 Vic. c. 17, is very short and its whole object is to protect the insurance from creditors for wives and children. There was no necessity to insert the words executors and administrators: the daughter's interest under the contract passed without them by the Common Law. Section 4 of the Act merely provides for all the children sharing where no appointment is made. That was the Act that was in force when the policy was effected. The Act of 1869,

33 Vict. ch. 21, (O.), has not a retroactive effect so as to cut down the daughter's property in the policy which she then had, and change the character of her rights in it. The recital shows its object, which was to make payment to executors a sufficient discharge where infants were the beneficiaries. Then the Act of 1873, 36 Vict. ch. 19, (O.), merely provided for a certain re-allotment which was never made here.

Miller, Q. C., in reply. The policy or contract is governed by the statutes so that its effect outside of the statutes cannot come in question here. The American cases cited by my learned friend depend on statutes different from ours. I rely principally upon sec. 6 of 33 Vict. ch. 21, (O.), (R. S. O. ch. 129, sec. 14), where it is provided that if some of the parties die, the insurance goes to the survivors, and if the survivors die, then to the executors or administrators of the insured, and in this case all have died, so it goes to the administratrix freed from everything. I refer to *In re Adam's Policy Trusts*, 23 Ch. D. 525; *King* v. *Lucas*, 23 Ch. D. 712.

December 14, 1885. FERGUSON, J.—The action is substantially for a declaration of rights in respect of certain insurance money. This is a demurrer by the defendant to the plaintiffs statement of claim. Counsel agreed that nothing of a technical character should be considered, each desiring that the substance only should be the matter for determination. The statement of claim sets forth:

1. That the late Alexander Maitland Munro in his lifetime and on or about the 12th day of October, 1868, effected an insurance on his life pursuant to the Act of the late Province of Canada, 29 Vic. ch. 17, for the sum of £400 sterling by a policy of insurance No. 2733, in the Commercial Union Assurance Company for the benefit of Helen Mary Munro, his daughter by his first marriage.

2. That the material portions of the policy are as follows: "Whereas, Alexander Maitland Munro of Toronto Canada, merchant, (hereinafter called the assured) being

desirous of effecting an insurance on the life of himself under the provisions of an Act entitled 'An Act to secure wives and children the benefit of assurances on the lives of their husbands and parents,' for the benefit of Helen Mary Munro his daughter, hath contracted with the Commercial Union Assurance Company for an assurance for the sum of four hundred pounds on the life of himself, and hath deposited a proposal and declaration dated the 11*th day of October, one thousand eight hundred and sixty eight*, and signed by him as the basis of the contract for such assurance. And whereas the assured hath paid the sum of eleven pounds fifteen shilings and eight pence as the premium for such assurance for one year from the 12th day of October, one thousand eight hundred and sixty eight, and hath agreed to pay the like sum on the 12th day of October in each year during the continuance of this assurance. Now these presents witness and declare, that the capital stock and funds of the said company shall be subject and liable to pay for the benefit of the said daughter of the said assured, the sum of four hundred pounds, within one calendar month after proof shall have been furnished to the reasonable satisfaction of the directors, for the time being, of the company, of the death of the said assured. Provided always, that the payment of the moneys due upon this policy to the executors or administrators of the said assured shall be a valid payment, and shall effectually discharge the company from seeing to the application and from all liability by reason of the misapplication thereof."

3. That the said Helen Mary Munro was married to the plaintiff in the year 1879, and on or about the 15th day of November, 1882, died, having first duly made and executed her last will and testament on the 12th day of November, 1882, and leaving her surviving the said plaintiff, her husband, and one daughter, Winfred Wicksteed.

4. That the said last will is in the words and figures following:

"In the name of God, amen. I, Helen Mary Wicksteed, wife of Henry King Wicksteed of Prince Arthur's Landing, Province of Ontario, civil engineer, make this my last will and testament.

"I give and devise to my said dear husband all my estate and property, real and personal, to aid him in defraying the expenses of the maintenance and education of our daughter Winfred, and her establishment in life on her coming of age or marrying.

"And, whereas my father, Alexander Maitland Munro, some years since insured his life for my benefit, and has for some years back failed to pay the yearly premiums thereon and I have paid the same, I will and direct that if the sum so insured or any part thereof, or any returns on account of premiums paid, or other sum, should become payable to me under the said insurance, then the same shall be paid to my said husband for the purposes aforesaid.

I appoint my said husband my sole executor and administrator. I revoke all former wills, and declare this to be my last will and testament," &c.

5. That probate of the said will was duly granted to the plaintiff, the executor named therein.

6. That the said Alexander Maitland Munro was married a second time to the defendant in the year 1877, and died on the 2nd day of January, 1884, intestate, leaving him surviving the defendant his widow and one child, Helen Mary Maitland Munro; and that letters of administration to his estate and effects were duly granted to the defendant.

7. That the said Alexander Maitland Munro after the death of the said Helen Mary Wicksteed, made no further or other appropriation, allotment, or appointment of the moneys secured by the said policy.

8. That the said insurance moneys were, at the request of the plaintiff and defendant, paid over by the said company and deposited in the Bank of Commerce, Toronto, at the joint credit of the solicitors for the plaintiff and defendant, pending this action, and the same are claimed

by the defendant as forming part of the general estate of the said Alexander Maitland Munro, but that the plaintiff claims that he is entitled to the said insurance money as executor and trustee under the said will of the said Helen Mary Wicksteed.

To this statement of claim is the demurrer.

As before stated, it was agreed that the only question to be considered is, as to whether the plaintiff or the defendant is entitled to this money.

The plaintiff's counsel contended amongst many other things that the contract on the part of the company was absolute to pay the money to the daughter of the assured on the happening of the events indicated, and that on the ordinary principles applicable to contracts, the money belonged to her estate. The case on her behalf was also elaborately argued on the doctrines of Trusts, and many American decisions on the subject of insurance for the benefit of the wives and children of the assured, were referred to for the purpose of shewing that the plaintiff is entitled to this money.

As to the contract, it seems to me to stand in the same position as any other contract of insurance made under, and in compliance with the requirements of the statute, and after having examined the authorities referred to, I am of the opinion that they do not apply, and that the case must be disposed of under the provisions of our own statutes on the subject.

If the Act 47, ch. 20 (O.), 1884, applied to the case, there could be little difficulty in deciding the matter, for the provisions of the 9th section would, I think, dispose of it in favor of the defendant's contention: there being, in my opinion, no difference in this respect between the case of several persons entitled, all dying in the lifetime of the insured, and the case of a single person so entitled, dying before the death of the insured.

It was conceded that this Act does not apply to the case, and I apprehend this concession was properly made, for although the first section says that the Act shall apply to

every lawful contract of insurance at the time of the passing of it, in force, or thereafter effected, which is based upon the expectation of human life, &c., yet the last section when repealing chap. 129 of the R. S. O., and some other acts that do not appear to be of importance in this case, provides that such repeal shall not affect any act done or right acquired, while the said acts or any of them were in force; and I think that upon the death of the insured (which happened before the passing of this Act) the rights whatever they are, were "acquired" within the meaning of this provision.

It was contended that ch. 129 of the R. S. O. has no application to this case, but I am not of this opinion. The sections of 33 Vic. ch. 21 (O.), seem to have been faithfully transcribed into this chapter of the R. S. O. The first section of that Act says: "That in all cases where a party insured under any policy has directed, or shall hereafter direct, the insurance money, or any portion thereof, to be paid to his child or children," &c. The fourth section says: "If a person who has effected, or shall hereafter effect, an insurance in the terms of the said Act (referring to 29 Vic. ch. 17), shall find himself unable to continue to meet the premiums," &c. The sixth section says: "In the event of the death of some of the parties for whose benefit the *said insurance* has been effected," &c. The Act, as I think, manifestly speaking of, and applying itself to, policies of insurance and directions made or given under 29 Vic. ch. 17, whether respectively effected or done before or after the date of its passing, which was the 24th day of December 1869, and it appears to me immaterial, whether in considering and disposing of this case, one looks at this act or at the appropriate sections of ch. 129 aforesaid, excepting this, that looking at the former, one sees the preamble which shows the purposes, or some of them, for which the act was passed, and this does not appear in ch. 129, but I apprehend it might be looked at in either case if difficulty arose in respect to interpretation.

The first section of 33 Vic. ch. 21 (O.), which is the same as the 9th section of ch. 129, R. S. O., provides for the payment of the moneys to which infants shall become entitled, in the cases therein stated, to the executor or executors of the insured whether he shall have died before the passing of the Act or not, and that such executor or executors shall hold the same as trustee or trustees for such children or infants.

The second section which is the same as the 10th section of ch. 129, R. S. O., provides for the payment of the moneys to which infants shall become entitled, in the case therein stated, to a guardian appointed by the Surrogate Court.

The third section which is the same as the eleventh section of ch. 129 R. S. O., calls the executor or executors and the guardians referred to in the first and second sections respectively a trustee or trustees and confers upon them certain powers as to the money.

The fourth section which is the same as section 12 of ch. 129 R. S. O., provides for the surrender of the policies in certain cases, and refers to insurances effected under the provisions of 29 Vic. ch. 17, whether before or after the passing of 33 Vic. ch. 21 (O.) And section six which is the same as section 14 of ch. 129 R. S. O. is in these words:

"In the event of some of the parties for whose benefit the 'said insurance' has been effected dying in the lifetime of the insured, the moneys payable thereunder shall be payable to the survivor or survivors of such parties, or in case they shall also die, to the executors or administrators of the assured, but nothing herein contained shall be held to prevent the said assured from assigning the policy for the benefit of any future wife or children, or executing a declaration in their favor, or in favor of some or one of them as hereinbefore is mentioned."

As I have already said, I think this section or rather the 14th section of ch. 129 R. S. O., applies to this case, and if so it seems to me that unless there is a difference between the case in which several are entitled and they

all die, living the insured, and a case in which there is only one who is entitled and he or she die during the lifetime of the insured (and I have already said that I think there is not such a difference) the money in this case must be paid to the defendant who is the administratrix of the insured; and if so, there is no trust mentioned that will attach to it. According to the letter of the Act she will receive it as administratrix of his estate, and I think the meaning of the legislation is, that she should so receive it, and that the money should form part of the estate of the insured. And I think the view that the child for whose benefit the insurance is must survive the insured in order to receive the benefit in fact, is not, at all events wholly at variance with the spirit of the original Act 29 Vic. ch. 17, for although the fifth section of that Act says that upon the death of the person whose life is insured, the insurance money due upon the policy shall be payable according to the terms of the policy, or the declaration * * as the case may be free from the claims of any creditor or creditors whomsoever, yet the fourth section says that when no apportionment is made * * all parties interested in the insurance shall be held to share equally in the same, and when it is stated in the policy or declaration, that the insurance is for the benefit of the wife and children generally, or of the children generally, without specifying their names, the word "children" shall be held to mean all the children of the person whose life is insured, *living at the time of his death*, or whether by any other marriage or not.

Does this mean that if the children are not named, they must survive the insured in order to take the benefit, but if they are named and die in the lifetime of the insured, those who represent their respective estates, will nevertheless take the benefit of the insurance; or does it only mean that when the children are named, such of these as survive the insured take the benefit of the insurance to the exclusion of any children there may be who are not named in the policy or declaration?

I cannot but think this, at least open to question, if it has not been determined, (and so far as I have seen it has not) and it may be that the real meaning is, that a child in order to take and receive the benefit must, under the provisions of this section, survive the insured, whether he or she is named in the policy or declaration or not, but as I am of the opinion that the subsequent legislation to which I have referred as applying, does apply to the case and, as I have said, the sixth section of 33 Vic. ch. 21 (O.), which is the same as the 14th section of ch. 129, R, S. O. according to my view of its meaning, settles the matter in favor of the defendant, I need not pursue this further.

I am of the opinion that the insurance money in question belongs to the estate of the insured, and is payable to the defendant as the administratrix thereof, and that the same should be declared.

There will be judgment for the defendant, with costs.

NOTE:—No question was raised on the argument as to the rights in respect of any premiums that may have been paid by Helen Mary Wicksteed, and as to them nothing is decided.

G. A. B.

[CHANCERY DIVISION.]

CLAXTON V. SHIBLEY.

Tax sale—Assessment—Sale for more than is due—Mistake in carrying forward amount—"Error or miscalculation"—R. S. O. ch. 180, sec. 150.

On an appeal to the Divisional Court the judgment of PROUDFOOT, J., (reported *ante* 9 O. R. 451) was reversed.

Per BOYD, C.—In *Yokham* v. *Hall*, 15 Gr. 335, the excess of statute labor tax was clearly illegal, and its imposition being unjustifiable vitiated the sale. There was no illegal excess of tax originally imposed upon the land in this case, and the owner must be regarded as being notified by the advertisement of sale of the error in carrying forward the amount, and having taken no steps to have it remedied, pending the period allowed for payment or redemption, he cannot afterwards invoke its aid to annul the tax sale.

Per FERGUSON, J.—The difference of twenty cents and the calculation of interest and commission upon it must fall within the meaning of the words "error or miscalculation" mentioned in sec. 150 of R. S. O. ch. 180, and if so the provision is that the tax deed shall not be invalid.

Yokham v. *Hall*, 15 Gr. 335, considered and distinguished.

THIS was an appeal from the judgment of Proudfoot, J., (reported 9 O. R. 451), to the Divisional Court, which was argued on September 5th, 1885, before Boyd, C., and Proudfoot and Ferguson, JJ.

Cassels, Q. C., and *George Macdonald*, for the appeal. The sale was for taxes due in 1876, and the amount unpaid was $2.30. This amount was by some mistake carried into the Treasurer's book at $2.50. There was no error in the tax as imposed, but in carrying forward the amount in the book. The treasurer's advertisement stated the amount due, and that amount is made the correct amount by R. S. O., ch. 180, sec. 137. If any tax is due the sale is good, sec. 155. The excess does not make any difference. It has been held under sec. 156 that if no taxes were due the sale is bad. No part of the tax shall be received by the treasurer as in this case, but the whole must be paid, sec. 118. Sec. 137 was passed after *Yokham* v. *Hall*, 15 Gr. 335, was decided, in which two half lots were assessed separately and sold together. In *Doe de. McGill* v. *Langton*, 9 U. C. R. 91, the inception of the tax was wrong. In

Ridout v. *Ketchum*, 5 C. P. 50, the lots were assessed together, and sold together. In *Harbourn* v. *Boushey*, 7 C. P. 464, the taxes were not in arrear. In *Allan* v. *Fisher*, 13 C. P. 63, there was only four years of arrears instead of five. In *Irwin* v. *Harrington*, 12 Gr. 180, there were no taxes in arrear. All these cases were decided before sec. 137 was passed. The tax in this case was all right, and the mistake in carrying the amount forward is a mere irregularity. In *McKay* v. *Crysler*, 3 S. C. R. 436, there were two taxes, one of which was bad. In all the older cases the inception of the tax was bad. If the tax is a valid tax, and the amount is increased by the error of the officer, that increase is only an irregularity, and the sale is good. The application of sec. 118 is to cure the defect where too much is assessed. The evidence shows that Claxton had express notice that his lands were sold for taxes. See also *The Bank of Toronto* v. *Fanning*, 17 Gr. 514; 18 Gr. 391; *Silverthorne* v. *Campbell*, 24 Gr. 17; *Beckett* v. *Johnston*, 32 C. P. 301; *Hamilton* v. *Eggleton*, 22 C. P. 536; *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253; *Hutchinson* v. *Collier*, 27 C. P. 249; *Carroll* v. *Burgess*, 40 U. C. R. 381.

Machar, contra. The error was made by the township treasurer so that the county treasurer could not have made the correction for the owner. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 U. C. R. 253, was decided in 1872. and the statute was passed in 1866, and follows *Yokham* v. *Hall*, *supra*. It is a confirmation of that case as far as this case is concerned. Where land has been sold for a larger amount of taxes than has been or can be lawfully imposed, such sale is void: *Cotter* v. *Sutherland*, 18 C. P. 357, (headnote). This case was not an error of computation, it is adding to a tax already imposed. [BOYD, C.—Does it make any difference how the error arose?] I think it makes a difference in the application of sec. 137. The fault in the sale here is not cured by sec. 155, the land was not sold *under the authority of the Assessment Act of* 1869, because it was sold for more than was due on

it. The evidence shews that the township treasurer returned the property to the county treasurer prematurely in July, 1877, although he did not get the collector's roll until October, 1877, and he returned it as "no distress," then it was marked "relieved by council." That relief put an end to the taxes, and paid them as far as the council and the land were concerned. The power to sell the land under sec. 114 never arose. The statement was not made, which the assessor should have made to the township treasurer, and the treasurer to the clerk, and the clerk to the county treasurer, and no effort was made to collect the arrears from the property, and there was evidence to shew that the property was occupied, and the taxes could have been made. This was occupied land of a non-resident, while the property in *Smith* v. *The Midland R. W. Co.*, 4 O. R. 494, was unoccupied land of a resident, as railways are residents. See also *Blackwell* on Tax Titles, 2nd ed., 174, 261.

Cassels, Q. C., in reply. The owner of land sold for more than is due cannot redeem for less than the full amount for which it was sold.

December 3, 1885. BOYD, C.—*Yokham* v. *Hall*, 15 Gr. 335, does not, in my opinion, govern this case. Nothing more was really decided there than this short point: the assessment on two half lots being united by the treasurer, and charged as upon one whole lot, he was wrong in not reducing the rate for statute labour, which is less when charged upon a lot than upon its halves assessed separately. This excess of statute labour tax was clearly illegal, and its imposition being unjustifiable, as well as intentional, vitiated the sale. In the case before us the point presented for decision is the effect of a slightly excessive tax imposed, not illegally, but irregularly. Such an error is apparently cured by a provision of the present statute (sec. 150), which was introduced subsequent to the decision in 15 Gr.

There was no illegal excess of tax originally imposed upon this land. The error of twenty cents arose from a

blunder in copying or transcribing the sum of $2.30 properly assessed in the collector's roll, so that it was carried forward as $2.50 in the books of the township treasurer, and it was not corrected in subsequent entries. The owner must be regarded as being notified of this error by the information given in the advertisement of sales for taxes inserted in the Official Gazette, and if he takes no steps to have it remedied pending the period allowed for payment or redemption, he cannot afterwards invoke its aid to annul the tax sale. According to *Payne* v. *Goodyear*, 26 U. C. R. 448, the owner might have tendered the proper amount of taxes in arrear at any time before the sale, and even thereafter during the period allowed for redemption: See secs. 118 and 122. Failing that, however, it is declared by sec. 137, that the amount of taxes stated in the treasurer's advertisement shall in all cases be held to be the correct amount due. And then it is further declared by sec. 150, that when once the tax deed is given, it shall not be invalid for any error or miscalculation in the amount of taxes or interest thereon in arrear. Having regard to these provisions, and also sec. 153, the result appears to be that the previous irregularity arising from unintentional miscalculation or clerical error in transcribing the figures becomes of no importance after the tax deed is executed if any legal tax is due upon the land for the third year preceding the sale: *The Governor of Bristol* v. *Wait*, 1 A. & E. 264. Such is the present case according to my reading of the Assessment Act. The sections I have referred to were not brought to the notice of my brother Proudfoot, and the case was then argued as if governed by *Yokham* v *Hall*, *supra*.

I am also of the opinion that this deed is, if possible further validated by section 156, because the lands were actually sold, and that for arrears of taxes actually due, and the deed though issued before the lapse of two years from the sale, was not questioned within the period of two years from the time of sale. I am aware of the cases upon this section which construe the period of two years as

current only from the giving of the tax deed, but in my humble judgment that is judicial legislation, and not exposition of the statute. See *Symons* v. *Leaker*, 33 W. R. 875. The Act directs that the deed be given after the expiry of the year allowed for redemption, and assigns a further period of one year for attacking the transaction, after which all actions (with certain exceptions not now important) are statute-barred. If the obvious import of the statute is to be departed from, and conjecture employed as to the meaning and intent of the enactment, it would strike me thus: a year for redemption is given from the time of sale, after the expiry of which the purchaser is entitled to a tax deed. This deed becomes absolute if not questioned within two years from the time of sale, *i. e.*, within one year from the date when it can be rightfully issued by the municipal authorities. The analysis of the statute would thus indicate that one year only was intended to be allowed for the attack upon the deed, dating from the time when it issues—a limit which has been overstepped in the present case. This ground, however, is not now open, though if it were, I should not hesitate to place my decision upon it.

It was further urged before us in support of the judgment below, that the sale and deed were invalid because the land was occupied, and taxes could have been collected if the assessor or clerk of the municipality had done his duty. The dereliction complained of arises under sec. 109 by virtue of which it is said the assessor should have marked this land as occupied, and then under the following sections the treasurer might have employed other means to collect the arrears, instead of selling the land. It was held at the trial that this was cured by sec. 155, and in this result I agree, and for reasons which I endeavoured to state in *Smith* v. *The Midland R. W. Co.*, 4 O. R. 494.

I think the plaintiff has no *locus standi*, and his action should be dismissed, with costs.

FERGUSON, J.—The action is to set aside a sale of land for arrears of taxes. The principal objection to the sale appears to be, that it was for too large an amount. The excess over the proper sum in arrear and unpaid seems to have arisen in this way. The lot was assessed in 1876 for $4.88. It was so assessed as resident land, and was returned to the county treasurer in 1877 as resident land, but on which there was no distress for $2.30 unpaid. The roll for 1876 shewed that $2.58 had been paid. Some action was taken (a resolution passed) by the municipal council as to this $2.30, but there was no by-law in respect of it, and besides the resolution did not remit or profess to remit the taxes, but only relieved the collector or professed to relieve him in respect to this sum.

This sum or balance was carried into the treasurer's book as $2.50 instead of $2.30, and the compound interest was charged upon this $2.50 for the period of five years, making $4.01, to which there were the additions of the cost of advertising $1.95, and the commission of ten cents, making in all the sum of $6.06, for which the land was sold.

It does not, I think, clearly appear how it was that this error of twenty cents occurred. One would, however, think that the most probable way was that in transcribing the figure 3 was taken for the figure 5.

The sale took place on the 21st of November, 1881. The deed to the purchaser was made on the 19th of March, 1883, and this action was commenced on the 14th of October, 1884.

Section 150 of the Assessment Act, ch. 180, R. S. O., after providing for the form of such a deed, what it shall contain, the effect of it. &c., proceeds in these words: "And no such deed shall be invalid for any error or miscalculation in the amount of taxes or interest thereon in arrear, or any error in describing the land as "patented," or "unpatented," or held under a "license of occupation."

There is no complaint that the taxes were illegally assessed against the land, or that the $2.30 was not in

arrear and unpaid. The principal complaint is simply that on account of this error or mistake of twenty cents, however it may have occurred, and the subsequent computations as upon a sum which included this small sum, the amount for non-payment of which the sale took place was too great.

Section 137 of the same Act, after providing for the mode in which the lands shall be sold by the treasurer, says: "And the amount of taxes stated in the treasurer's advertisement shall, in all cases, be held to be the correct amount due."

Evidence was given on the subject as to whether or not the plaintiff had notice of what was being done in regard to the sale, so that he might have taken action by having the error corrected, and paying what according to his now contention was the proper sum, but, in the view that I take of the case, this is, I think, not material one way or the other.

The defendant appears to have a conveyance from the purchaser at the sale, who obtained—as seems not to be disputed—a deed in due form from the proper officer pursuant to his purchase.

If the part of the 150th section that I have quoted above does not so operate as to answer this complaint of the plaintiff, I am at a loss to know what meaning can be attached to it. Surely this difference of twenty cents, and the calculation of interest and commission upon it, in conjunction with the $2.30, must fall under the meaning of the words: "error or miscalculation," mentioned in section 150, and if so, the provision is, that the deed shall not be invalid. It does seem to me that this part of the section was passed for the purpose of meeting just such a contention as this contention of the plaintiff, and whatever may have been the intention in passing it, I think it does meet the contention.

I do not think the case of *Yokham* v. *Hall*, 15 Gr. 335, can be considered to govern this case in any degree. There, there was an illegal and excessive tax imposed, and the real

point of the decision seems to me to be in respect to the statute labor mentioned in the judgment. The learned Judge in speaking of sec. 4, of 27 Vic. ch. 19, does say that the section evidently contemplated that the land should be sold only for the taxes due, and that when it spoke of a sale for taxes it must have meant a sale for legal taxes. There, the taxes were illegally imposed. Here the $2.30 were legally imposed. The section 150 above mentioned is taken from 32 Vic. ch. 3C (O.), and 34 Vic. ch. 28 (O.), the earlier of which was passed after the decision in *Yokham* v. *Hall*, or, at all events, after the happening of the facts and the commencement of the suit in that case.

The cases in which two or more parcels of land were assessed together, or as if constituting but one parcel, have, I think, no governing application to the present case, for the reason, if there were none other, that in the present case the taxes were legally imposed, and in my opinion, as I have already said, the twenty cents and what followed as a consequence fall under the provision of the section 150 to which I have referred.

I think I need not refer to the other objections raised by the plaintiff. The learned Judge before whom the cause was tried has disposed of them in favor of the defendant, and I think rightly so.

Looking at the value of the land as found by the learned Judge, and the small amount of the taxes for which it was sold, a decision against the plaintiff's contention is no doubt a great hardship upon him, but many others have suffered the same hardship, and it would be well if landowners would pay more particular attention to the concluding words of section 155 of the Assessment Act, namely: "It being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof.

I am, for the reasons that I have endeavored to give, of the opinion that the appeal should be allowed.

G. A. B.

[CHANCERY DIVISION.]

MORRISON V. MORRISON.

Will—Devise—After-acquired property—"Contrary intention"—R. S. O. ch. 106, sec. 26.

The judgment of BOYD, C., (reported ante 9 O. R. 223), sustained on appeal to the Divisional Court, PROUDFOOT, J., dissenting.

Per BOYD, C.—The residuary clause in the will covers unquestionably all that the testator might acquire subsequent to the date of the will and down to the day of his death.

Per PROUDFOOT, J.—There is nothing in the will indicating that the testator was referring to a specific piece of property. The words, "The property on Hughson Street," read immediately before the death of the testator, would apply to all the lands on Hughson Street he then possessed, which, therefore, all passed to Robert Morrison; and the will should be thus read under R. S. O. ch. 106, sec. 26.

Per FERGUSON, J.—The will shews an intention on the part of the testator that his subsequently acquired property should be disposed of differently from the property vested in him at the time of the making of the will, and thus the "contrary intention" mentioned in sec. 26 of R. S. O. ch. 106, appears by the will, which consequently does not "speak or take effect as if executed immediately before the death of the testator."

THIS action (reported *ante* 9 O. R. 223) came on by way of appeal from the judgment of Boyd, C., to the Divisional Court, and was argued on September 3rd, 1885, before Boyd, C., and Proudfoot and Ferguson, JJ.

Parkes for the defendant Robert Morrison, who appealed. No question arises on the execution of the will, which took place on May 19th, 1873, and the testator died on March 8th, 1883. The question is: Did the after-acquired property on Hughson street pass under the devise to Robert Morrison, or under the residuary devise to Alexander Morrison? The two material devises are thus worded (the learned counsel read the clauses in question as set out in the case reported in 9 O. R. 223). The Wills Act, R. S. O. c. 106, came into force in 1874, and section 26 provides that the will should be read as if the testator had executed it just before his death, for he owned property on Hughson street when he executed it, and he afterwards acquired more: *In*

re Portal and Lamb, 27 Ch. D. 600. [BOYD, C.—That case was not cited at the trial.] No, it was not then reported. The will should therefore be read as if executed at the time of his death. [BOYD, C.—But at the time of its execution he speaks of his property on Hughson street, and he then goes further and refers to his property to be after-acquired.] The statute, however, is explicit, and says that the will must be read as if it had been executed just before his death. [FERGUSON, J.—But he gave all the property he then had on Hughson street to Robert, and went further and devised his after-acquired property to Alexander.] I think it will be found that it was held in a case of *Re Midland R. W. Co.*, 34 Beav. 525, when the word "now" was used that the word "now" referred to the time just before the death. See also *Thomas* v. *Jones*, 1 DeG. J. & S. 63; *Vansickle* v. *Vansickle*, 9 A. R. 352. The will must be construed so that the testator does not die intestate as to part of the property on Hughson street, and it is evident he did not intend any of the Hughson street property to pass under the residuary devise to Alexander: *Castle* v. *Fox*, L. R. 11 Eq. 542; *Lord Lilford* v. *Keck*, 30 Beav. 300.

R. Martin, Q. C., for defendant Mitchell and his wife. Before the year 1834 the law of England and our law were about the same, and no after-acquired property passed. Then our consolidated statute provided that if apt words were used such property would pass: C. S. U. C. c. 82, s. 11. At the time this will was made it spoke for all purposes from the day of its execution, and not the day of the death. It does not come within the 26th sec. of R. S. O. c. 106. The will says *the* property on Hughson street, and that specifies it as the property he then owned: *Maxwell* on the Interpretation of Statutes, 2nd ed., 393; *Whateley* v. *Whateley*, 14 Gr. 430; *Laidlaw* v. *Jackes*, 22 Gr. 171. The testator in this case did not give, by his will, property which he had no idea of acquiring at the time he made the will: *Crombie* v. *Cooper*, 24 Gr. 470; *Hutchinson* v. *Barrow*, 6 H. & N. 583; *Emus* v. *Smith*, 2 DeG. & S.

722, 736; *Lady Langdale* v. *Briggs*, 3 Sm. & G., at p. 254; *S. C.*, 8 DeG. McN. & G. 391; *Bullock* v. *Bennett*, 7 DeG. McN. & G. 285; *Goodlad* v. *Burnett*, 1 K. & J. 348; *Ruthven* v. *Ruthven*, 25 Gr. 534; *McIntosh* v. *Bessy*, 26 Gr. 499; *Newman* v. *Pearcy*, 4 Ch. D. 41, 48; *In re Wolverhampton Mortgaged Estates*, 7 Ch. D. 197; *Stanley* v. *Stanley*, 2 J. & H. 491; *Webb* v. *Byng*, 2 K. & J. 669.

Furlong, for Mrs. Mitchell and other defendants. The questions are: Was the devise to Robert Morrison limited, and does the will shew a "contrary intention"? I contend that if the testator had taken up and read his will just before his death, he would have said to himself, "I have indicated one devise of the property I owned on Hughson street at the time I made this will, and have provided that the property I after acquired shall pass under the residuary clause," as he evidently intended to do. *Cole* v. *Scott*, 1 Mac. & G. 518, is approved of *In re the Midland R. W. Co.*, 34 Beav. 527. In *Hepburn* v. *Skirving*, 4 Jur. N. S. 651, V. C. Stuart said he adhered to the decision in *Lady Langdale* v. *Briggs*, and said that "where a testator devises lands by the description 'all the lots now vested in me,' and in the same will speaks of other lands which shall be vested in him at the time of his death, the language affords sufficient evidence of an intention to distinguish after-acquired lands from lands vested at the time of the date of the making of his will." In *Lord Lilford* v. *Keck*, *supra*, the Master of the Rolls avoided intestacy.

Waddell, appeared for the executor.

December 3, 1885. BOYD, C.—The residuary clause in the will covers unquestionably all that the testator might acquire subsequent to the date of that will and down to the day of his death: *Churchman* v. *Ireland*, 1 R. & My. 250. I find two cases in Ireland which strongly confirm the view heretofore taken by me as to the effect of this will.

In *Re Farrer*, 8 Ir. C. L. R. 377, Monaghan, C. J., thus proceeds to illustrate what would be a sufficient "contrary

intention" displayed by the will so to render the statute inapplicable; "in no way can that intention be more satisfactorily discovered than by finding an intention that subsequently acquired property should be disposed of differently from the property vested in the testator at the time of making his will; for example, if a testator by his will devised all his property in one county to one person, all his property in another county to another person, thus exhausting all his then real estates, and should devise all his subsequently acquired real estate to a third person, it cannot be doubted that the subsequently acquired real estates in the specified counties would pass to the devisee of the subsequently acquired property, and not to the specific devisees of the lands in these counties."

Again, the same Chief Justice in *Strevens* v. *Bayley*, 8 Ir. C. L. R. 423, puts this case: If the testator at the date of the will was seized of one townland, Curramore, and afterwards purchased another townland of the same name, in a different part of the county, in no way connected with the former, and that the will contained a devise of "the lands of Curramore." It may be held, he says, that a devise of "the townland of Curramore" can apply only to one townland; and therefore, to prevent it being void for uncertainty, must apply only to the townland of which the testator was seized at the date of his will.

Further consideration has but confirmed my opinion that the devise of "the property on Hughson street" is to be limited to that piece owned by the testator at the date of the will, and that the after acquired property thereon goes to the residuary devisee.

PROUDFOOT, J.—On the 19th of May, 1873, David Morrison made his will, by which he gave and bequeathed to his brother Robert Morrison five hundred dollars, and the property on Hughson street; and he gave, devised, and bequeathed all the rest and residue of his estate, real, personal, and mixed, which he should be entitled to at the time of his decease to his nephew, Alexander Morrison.

The testator died on the 8th of March, 1883.

At the date of the will, he possessed only one property on Hughson street, called the Red Lion Hotel. He subsequently acquired other property on Hughson street not connected with the Red Lion Hotel, but on the opposite side of the street, consisting of three houses and lots.

The question is: Whether all the properties on Hughson street go to Robert Morrison, or whether the after-acquired property passes under the residuary devise to Alexander Morrison?

The R. S. O. ch. 106, sec. 26, enacts that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention, appears by the will; and section 8 makes the 26th section apply to the will of every person who has died since the 31st December, 1868, or who dies after the passing of this Act.

The Chancellor thought he found such "contrary intention" in the residuary devise which refers to the property the testator should be entitled to at the time of his death.

The latest exposition of the statute is to be found in *Re Portal and Lamb*, 30 Ch. D. 50, on appeal from a decision of Mr. Justice Kay, 27 Ch. D. 600. Mr. Justice Kay had held that a devise of "my cottage and all my land at Stour Wood, * * on the condition that no fir or other trees, or shrubs thereon be cut down and removed, and that the boundary fences be kept in good preservation, and the plantations, heather, and furze, all preserved in their present state," passed a house of considerable size with gardens and lands of ten acres adjoining or contiguous to the cottage, which, after the date of the will, the testator entered into a contract to purchase, and which contract was not completed at his death, notwithstanding a residuary devise of "all other my freehold manor, messuages, lands, and real estate whatsoever and wheresoever," to trustees upon trust for sale. The Court of Appeal reversed this decision upon the ground, that "all my land

at Stour Wood," having added to it "my cottage," shewed in that case that it was not intended the after-acquired residence with the garden and grounds should pass.

Cotton, L. J., says: "If it were not for this section of the *Wills Act*, there can be no doubt but that, when the testator referred to "my cottage and all my land at *Stour Wood*," he meant specifically to devise that cottage and the land held with it, which he then held, and that only. But we have the Wills Act, which says the will shall be construed as if it had been made at a time other than that at which in fact it was made. The words "and all my land at Stour Wood," are no doubt sufficient by themselves to carry the after-acquired land and the house on it; but that is not all, we have 'my cottage' preceding these words, when we find that at his death he had the small cottage and also this large house in which he was then residing, and which was a gentleman's residence with gardens and pleasure grounds, all which would pass under the description of a house, I cannot but think that what passed by the devise, was that, which was aptly described, the small cottage which he had held, and the land he had held with it, and that only: and for this reason, 'my cottage' does not aptly describe the subsequently purchased house; and when we come to the words, 'and all my land at Stour Wood,' although such a devise by itself would carry with it any house standing on that land; yet where these words are added to the previous description of 'my cottage,' in my opinion it shews that 'all my land' in this particular case was not intended to include this residence with the garden and grounds held with it." Lindley and Fry, L.JJ., express similar opinions.

In the present case we do not find in the will anything indicating that the testator was referring to a specific piece of property. "The 'property on Hughson street," read immediately before the death of the testator, would apply to all the lands on Hughson street he then possessed. Had he mentioned the property as "The Red Lion Hotel," no doubt the devise would have been limited to that. But

"the property on Hughson street'" refers to a general class of property, and the language of all the Judges in *In re Portal and Lamb*, *supra*, is, that a devise of "all my land at Stour Wood" would, if standing alone, have carried all that he subsequently acquired there, notwithstanding the residuary devise. So here "all the property on Hughson street" must carry all he afterwards purchased there. I am quite unable to distinguish the present from *In re Portal and Lamb*, leaving out "my cottage," the presence of these words being the ground of that decision.

The words in the residuary devise here, "which I shall be entitled to at the time of my decease," and which do not occur in *In re Portal and Lamb*, do not appear to me to withdraw it from the effect of that decision. For the will is still to be read as if made just prior to the death, and so reading it the after acquired property must be that acquired elsewhere than on Hughson street. The distinction does not amount to a difference. It does not appear in the will that he meant all his after-acquired property to pass to the residuary devisee, but only that not on Hughson street.

The rule deduced from *Cole* v. *Scott*, 1 Mac. & G. 518, and *Douglass* v. *Douglass*, Kay 404, that "if it be clear that the testator is not referring to a general class of property, but to something specific, the new statute is not to have the operation of passing property which evidently was not in the contemplation of the testator, when the subject of the gift appears to have been defined and marked out by him as existing at the period when he was speaking," does not interfere with this conclusion. For here there is nothing definite and marked out—the language is general. It is not the Red Lion Hotel on Hughson street, but the property on Hughson street. And in *Cole* v. *Scott*, *supra*, there was a word *now* not to be found in the present case. The devise there was of "the house in which I *now* reside," and of "residue and remainder of my messuages, &c., whereof I am *now* seized or possessed," and then "all such manors, &c., as well freehold, as

copyhold and leasehold, as are *now* vested in me, or as to the said leasehold premises as shall be vested in me at the time of my death." Lord Cottenham thought he was entitled to refer to the date of the will to find out what the language applied to. But in this respect his decision has not been acquiesced in. For as Mr. Jarman says, Wills, vol. 1, 312, 3rd ed.: "It has been repeatedly held that, unless it clearly appears on the face of the will that words importing the present time, are used with the intention of limiting the operation of the will to property then in the testator's possession, they will not have that effect."

I fail to find any such intention here. *Strevens* v. *Bayley*, 8 Ir. C. L. R. 410, is in harmony with the view I am now expressing. The testatrix devised to the plaintiff "the lands of Curramore," and all the residue of her estate to the defendant. The townland of Curramore had originally been held in undivided moieties, and there had been a partition under which the testatrix was, at the date of her will, entitled to one portion in severalty; and after the date of her will, she purchased the other portion. It was held that the whole townland passed to the plaintiff. Monahan, C. J., who delivered the judgment of the Court, considered that the description comprised the whole townland, and, consequently, included all in the townland of which the testatrix was seized at her death. No doubt the testatrix, by the language of her will, only thought she was giving to the plaintiff a moiety, but the statute interposes and gives to her language a different meaning to that she had in her mind. So here the property on Hughson street included all on that street.

In re Farrer's Estate, 8 Ir. C. L. R. 370, was decided by the same Court, the judgment being given by Monahan, C. J., and is explained by him in *Strevens* v. *Bayley*, p. 418. He says the circumstances of that case were rather peculiar and complicated. In the earlier part of the will, there was a devise of all the real estates in Limerick and Tipperary, excepting those vested in him as trustee or mortgagee. In a subsequent part of the wil' there was a

disposition of the money due * * on a mortgage * * affecting property * * in Limerick; and in another clause the testator directed that any subsequent acquired property he might die seized of, should be a primary fund for payment of legacies. At the date of his will he was declared the purchaser of the mortgaged lands in the Incumbered Estates Court. The lands were afterwards conveyed to him, and then the will was republished by a codicil." The Court thought that the lands so purchased did not pass by the specific devise; that they found an expressed intention that the same should not pass to the specific but to the residuary devise.

It would seem therefore that there was an express exception from the devise of the land he held in mortgage, and this was the land of which at the date of the will he was equitable owner, and of which he subsequently had conveyed to him the legal estate. There was not much difficulty in finding then that the land covered by the mortgage was not to pass to the specific devisee, it being expressly excepted from the devise.

There are some remarks of the Chief Justice, in giving judgment, that were not necessary for the decision, and are stated by way of example, and do not cover the present case.

I think, therefore, that all the Hughson street property passed to Robert Morrison.

I am unable to follow Mr. Martin's argument, that the Wills Act does not apply to this will.

FERGUSON, J.—The devise in the will (that is material) in the present contention is as follows :—

"I give and bequeath to my brother, Robert Morrison, $500, and the property on Hughson street. I give, devise, and bequeath all the rest and residue of my estate, real, personal, and mixed, which I shall be entitled to at the time of my decease, to my nephew, Alexander Morrison."

At the time of the making of the will (the 19th May, 1873,) the testator had one property on Hughson street

which was known as the "Red Lion Hotel." At the time of his death (the 8th March, 1883,) he was possessed of other properties on Hughson street. The question is, whether or not these other properties on Hughson street, of which the testator died possessed, passed to Robert Morrison under the devise to him of "the property on Hughson street."

The case *In re Portal and Lamb*, 30 Ch. D. 50, is a late exposition of the law by the Court of Appeal on the subject of the application of the statute 1 Vic. ch. 26, sec. 24, in England, which, as regards the material question, is the same as our Acts of 1869 and 1873, which are incorporated into the Revised Statutes of Ontario, ch. 106, sec. 26, the provision being that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

The case *Portal and Lamb, supra*, is, however, I think, quite distinguishable from the present case for the reason that the residuary devise in that case was a devise of "all other my freehold manor, messuages, lands, and real estate, whatsoever and wheresoever," and not as in the present case, of "all the residue, &c., which the testator should be entitled to at the time of his decease. There are, of course, other differences between the cases, but I think this the one material here.

The question for determination seems to me to be whether or not the "contrary intention" mentioned in the Act appears by the will. If such "contrary intention" does appear by the will, then the will does not speak and take effect as stated in the Act, as if it had been executed immediately before the death of the testator, that is, so far as it concerns real estate. If such "contrary intention" does not appear by the will, then the will must be held to speak and take effect, as stated by the statute, for I think it clear from a perusal of the Acts that some one of them would in such case apply.

The question as to whether or not such "contrary intention" does appear by the will, seems to me one not easily answered. The language of the judgment of Chief Justice Monahan in the case *In re Farrer*, 8 Ir. C. L. R. at p. 377, where the subject is discussed, seems, however, to be in point.

The learned Chief Justice, in delivering the judgment of the Court, said: "We therefore should hold * * that the property in question passed under the description of his estates in Limerick, unless we find in the will itself a contrary intention; and in no way can that intention be more satisfactorily discovered than by finding an intention that subsequently acquired property should be disposed of differently from the property vested in the testator at the time of making his will; for example, if a testator by his will devised all his property in one county to one person, all his property in another county to another person, thus exhausting all his then real estate, and should devise all his subsequently acquired real estate to a third person, it cannot be doubted that the subsequently acquired real estates in the specified counties would pass to the devisee of the subsequently acquired property, and not to the specific devisees of the lands in these counties."

Later on, the learned Chief Justice speaking of the case of *Cole* v. *Scott*, 1 Mac. & G. 518, says: "But so far as it turned on the fact that the will itself made a distinction between the then existing and subsequently acquired property, it seems to be considered as having been properly decided."

The devise in the present case does, I think, show an intention on the part of the testator that his subsequently acquired property should be disposed of differently from the property vested in him at the time of the making of the will. I think the will says this, and, I cannot understand it otherwise. Then, if the language of the judgment in the case of *In re Farrer*, to which I have referred, be applied to the present case, and as I have already said, I think it is applicable, it seems to me that the "contrary

intention" mentioned in the statute, appears by the will, and if so the judgment should be affirmed. I may add that before I was referred to the case *In re Farrer*, I had arrived at the same opinion and upon the same ground. The judgment should, I think, be affirmed, with costs.

G. A. B.

[CHANCERY DIVISION.]

KEAYS v. EMARD ET AL.

Mortgage—Subsequent parol agreement—Contract—Consideration—Forbearance—Short form deed.

In an action of foreclosure of a certain mortgage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant: that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form) and give the mortgage: that as a matter of fact the land was at the time of such representations and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the said date: that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff in consideration that he would forbear the same, agreed with him that the times of payment under the mortgage should be postponed for a length of time equivalent to that during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage; which matters of defence being duly proved,

Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counter-claimed for damages, was entitled to the same, and to a reference to fix the amount thereof.

THIS was an action brought by Ellen Keays against Felix Emard, and Victorine Dignard Emard, for the payment or foreclosure of a mortgage of certain lands, and delivery of

possession thereof under the circumstances, which are fully set out in the judgment.

The action was tried at Ottawa, on October 28th and 29th, 1885, before Ferguson, J.

Martin O'Gara, Q. C., for the plaintiff, cited *Dinsmore* v. *Shackleton*, 26 C. P. 604; *McKenzie* v. *McGlaughlin*, 8 O. R. 111; *Porteous* v. *Muir*, 8 O. R. 127; *Thomas* v. *Crooks*, 11 U. C. R. 579.

J. J. Gormully and *F. Macdougall*, for the defendants, cited *Brown* v. *Deacon*, 12 Gr. 198; *Nash* v. *Armstrong*, 10 C. B. N. S. 259; *LaRoche* v. *O'Hagan*, 1 O. R. 300; *Albert* v. *Grosvenor Investment Co.*, L. R. 3 Q. B. 123; *Williams* v. *Stern*, 5 Q. B. D. 409; *Leak* v. *Scott Bros.*, 2 Q. B. D. 376; *Oldershaw* v. *King*, 2 H. & N. 399; *Mostyn* v. *The West Mostyn Coal and Iron Co., Limited*, 1 C. P. D. 145; *Cameron* v. *Carter*, 9 O. R. 426.

December 3rd, 1885. FERGUSON, J.—The action is brought by Ellen Keays, the wife of James Keays, upon a mortgage dated December 23rd, 1882, upon the south half of lot 7 in the 9th concession of the township of Russell for securing the payment of $1175, with interest. The money was made payable annually by instalments, the first of which according to the mortgage fell due on January 1st, 1884. Default in payment is alleged, and the plaintiff asks payment, foreclosure, possession and general relief.

The mortgage was given to secure a balance of the purchase money of the same land which was sold by the plaintiff to the defendant, Felix Emard, $250 having been paid down, the balance being the amount mentioned in the mortgage.

The defendant by his statement of defence says that at the time of the agreement for the purchase, and previously to the acceptance of the deed by him, and the giving of the mortgage, he declined to make the purchase, or accept the deed, or execute the mortgage unless the plaintiff would

agree to deliver him possession of the lands on the first day of May, 1883, and that the plaintiff thereupon falsely and fraudulently represented to him that no person was in possession of the land, or had any claim upon the same, and that she could if the defendant desired it deliver immediate possession thereof, and that she then had possession, and that she thereupon agreed to give and deliver the possession on the first day of May, then next ensuing; and that he the defendant relying on this representation was thereby induced to accept the conveyance, and pay the plaintiff $250, part of the purchase money, and execute the mortgage, and that at the time of such representations and for a long time thereafter, and until about the first day of May, 1885, the lands were as the plaintiff well knew in the possession of one Lemieux, who claimed to be the owner thereof, and that the plaintiff was unable to and did not deliver possession of the land to the defendant until the month of May, 1885. These allegations are contained in the 3rd and 4th paragraphs of the statement of the defence.

In the 5th paragraph of the statement of defence the defendant alleges that subsequent to the execution of the mortgage, and after the time agreed upon for the delivery of possession, and before any of the interest and principal money became due, the defendant threatened proceedings at law to recover damages for the breach of the agreement for delivery of possession, and for the aforesaid fraudulent misrepresentations, and that the plaintiff in consideration that the defendants would delay or forbear to take legal proceedings for a reasonable time, so as to enable the plaintiff to procure possession of the land, agreed with the defendant that the time from which interest should be computed, and the payment of principal and interest in the mortgage should be postponed for such a period of time after the dates and times fixed by the mortgage for the computation and payment of the same, as would be equivalent to the time (whatever the same should be) that the defendant should be kept out of possession after the first

day of May, 1883, and would pay to the defendant all or any damages to be sustained by reason of her such non-delivery of possession. And in the 6th paragraph of the statement of defence it is alleged that the defendant *delayed and forebore* such threatened legal proceedings for a reasonable time, and that he is and always had been ready and willing to pay the instalments and interest in accordance with the said agreement, but that no portion of the same will fall due before the first day of January, 1886, and that the plaintiff is not entitled to maintain this suit.

The defendant also claims damages for breach of the agreement, and for the false and fraudulent representations that he alleges.

The contract of purchase and sale and as to the mortgage, was made between the defendant and James Keays, the husband of the plaintiff. The plaintiff herself was present at the time of the execution of the conveyances. It was said that it was her husband who did the talking. During the early part of the trial it was disputed that Keays was the agent of his wife in making the transaction. I find upon the evidence, and I have no doubt of the fact (which during the latter part of the trial did not appear to be disputed), that James Keays was the agent of his wife, the plaintiff, in all that he did and said respecting the transaction from the beginning to the end of it, although in the early part of his evidence he seemed to endeavor to make the contrary appear. He was, to my mind, not at all a candid witness.

The land in question had been purchased from the Messrs. Cook, who, it was said, had given some kind of undertaking or obligation regarding the possession. Lemieux manifestly had been claiming title and the right to possession. He is a person having only ten sons, and he and they, or some of them, had been cropping and using the cleared portion of the land more or less, and had been claiming title or some right in respect to the land. The plaintiff and her husband were well aware of this, for two prior sales had been made of the land by the plaintiff

through her husband, and on each occasion the sale went off by reason of inability, or supposed inability, to give possession on account of the claim made by the Lemieux, or some of them.

The defendant went to the lands shortly after the time at which by his agreement he says he was to get possession. He did some little work by way of repairing fences, but ere long Lemieux appeared on the scene. He prosecuted the defendant, had him arrested, brought before a magistrate, and fined and ordered to pay costs. He naturally made these grievances known to Keays, and much correspondence took place between him (Keays) and the Messrs. Cook regarding the possession of the land and the claim, or alleged claim, of Lemieux. Eventually, however, an action was brought by the Cooks against Lemieux to dispossess him, so as to be able to give the possession to the plaintiff. This action was settled, as appeared by the evidence, by the Cooks paying the Lemieux $30 and all their costs of suit, after which the plaintiff was able to give, and did give, or permitted the defendant to take possession of the land she had sold to him, but this was two years, or nearly so, after the time the defendant contends he should have had possession—namely, May 1st, 1883. I find on the evidence that the representations set forth in the third paragraph of the statement of defence and before referred to were proved to have been made by Keays as the agent of the plaintiff substantially if not precisely as alleged, and that at the time they were made Keays believed them to be untrue, and that they were untrue, although a contention of plaintiff's counsel is that they were not in fact untrue, because, as he says, Lemieux had not any rights whatever.

I find that these representations were fraudulently made with the view of inducing, and they had the effect of inducing the defendant to enter into the contract of purchase and sale, pay part of the purchase money, and give the mortgage in question, which he would not otherwise have done.

I find also that the agreement set forth in the 5th paragraph of the statement of defence was fully proved, and that it was also proved that the defendant did promise to forbear, and did forbear to prosecute the threatened proceedings against the plaintiff as alleged in the statement of defence.

As to the parol agreement to give the defendant the possession on the first day of May, 1883, made at the time of the delivery of the deed and mortgage, or immediately before it, I think this was really a collateral agreement, and that it was made in consideration that the defendant would enter into the transaction as he did, and if there were nothing more to be said as to it the agreement would, according to the statement of the law by Mellish, L. J., in *Erskine* v. *Adeane*, L. R. 8 Ch., at p. 766, be a binding agreement, notwithstanding the execution and the delivery of the deed and mortgage. This statement of the law is referred to by Mr. Justice Burton apparently with approval in the case *Mason* v. *Scott*, 22 Gr. at p. 599. Mellish, L. J., however, added: "Unless, of course, the stipulation contradicts the terms of the deed itself." In the present case the conveyance to the defendant contains a covenant as to the possession, which is the ordinary short form covenant for quiet possession free from all encumbrances, and it appears to me that the parol agreement is either contradictory of the meaning of this as shown by the column in the statute which contains the extended form of the covenant, or if not contradictory then it adds another term to the deed, which, as I understand, was held in *Mason* v. *Scott* to be fatal to the reception of the evidence of and giving effect to the parol agreement.

I think then that owing to the fact that the conveyance contains the covenant that I have referred to, effect cannot be given to the parol agreement to give possession on the first of May, 1883. But the false and fraudulent representation I think still remains.

I forbear from writing more on the subject of the parol agreement lastly mentioned, as it involves a branch of the law upon which so much has been written.

It was contended that there was no consideration for the agreement set forth in the fifth paragraph of the statement of defence, because as the plaintiff argued Lemieux really had no rights in respect of the land and the threatened proceedings if proceeded with, would have been found to be without any foundation on which to rest. Now I cannot accede to this contention that it was made to appear that Lemieux really had no such rights. I have already referred to the way in which the Messrs. Cook settled with him, but I do not think that this is the crucial test as to whether or not there was consideration for the agreement.

In *Pollock* on Contracts, 3rd ed. p. 198, it is said: "As to forbearance, the commonest case of this kind of consideration is forbearing to sue. The forbearance or promise of it must be for a definite or ascertainable time in order to be a good consideration. Forbearance for a reasonable time is enough for it can be ascertained as a question of fact what is a reasonable time in any given case:" and further on, "That which is foreborne must also be the exercise or enforcement of some legal or equitable right which is at least reasonably believed to exist;" and still further on, and on page 199, "Every day a compromise is effected on the ground that the party making it (a doubtful claim) has a chance of succeeding in it, and if he *bonâ fide* believes he has a fair chance of success, he has a reasonable ground for suing and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action and the other party gets the advantage. It would be another matter if a person made a claim which he knew to be unfounded and by a compromise claimed an advantage under it; in that case his conduct would be fraudulent."

Now there cannot be any real doubt, and I find as a fact upon the evidence, that at the time of the making of this agreement the defendant *bona fide* believed that he had a good cause of action for the false representations and the

breach of the agreement; and I entertain no doubt whatever that Keays, acting as the authorized agent of the plaintiff his wife, also believed the same thing, and, as I have said, these false representations are there notwithstanding the opinion I have stated respecting the agreement. I think the promise to forbear and forbearance were a good consideration for this parol agreement.

Then there seems to be authority for saying that the mortgage deed may be varied by this subsequent parol agreement: *Brown* v. *Deacon*, 12 Gr. 198, and the cases there cited; and *Nash* v. *Armstrong*, 10 C. B. N. S. 259. There are many other cases on the subject, some of which were referred to on the argument.

I am of the opinion that the agreement set forth in the fifth paragraph of the statement of defence is a good and valid agreement, and that the plaintiff was and is bound by it.

According to the agreement, which had the effect of extending the time for payment of the interest and instalments of the mortgage, nothing was due the plaintiff at the time of the commencement of this action, and I think this action should be dismissed, with costs.

As to the defendant's counterclaim I think this has been sustained in respect to the fraudulent representations alleged. It is, I think, proved that but for these representations the defendant would not have entered into the transaction at all, and I think that it sufficiently appears that he has been substantially damnified by his having entered into it. I am also of the opinion that the defendant is not precluded from making a claim for such injury by reason of anything that has been shown to have taken place, and I think the defendant entitled to damages under the agreement to pay damages set forth in the fifth paragraph of the defence. There will be a reference to the Master at Ottawa to take an account of said damages. The costs, if any additional costs there are by reason of the counterclaim, will be paid by the plaintiff to the defendant.

The defendant will, if he takes and prosecutes the reference, do so at his own risk as to the costs of it. Further directions and costs of the reference and all subsequent costs are reserved.

Judgment accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

BOGART v. THE CORPORATION OF THE TOWNSHIP OF SEYMOUR.

Municipal corporations—Medical health officer—47 Vic. c. 38 (O.)—By-laws appointing—Absence of fixed salary—Duties—Reasonable remuneration—Objections to by-law.

In December, 1884, B. was by by-law appointed health officer of the township of Seymour, but the by-law did not fix any salary as might have been done under 47 Vic. c. 38, s. 20 (O).

Held, on action brought by B. for remuneration, that the law would fix the salary at a reasonable sum, regard being had to the services performed, and to be performed by the plaintiff.

Where B. brought action against the township of S. to recover remuneration for medical services performed on the instructions of the corporation and of the Board of Health, and it was objected that the by-law professing to appoint the Board of Health was invalid by reason of the fact that it merely purported to appoint three persons to be a Board of Health, but did not make any mention of the officers who by 47 Vic. c. 38, s. 12, subs. 2, are made *ex officio* members of the Board of Health, and because it did not specifically state the three individuals named to be ratepayers.

Held, that looking at the provisions of the said statute, and considering that the attack now made upon the by-law was not by motion to quash it or of a like character, the objections could not be allowed to prevail.

THIS was an action brought by Irwin D. Bogart against the corporation of the township of Seymour, claiming $1080, as for medical attendance rendered on the order of the Local Board of Health of the said township, under the circumstances which are sufficiently stated in the judgment.

The action was tried at Peterborough, on November 13th, 1885, before Ferguson, J.

W. Cassels, Q. C., and *Lynch*, for the plaintiff.
B. B. Osler, Q. C., and *Caldwell*, for the defendants.

December 14th, 1885. FERGUSON, J.—The action is in effect for medical services in attending persons afflicted with smallpox in the township of Seymour, and for vaccinating a large number of persons in the same township, between the 2nd day of January and the 24th day of February in the present year of 1885, on the order of the Local Board of Health of the same township, and on the order of the defendants, at the rate of $20 per day, the plaintiff claiming by his statement of claim $1080.

The defendants deny their alleged liability to the plaintiff, and state some other defences.

In December, 1884, the plaintiff was by by-law appointed medical health officer of the township of Seymour. It was not disputed that this appointment was good and valid. This by-law did not, however, fix any salary for the plaintiff as might have been done under 47 Vic. ch. 38, sec. 20, (O.), and it was contended that on that account the plaintiff, though acting as medical health officer for the township under a good and valid appointment to the office, should have no remuneration. This is an argument that I cannot give effect to. The section says that the municipal council may make the appointment and may fix the salary. They made the appointment but did not fix the salary, and I am of the opinion that the law would fix it at a reasonable sum, regard being had to the services to be performed, and performed by the plaintiff.

It was also contended that there had been no Local Board of Health properly appointed. There was a by-law passed on, I think, the 19th of January, 1885, which was admitted to be the proper day of passing it, which proposed to appoint a Local Board of Health. The material part of this by-law is as follows :

"Be it enacted by the municipal council of the corporation of the township of Seymour, and it is hereby enacted by the authority of the same that, John Johnston, Moses Stephens, and William Worts, be and they are hereby appointed a Local Board of Health for the township of Seymour for the year 1885."

Sub-section 2 of section 12 of 47 Vic. ch. 38, provides that there shall be a Local Board of Health in each township and incorporated village, to be composed of the reeve, clerk, and three ratepayers, to be appointed annually by the municipal council. Two objections were urged against the validity of the by-law. First, that it professedly appointed the three persons named in it "a Board of Health" to the exclusion of the two officers named in the statute; and secondly, that it does not appear by the by-law that these three persons were ratepayers. There was nothing to shew that these three persons intended to act as a board to the exclusion of the officers, (who it appears were *ex officio* members of the board,) or that they did so act, or that it was intended that they should so act. It was not pretended that these three persons were not in fact ratepayers, and looking at the provisions of section 68 of the Act, 47 Vic. ch. 38, above referred to, and considering that the attack now made upon the by-law is not by motion to quash it, or of a like character.

I think these objections to it cannot be allowed to prevail.

The municipality of the township of Seymour was threatened with an epidemic known as smallpox. According to the plaintiff's evidence, he did perform a large amount of work and services of a professional character, to arrest the spread of the disease, which was found (if my recollection of the evidence is correct) in several families, and he says that in his opinion he took the proper steps to arrest the spread of it; and the evidence of Stephens, the Chairman of the Board of Health, is much in support of what the plaintiff says.

It also appears that the plaintiff did receive instructions from the Board of Health to perform the greater part of

the services that he did perform. The plaintiff and Stephens (the chairman) do not appear to disagree to any great extent as to this.

It was also objected that the defendants were not liable by reason of instructions given by the Board of Health, unless the instructions or directions were given under the provisions of section 8 of the Act, 47 Vic. ch. 38, but I do not see that I need determine this question at present, because by the first clause of schedule A to the Act last aforesaid, the Medical Health Officer besides performing certain duties therein mentioned, is to perform such other duties and lawful acts for the preservation of the public health, as may, in his opinion, be necessary or as may be required by the Board of Health; and the plaintiff says that in his opinion, what he did was necessary for the preservation of the public health. I am of the opinion that the plaintiff has succeeded in showing that the defendants are indebted to him in a substantial sum for the causes of action in respect of which he has sued; and that there should be reference to the Master to take the account and report as to the amount of the sum.

It was said that the plaintiff had not kept certain accounts and the names of persons vaccinated by him, as it was alleged was his duty, and as he was requested and promised to do; and that he did not make his claim against the defendants in a reasonable way before bringing this action, and for these and other reasons it may be as well not to determine the question as to the costs of the actions at present, and these being reserved, further directions may as well be reserved also.

The reference will be to the Master at Peterborough. Further directions and all costs reserved till after report.

The Master may, of course, at the request of either party report specially and fully as to any matter that may be deemed material.

Judgment accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE CLEATOR.

Will—Devise—Estate in fee tail or fee simple—Vendor and purchaser—R. S. O. ch. 109.

M. C. by her will devised as follows: "First, I give and devise to my grandson, J. C., the farm * * to have and to hold the same and every part thereof for and during his natural life, and after his death to the heirs of his body, should he leave any such, him surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be, amongst * * to have and to hold the same to them, their heirs and assigns forever; but my will and desire is that my said grandson, J. C., shall not have or go into the possession * * until he shall have attained the age of twenty-five years, or five years after my death. Secondly, I give and bequeath to my son, J. C., $100 annually during his natural life, the same to be paid to him quarterly * * and to be a charge on the farm or homestead above devised to his said son John."

Held (reversing the decision of Proudfoot, J.), That the effect of the limitations was to give J. C. an estate tail, which he had barred as the result of his dealings with the land by way of conveyance. *Greenwood* v. *Verdon*, 1 K. & J. 74, distinguished.

Per PROUDFOOT, J.—"Heirs of the body" mean heirs of the body living at the death of J. C. J. C. took only a life estate, and his heirs of his body would take as purchasers a fee simple, if at J. C.'s death there were no heirs of his body, the estate would go to his then living brothers and sisters in fee simple. *Eden* v. *Wilson*, 4 H. L. C. 257 distinguished.

THIS was an application by John Cleator under the Vendor and Purchaser Act, R. S. O. ch. 109.

The petition set out an agreement to sell all that part of lot No. 20, lying south of the Grand River, in the 3rd concession of the township of Brantford in the county of Brant, and being the lands described in the will of the late Mary Cleator as the farm or homestead on which she resided at the date of her will, which was dated the 13th day of January, 1884: that the title to said premises was an estate in fee simple, or fee tail: that the petitioner claimed title to the said lands by virtue of a devise thereof to him by Mary Cleator, widow of John Cleator, deceased, which devise was as follows:

"First, I give and devise to my grandson John Cleator, son of my son John Cleator, the farm or homestead whereon I now reside, together with all and singular the heredita-

ments and appurtenances thereunto belonging, to have and to hold the same, and every part thereof, for and during his natural life, and after his death to the heirs of his body should he leave any such, him surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be amongst his brothers and sisters him surviving, to have and to hold the same to them, their heirs and assigns forever; but my will and desire is that my said grandson John Cleator shall not have or go into the possession of the said farm or homestead, until he shall have attained the age of twenty-five years, or five years after my death.

Secondly, I give and bequeath to my son John Cleator the sum of one hundred dollars annually for and during his natural life, the same to be paid to him quarterly in each and every year, and to be a charge on the farm or homestead above devised to his said son John." (Then follow some pecuniary legacies): that the petitioner and his wife granted and conveyed the said property to one James Hunter, who with his wife reconveyed the same to the petitioner: that the purchaser objected to the title of the petitioner on the ground that the said devise did not confer upon the petitioner an estate in fee tail, and that even if it did that the said conveyance to Hunter did not operate to pass an estate in fee simple in the said lands.

The petition which prayed to have it declared that the proper construction of the said will was, that the petitioner took an estate in fee tail, and the conveyance to Hunter operated as a conveyance in fee simple, and that the objections made by the purchaser were not valid objections, came on for argument on May 27th, 1885, before Proudfoot, J.

H. T. Beck, for the petitioner, the vendor. The question here is: Did John Cleator take an estate tail, or an estate for life under the will of his grandmother? If an estate tail, then the case comes within the rule in *Shelley's Case*. [PROUDFOOT, J.—The question is: What is the meaning of

the words "heirs him surviving"?] The will in this case is an old will, and is not affected by the Wills Act. It has been held that a devise of premises to A., and the issue of his body living at his death, and for want of such issue, over, is an estate tail in A.: *The University of Oxford* v. *Clifton*, 1 Ed. 473. The Judge there said that it was the plainest case he ever saw in his life: *Marshall* v. *Grime*, 28 Beav. 375; 2 Jarman, 4th ed., 445; *Wright* v. *Pearson*, 1 Ed. 119. *Chisholm* v. *Emery*, 18 Gr, 467, may be cited against my contention, but there the words used were "dying without issue," which is a different case from dying without heirs. When the words used are "heirs of the body," an estate tail is conferred, as they are technical words, and it requires very strong words in the context of the will to cut that estate down to an estate for life: *Dawson* v. *Small*, L. R. 9 Ch. 651. [PROUDFOOT, J.—That point was considered in *Little* v. *Billings*, 27 Gr. 353.] Then as to the other question: Is there any restraint on alienation when John Cleator is not to get possession until he is twenty-five years of age? [PROUDFOOT, J.—That is not a restraint on alienation.] No, but on possession, and shews that he was to take a permanent interest. [PROUDFOOT, J.—It would be the same in the case of an estate for life.] "Should he leave any heirs" is mere surplusage. A man has no heirs until he dies: 2 Jarman, 4th ed., 360, 363, [PROUDFOOT, J.—It may be that the words "heirs of his body" are such violent words that they cannot be controlled.] Cases where an estate is cut down are those where a devise is a personal one, which is not the case here.

Beverley Jones, for the purchaser. The intention of the testator must govern. *Chisholm* v. *Emery*, 8 Gr. 467, governs this case. The whole will must be looked at. The case of *O'Reilly* v. *Corrie*, 11 U. C. R. 557, apparently supports the petitioner's contention. [PROUDFOOT, J.—That was a devise in fee cut down to an estate tail, and Mr. Beck contends that this is an estate tail which cannot be cut down to an estate for life.] There is no doubt the devise does not convey more than an estate for life, for if John Cleator died leav-

ing no heirs, the property was to be divided between his brothers and sisters. I refer to *Ray* v. *Gould*, 15 U. C. R. 131; *Doe d. Todd* v. *Duesbury*, 8 M. & W. 514; *Parr* v. *Swindels*, 4 Russ 283; 2 *Jarman*, 4th ed., 476.

May 28, 1885. PROUDFOOT, J.—The petitioner John Cleator claims as devisee under the will of his grandmother, Mary Cleator, made on the 13th January, A. D. 1864.

The devise is in these terms: "I give and devise to my grandson John Cleator * * the farm or homestead whereon I now reside, together with all and singular, the hereditaments and appurtenances thereunto belonging To have and to hold the same and every part thereof for. and during his natural life, and after his death to the heirs of his body, should he leave any such heirs him surviving, and in the event of his leaving no such heirs, then the same and every part thereof, is to be divided as fairly and equally as may be amongst his brothers and sisters him surviving. To have and to hold the same to them, their heirs and assigns forever; but my will and desire is, that my said grandson John Cleator shall not have or go into the possession of the said farm or homestead until he shall have attained the age of 25 years, or five years after my death;

"Secondly, I give and bequeath to my son John Cleator the sum of $100 annually, for and during his natural life, the same to be paid to him quarterly in each and every year, and to be a charge on the farm or homestead above devised to his said son John."

The question is: What estate John the grandson took?

The devise to the grandson for life, and after his death, to the heirs of his body, standing alone, would give an estate tail to the grandson through the operation of the rule in *Shelley's Case*. But here there is the devise over, in the event of his leaving no such heirs, to his brothers and sisters him surviving, and to their heirs and assigns for ever.

The phrase, "heirs of the body," is not inflexible and may be explained by other provisions in the will, not to have been used in their ordinary sense. Thus in *Lisle* v. *Grey*, 2 Lev. 223, "heirs male of the body" were explained to mean "sons"; to the same effect is *Goodtitle d. Sweet* v. *Herring*, 1 East 264. In *North* v. *Martin*, 6 Sim. 266, "heirs of body" were held to mean "children"; to the same effect is *Gummoe* v. *Howes*, 23 Beav. 184.

In the present case the devisees over are the surviving brothers and sisters of John, and are to take on the failure of heirs of John's body at his death. It seems clear that the expression heirs of the body here does not mean an indefinite body that might exist for centuries, but is limited to heirs of the body living at John's death, and is therefore equivalent to children or issue. The failure of heirs of the body or of issue was contemplated as to take place at John's death, and the devisees over were his brothers and sisters surviving him; it was a benefit personal to them, for the addition of the words "*heirs and assigns*" of the devisees over is plainly not substitutionary, but by way of limitation, the brothers and sisters must themselves survive,

I think that John took only a life estate, and his heirs of his body will take as purchasers a fee simple; if at John's death there are no heirs of his body, the estate will go to his then living brothers and sisters in fee simple.

This conclusion is, I think, sustained by *Greenwood* v. *Verdon*, 1 K, & J., 74; *Chisholm* v. *Emery*, 18 Gr. 467, and the cases cited by Draper. C. J., in his judgment there, and by *Gray* v. *Richford*, 2 S. C. 431, 445. These cases establish that where the devise over on the death of A without leaving issue, is to such of a class of persons as shall be living at the death of A. the gift over should be construed as a gift over on the death of A. without issue living at his death.

In *Marshall* v. *Grime*, 28 Beav. 375, there was no language pointing to a definite failure of issue such as in the present case. It is classified with *Wright* v. *Pearson*, 1

Ed. 119, as establishing that where a devise to a person and his issue, or to him and the heirs of his body, is followed by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these special words is to make the remainder contingent on the prescribed event: 2 *Jarman* on Wills, 3rd ed. 422. In *Marshall* v. *Grime*, *supra*, the devise was of all the rest, residue, and remainder of the real and personal estate unto the testator's son, but without power to sell the lands: and then the lands so given to the son should, at his death, go to his lawful issue absolutely: and if the son should not have any lawful issue him surviving, then the lands were to go and be held absolutely by the testator's nephew, the second son of testator's sister now living, his heirs and assigns forever.

The Master of the Rolls says (p. 378:) "If I read this will as giving an estate in fee with an executory devise over in case he died without issue surviving him, I, in fact, read the will as if the words of the direction giving the estate to the issue were omitted from the will, unless, indeed, I can read the words as giving the issue an estate as purchasers. But it is clear that I cannot omit the words from the will, and I think that as little can I, upon the authority of the decided cases, hold, that the issue, under the terms of this devise *which contains no words of distribution among the issue, take as purchasers.*

Undoubtedly, had the devise been to the issue living at his decease, as tenants in common, absolutely, the case would have been very different."

This statement shews that *Marshall* v. *Grime* can have no bearing upon the present case in which a time is specified when the heirs are to be ascertained, and which provides for an equal and fair distribution among the brothers and sisters. Had the nephew in *Marshall* v. *Grime* been required by the terms of the devise to be alive when the son died, the case would have been more like the present. But the mention of the heirs and assigns of the nephew in that case excluded the presumption that the devise was intended as a personal benefit to

him, while it is otherwise where the devisee is himself required to be alive when the estate devolves upon him.

Eden v. *Wilson*, 4 H. L. C. 257, to which I was referred seems to me to have no application to the present. In that case there was a proviso that if Lady E. who was tenant for life should have no issue male, living at her death, or no such issue male as should be entitled under the will to the estates, then the estates were devised to her daughters. But Lady E. had issue male, living at her death, and the daughters were held not entitled to the estates.

The construction I have placed on this will seems to me to carry out what was plainly the intention of the testatrix She wished her grandson to have the land for his life, and she desired it to go to his children in fee simple, but if there were no such children, it was to go to her grandson's surviving brothers and sisters. The only mode of certainly effecting these objects is to hold that the children or heirs of the body take as purchasers. The grandson has executed some deeds that would have the effect of barring the entail if there is one, and thus defeating the desire of the testatrix.

There will be a declaration accordingly, and the petitioner will pay the costs of this application.

It is not by any means a very clear case, and it would be satisfactory to have the opinion of the Divisional Court. upon it.

See also *Smith* v. *Smith*, 5 C. L. T. 225 ; *Parker* v. *Birks*, 1 K. & J. 156.

From this judgment the petitioner appealed to the Divisional Court, and the appeal was argued on September 10th, 1885, before Boyd, C., and Proudfoot and Ferguson, JJ.

The same counsel appeared, and the same line of argument was followed.

Beck, for the petitioner, referred to *Toller* v. *Attwood*, 15 Q. B. 924; *North* v. *Martin*, 6 Sim. 266; *Gummoe* v *Howes*, 23 Beav. 184; *Tyrwhitt* v. *Dawson*, 28 Gr. 112;

Shelley's Case, Tudor's L. C. 3rd ed., 606, 608; *Ostrom* v. *Palmer*, 5 A. R. 61.

Beverley Jones, for the purchaser. The will creates an estate tail in John Cleator subject to be defeated at his death by an executory devise, or in the event of his dying without issue: *Parker* v. *Birks*, 1 K. & J. 156; *McEnally* v. *Wetherell*, 15 Ir. C. L. R. 502; *Ex p. Hooper and Wife*, 1 Drew. 264; *Ex p. Davies*, 2 Sim. N. S. 114; and *Goodtitle d. Sweet* v. *Herring*, 1 East 264.

December 3, 1885.—BOYD, C.—I have had much hesitation in arriving at a conclusion upon the construction of this will, and more particularly so, as I find that the result I have reached differs from the view of my brother Proudfoot. I think the effect of the limitations is to give the grandson an estate tail which has been barred as the result of his dealings with the land by way of mortgage and reconveyance. The devise to John Cleator may be thus shortly expressed: "To him for his life, and after his death to the heirs of his body, should he leave any such heirs him surviving, and in the event of his leaving no such heirs, then the land is to be divided equally among his brothers and sisters him surviving, to hold to them their heirs and assigns for ever."

As observed by Lord Alvanley in *Poole* v. *Poole*, 3 B. & P. 627: "In construing limitations of this sort the Courts have never deviated from the general rule which gives an estate tail to the first taker when the devise to him is followed by a limitation to the heirs of his body, except when the intent of the testator appeared so plainly to the contrary that no one could misunderstand it."

In this will we find the words "heirs of the body," which have a fixed technical meaning, not to be displaced unless from subsequent inconsistent words it is very clear that the testator used them in a different and restricted sense. This is the language of Lord Redesdale in *Jesson* v. *Wright*, 2 Bli. 57, where also Lord Eldon defines the primary meaning of the phrase, thus, "Heirs of the body'

primâ facie mean all descendants; and it is likewise a rule of law, that all descendants shall take under these words unless they are clearly qualified and restricted by other words," p. 49.

The plain import of the will appears to be that until all the heirs of the body of the first taker fail, the estate should not go over to his brothers and sisters in fee, according to the final limitation; if so, the necessary conclusion is an estate in fee tail in the first taker with remainder in fee which is susceptible of being barred.

The first part of the devise to John Cleator for life and after his death to the heirs of his body, is beyond controversy an estate tail. Is there anything subsequently in the will which detracts from this, so unmistakably as to displace the operation of the rule in *Shelley's Case* but the words, "should he leave any such heirs him surviving"? As to these words they appear to be of no efficacy, as *nemo est hæres viventis*. The language of Lord Hardwick, in *Southby* v. *Stonehouse*, 2 Ves. Sr. 615, is apposite, where the devise was "to my children if I leave any to survive me." He said, the words "if I leave any to survive me, were quite nugatory, for no person can take under a will unless upon surviving the testator." I do not read them as words controlling the next clause in this will, which proceeds, "and in the event of his leaving no such heirs *then*" over. "Such" is not properly, much less necessarily referable to the words "him surviving," but rather to the words "heirs of the body," that is is to say, the gift over is not defeated merely if heirs of the body survive the testator, but may take effect upon any subsequent failure of such heirs: *Elton* v. *Eason*, 19 Ves. 73. The gift over to "his brothers and sisters him surviving," is not, upon the authority of many unquestioned decisions, sufficient to limit "heirs of the body" to such individuals as may answer that description at the death of the first taker. Some cases are collected and commented on in *Doe d. Cudogan* v. *Ewart*, 7 A. & E. 636; I also refer particularly to *Doe d. Cole* v. *Goldsmith*, 2 Marshall 517;

S.C. 7 Taunt. 209: and *Doe d. Cock* v. *Cooper*, 1 East 229; *Wright* v. *Pearson*, 1 Ed. 119, S. C, *Ambler*, 358. and *Mills* v. *Seward*, 1 J. & H. 733. I also refer upon the former part of the devise to *Richards* v .*Bergavenny*, 2 Vern. 314; *Doe d. Cannon* v. *Rucastle*, 8 C. B. 876; and upon the importance of adhering to the rule in *Shelley's Case*, to the judgment of Cairns, L. C., in *Bowen* v. *Lewis*, L. R. 9 App. Cas. 907.

I do not feel pressed by *Greenwood* v. *Verdon*, 1 K. & J. 74, as affecting this will. Two points of distinction at least differ that case from this. The words there dealt with were "dying without issue," which require a less demonstrative context in order to modify their import than does the technical expression "heirs of the body": *Lees* v. *Mosley*, 1 Y. & C. Ex. 589, and in *Greenwood* v. *Verdon*, it was held that a personal benefit was intended to the executory devisees, which cannot be argued here, as words importing transmissible interest are conjoined with the devise to the surviving brothers and sisters.

I may add that though the will be read as providing that in case the first taker has no heirs of the body living at his death, then the devise over is to take effect, but if he has such heirs then living the devise over is defeated notwithstanding a subsequent failure of descendants yet I do not see that this construction would change the result as to the grandson being tenant in tail. In this view there is no restriction in the limits of the lineal succession. "Heirs of the body" would not then indicate a particular class or generation of such issue, but would comprehend the whole inheritable succession in due course beginning, from its proper terminus *a quo*, *i. e.*, the death of the testator before which there can be no "heir" in its proper and actual sense. Upon this aspect of the will I refer to *Richards* v. *Bergavenny*, 2 Vern. 324; *Jones* v. *Morgan*, 1 Bro. C. C. 219; *Dubber d. Trollope* v. *Trollope*, Ambl. 453; *S. C.*, Lee *temp.* Hard. 160; *Doe* v. *Goff*, 16 East. 406, and the comments of Mr. Hayes upon that case in his "Enquiry into the effect of limitations to heirs of the body in devises": *Hayes* on Limitations, pp. 129-131.

I think that it should be declared that the vendor can make a good title, and that the judgment below should be reversed, with costs.

FERGUSON, J.—The difficulty between the parties to this petition arises solely in respect to the meaning of the first clause of the will of the late Mary Cleator, which bears date the 13th day of January, 1864.

The petitioner claims to be entitled to the lands in question in fee simple or in fee tail by virtue of the provisions of this will. He is the grandson of the testatrix named in the first paragraph of the will. This clause or paragraph is as follows:—

[The learned Judge here read the first clause of the will set out, *supra*.]

Counsel agreed in saying that no other clause or part of the will casts any light upon or in respect to the meaning to be given to the words of the clause, and in this I think they were right.

The respondent objects to the title of the petitioner on the ground that this devise does not confer upon the petitioner an estate in fee tail in the lands, and also upon the ground that even if it does, a certain conveyance made by the petitioner and his wife (to bar dower) bearing date the 18th day of May, 1880, to one James Hunter, of the same lands, did not operate so as to pass an estate in fee simple, and that a certain other conveyance of the lands made on the 4th day of November, 1880, by the said James Hunter and his wife (to bar dower) did not pass the estate in fee.

The only information there is regarding these conveyances going to shew that they or either of them are different from the ordinary conveyance, is, that it is stated in the petition that the former one was for the purpose of a security only. The only argument was in respect to the meaning of the clause of the will above set forth.

If the words of the gift had ended with the words "and after his death to the heirs of his body," it seems plain that

this would have been under the rule in *Shelley's Case* a gift of an estate in fee tail. The additional words, "should he leave any such heirs," and the gift over in the event of his leaving no such heirs seem to have created the difficulty or doubt which gave rise to the petition.

In the case of *Jordan* v. *Adams*, 9 C. B. N. S. at 497, C. J. Cockburn said: "I take the effect of the authorities on this subject clearly to be, that, when land is devised to a man for life, with remainder to his heirs, or the heirs of his body, no incident superadded to the estate for life, however clearly shewing that an estate for life merely, and not an estate of inheritance was intended to be given to the first donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance, nor any declaration however express or emphatic of the devisor, can be allowed, either by inference or by the force of express direction, to qualify or abridge the estate in fee, or in tail, as the case may be, into which, upon a gift to a man for life, with remainder to his heirs, or to the heirs of his body, the law inexorably converts the entire devise in favour of the ancestor, notwithstanding the clearest indication of the intention of the donor to the contrary:" and after referring to a large number of authorities, the learned Judge said that the same would be the case, even though the devisor should expressly declare that the heirs should take by purchase and not by descent; and that such a declaration would be set aside as unavailing." Further, on p. 499, the learned Judge said: "When once the donor has used the terms 'heirs,' or 'heirs of the body,' as following on an estate of freehold, no inference of intention, however irresistable; no declaration of it, however explicit, will have the slightest effect. The fatal words once used, the law fastens upon them and attaches to them its own meaning and effect as to the estate created by them, and rejects, as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of

inheritance, and which tend to show that no such estate was intended to be created; although, all the while, it may be as clear as the sun at noon-day, that by such a construction the intention of the testator is violated in every particular." And further on he says that such is the principle invoked in the cases of *Perrin* v. *Blake*, 4 Burr. 2579; *Jesson* v. *Wright*, 2 Bli. 1, and *Roddy* v. *Fitzgerald*, 6 H. L. C. 823.

In that case there were differences of opinion, the Court was equally divided; but so far as I can glean from the report of the case, the other members of the Court did not dissent from this statement of the law made by the Chief Justice, who, however, was of the opinion that, in that case an estate tail was not created, saying; "But although the rule thus established is inflexible to the extent I have stated, there is, nevertheless, one quarter from which it permits light to be let in, and effect to be given to the real intention of the testator: this is where by some explanatory context, having a direct and immediate bearing upon the term "heirs" or "heirs of the body," the devisor has clearly intimated that he has not used these words in their technical, but in their popular sense, viz.: that of sons, daughters, or children, as the case may be." For an illustration of this branch of the rule, the learned Judge referred to the language of Lord Brougham in *Fetherstone* v. *Fetherstone*, 3 Cl. & F. 67: "If there is a gift to A. and the heirs of his body, and then, in continuation, the testator referring to what he has said, plainly tells us that he has used the words 'heirs of the body' to denote A.'s first and other sons, then clearly the first taker would only take a life estate."

In the will under consideration in *Jordan* v. *Adams*, there was a direction following immediately upon the devise to the heirs male of the body that they should take "in such parts, proportions, manner, and form, and amongst them as the said William Jordan, their father, should direct," and the Chief Justice was of the opinion that the testator had thereby given his own key to the meaning

"heirs male of the body of William Jordan," namely those heirs male of the body of William Jordan, of whom William Jordan was the father, that is the sons of William Jordan. Other members of the Court were of opinion that even this was not sufficient to take the case out of the rule.

In *Jordan* v. *Adams*, there was a gift over "in default of such issue." This did not embarrass the learned Chief Justice, for he said the "issue" spoken of were the same as were previously spoken of as "heirs male of the body."

Two of the learned Judges were of the opinion that Jordan took a life-estate only, and two that he took an estate tail. The Chief Justice being of the opinion that he took only a life estate.

Now looking at the will in the present case I do not perceive that there is any explanatory context having a direct and immediate bearing upon the words "heirs of the body" used by the testator, or that the devisor has clearly intimated that he did not use these words in their technical sense. After having examined the will as carefully as I have been able, I am of the opinion that there is no context contained in the will having a direct and immediate bearing upon the terms that she employed, whereby the testatrix intimated that she did not use the words in their technical sense. She did not, so far as I have been able to perceive by any context, place any interpretation upon the words showing that she intended to use them in a sense differing from their technical sense, and in all the cases that I have examined in which it has been held that such words were used in a sense different from their technical sense, such interpretation or means of interpretation are afforded by the context of the will, or some part or parts of the context. It seems to me from the authorities that the gift over does not afford such interpretation, or the means of it. What may be said is this: that by the words the testatrix employed, there is good ground for the opinion that her intention, in fact, was to make three gifts, "one absolute, and to the petitioner for life: another contingent, and in fee to the children of the petitioner who might survive him: and

another contingent and in fee to the brothers and sisters, in default of such issue, which if the gifts were properly made would present a case such as that of *Ladingtan* v. *Kime*, 1 Salk. 224 Ld. Raymond, 203, which has sometimes been called a contingency with a double aspect. But even if it were assumed that such was in fact her intention, that would not, according to the authorities, as I understand them, be a sufficient reason for concluding that the words employed should not be construed according to their technical meaning.

A peculiarity exists, and some difficulty arises by reason of the words, "should he leave any such heirs him surviving," occurring immediately after the words "heirs of his body." The case, *Richards* v. *Bergavenny*, 2 Vern. 324, (for a reference to which I am indebted to the Chancellor) decided that the limitation of the estate to Lady Bergavenny and such heir of her body as should be living at her death, with remainder over, for want of such heir, was an estate tail; and it is also there said that the use of the word "heir" in the singular number did not make any difference.

After perusing a large number of authorities, I have arrived at the opinion that by the gift in this will, the petitioner took an estate in fee tail, and I apprehend that the conveyances mentioned in the petition, operated as a disentailing assurance.

I think the judgment should be for the petitioner.

G. A. B.

[CHANCERY DIVISION]

COOK V. EDWARDS.

Landlord and tenant—Covenants—Bringing new land into cultivation—Fencing.

A lessee covenanted that during the term he "will cultivate, till, manure, and employ such part of the demised premises as is now, or shall hereafter be brought under cultivation in a good, husband-like, and proper manner, and shall not nor will during the said term cut any standing timber upon the said lands except for rails or buildings on the said demised premises and also shall and will sufficiently repair and keep repaired the erections and buildings, fences, and gates erected or to be erected upon the said premises: the said lessor finding or allowing on the premises all rough timber for the same, or allowing the said lessee to cut and fell so many timber trees upon the said premises as shall be requisite." The lessor having brought an action on the above covenant claiming damages against the lessee on the ground that he had converted certain pasture into arable land, which, however, the jury found was an act of proper husbandry, whereupon judgment was entered for the defendant. On motion for a new trial,

Held, that the lessee was at liberty under the lease to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent, if it was a reasonable and proper thing to do in the course of good and judicious husbandry, and there was nothing to indicate that the landlord was to control the use of the timber so as that he might limit it to the buildings, fences, and erections existing at the date of the lease.

THIS was an action brought by George Cook against Anthony Edwards, for an account of damages alleged by him to have been sustained by reason of breaches by the defendant of the covenants contained in a lease dated August 31st, 1880, whereby he demised to the defendant certain lands therein mentioned, by reason of which breaches the plaintiff was under the lease entitled to determine the same and re-enter on the premises, and for an injunction restraining further breaches, and for occupation rent, and mesne profits since the commencement of the action and further relief.

The words of the covenants in the lease so far as it is necessary to set them out for the purposes of the present report were as follows:

"And that the said lessee will during the said term, cultivate, till, manure, and employ such part of the said demised premises as is now, or shall hereafter be brought under cultivation, in a good, husband-like, and proper manner, so as not to impoverish or injure the soil, and plough said land in each year during the said term six inches deep and at the end of said term will leave the said land so manured as aforesaid * * and will preserve all orchard and fruit trees (if any) on the said premises from waste, damage, or destruction * * And will keep clear and in good repair all drains and ditches on the said lands. And shall not nor will during the said term cut any standing timber upon the said lands, except for rails or for buildings upon the said demised premises or for firewood upon the premises, and shall not allow any timber to be removed from off the said premises; and also shall and will, at the costs and charges of the said lessee well and sufficiently repair and keep repaired the erections and buildings, fences, and gates erected or to be erected upon the said premises: the said lessor finding or allowing on the said premises all rough timber for the same or allowing the said lessee to cut and fell so many timber trees upon the said premises as shall be requisite."

The action was tried at Chatham on October 16th, 1884, before Toms, J., Local Judge, acting for Wilson, C.J., and a jury, when a verdict was found for the defendant and judgment thereupon entered for him.

On December 18th, 1884, *J. K. Kerr*, Q.C., moved for and obtained an order *nisi*, setting aside the verdict on the ground of misdirection, and on other grounds, or for a new trial, and on February 24th and 25th, 1885, motion to make the same absolute, was argued.

J. K. Kerr, Q.C., for the plaintiff, cited *Campbell* v. *Shields*, 44 U. C. R. 449; *Leighton* v. *Medley*, 1 O. R. 207; *Pickard* v. *Wixon*, 24 U. C. R. 416; *Wixon* v. *Pickard*, 25 U. C. R. 307; *Borgnis* v. *Edwards*, 2 F. & F. 111; *Gunge* v. *Lockwood*, 2 F. & F. 115; *Platt* on Leases, 208; *Elliott* v. *Watkins*, 1 Jones Jr. Exch. R. 308; *Crozier* v. *Tabb*, 26 C. P. 369; *Drake* v. *Wigle*, 22 C. P. 341; *Emmett* v. *Quinn*, 7 A. R. 306.

Falconbridge, for the defendant, cited *Doe* v. *Jones*, 4 B. & Ad. 126; *Doe* v. *Earl of Burlington*, 5 B. & Ad. 507; *Rosc.* N. P., 14th ed. p. 326; *Jones* v. *Chappell*, L. R. 20 Eq. 539; *Campbell* v. *Shields*, 44 U. C. R. 449; *Lundy* v. *Tench*, 16 Gr. 597; *Doe* v. *Bond*, 5 B. & C. 855; *Leith's*

Blackst. 2nd ed. p. 304 *seq*; *Jackson & Gross*, Landlord and Tenant in Pensylvania, sec. 104; *Platt* on Leases, vol 2, p. 189; *Woodfall*, Landlord and Tenant, 11th ed. pp. 551, 568.

May 21st, 1885. BOYD, C.—The lease is dated August 31st, 1880, and is for a term of twenty-one years and one month from August 31st, 1880, at a rent of $300 yearly.

The following breaches of covenant are complained of in the pleadings:

(1) The defendant has failed to cultivate, till, manure and employ such part of the demised premises as at the date of the lease was under cultivation in a good, husband-like, and proper manner, so as not to impoverish or injure the soil.

(2) He has not cropped the same by a regular rotation of crops in a proper farmer-like manner.

(3) He has not preserved all orchard and fruit trees on said farm from waste, damage, and destruction, but has destroyed a large number of such trees.

(4) He has cut standing timber upon said lands for purposes other than those specified in the said lease and has removed timber therefrom.

(5) He has not kept clear and in good repair all drains and ditches upon the said lands.

(6) He has not repaired and kept in repair the erections, buildings, fences, and gates upon the said premises as by the lease required.

(7) He has torn down and removed fences upon the said lands and has enclosed portions of the permanent pasture land in a separate field and has cut down and used up valuable timber for posts and for manufacturing into boards to fence and has fenced in such pasture land with the arable land and has not provided for the plaintiff proper pasturage for a horse, and in reducing the pasture land has deprived the plaintiff of pasture land and has unduly curtailed the right of pasturage by said lease reserved to the plaintiff, and has suffered pigs, sheep, and

other cattle to run at large in the orchard on said land to the great and permanent injury of the said orchard and the fruit trees therein, and has broken up and destroyed permanent pasture land and converted a portion thereof into arable land, and has cut down and destroyed valuable shade, ornamental, and other trees upon said land, and has otherwise committed waste thereon whereby the plaintiff's interest and reversion in said land is greatly injured.

An injunction is also claimed against the defendant, because he threatens and intends to break up and destroy further premanent pasture land and otherwise commit acts of waste.

The action was begun on April 26th, 1884. The defendant asked a jury trial and the verdict was in the defendant's favour.

The plaintiff now objects to the verdict on four grounds:

(1) As touching the non-preservation of the fruit trees in the orchard.

(2) As to cutting of oak trees on pasture land and bringing it under cultivation.

(3) As to drains and ditches not being kept in repair.

(4) As to cutting of timber for purpose of bringing a larger part under cultivation and breaking up pasture land, as to which an injunction is asked against its threatened repetition and continuance.

It was argued that there was no power under the lease to bring a larger part of the land under cultivation than was under tillage at the date of the lease without obtaining the lessor's consent, and no power to erect new fences or change old ones without the like consent. The defendant contends the contrary of this and relies on the jury having found that the breaking up of the pasture land was an act of proper husbandry, and also on the further fact that the trees cut down and complained of were used in fencing the new part so brought under cultivation.

The defendant further contends that there was no specific objection to the Judge's charge as to the fruit trees and the drains, and that the verdict is substantially

right as to there being no damage sustained by the plaintiff in regard either to orchard or drains.

The action is one for damages and an injunction, and not for the recovery of the land as upon a right to re-enter. The only damages for which the plaintiff could now recover would be for damages to his reversion. The onus is on him to shew clearly that the tenant with a yet unexpired term of fifteen years has so acted as to injure the plaintiff in his reversion.

I think that the proper construction of the lease implies that the lessee was at liberty to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent, that is to say, if it was a reasonable and proper thing to do in the course of good and judicious husbandry so to enlarge the arable area of the farm, the right to do this existed without the lessor's assent. The lease contemplates the extension of the arable land but does not impose any condition thereon, such as an assent from the landlord. Nor can I read the clause relating to fencing and repairs as indicating that the landlord was to control the user of the timber, so that he might limit it to the buildings, fences, and erections existing at the date of the lease. The covenant is that the lessee "shall and will at his own costs and charges repair and keep repaired the erections and buildings, fences, and gates erected, *or to be erected*, upon the said premises, the said lessor finding or allowing on the said premises all rough timber for the same or allowing the said lessee to cut and to fell so many timber trees upon the said premises as shall be requisite." That is to be read as if the word "hereby" were inserted before "allowing." It is intended to intimate by that clause that the lessor permits the use as occasion arises of the timber for such purposes.

The case of *Tucker* v. *Linger*, 21 Ch. D. 18, 30, is a good deal in point, as shewing that the doing of the repairs was not conditional on the landlord finding the materials.

The other matters are of the most trivial character. Three or four young apple trees were injured by pigs and died. They were replaced by other trees of a much better kind by the lessor. One forty years old apple tree was smothered by a heap of manure, after the knowledge of which the landlord took rent twice from the tenant without complaint. The ditches have been cleared from time to time and kept in good repair sufficient for all the purposes of the farm. The jury have found upon the facts that there was no waste and no damage to the reversion for any small complaints of this kind, and I do not think the Judge's charge which is complained of should be microscopically examined with a view to reinstate this action for another costly trial. A jury from the neighbourhood were very much better judges than we can be of such a case as this, and I think the verdict and judgment below should not be disturbed.

The judgment is affirmed, with costs.

PROUDFOOT, J.—The lease contains covenants by the lessee to cultivate such part of the demised premises as were then, *or shall hereafter be brought under*, cultivation &c. There is nothing here requiring the assent of the lessor, and so long as the newly taken in land was not done in such a way as to constitute waste the tenant was doing no wrong in bringing some more land under cultivation. And the jury have found that there was no waste.

The jury have also found that the defendant worked the place in a proper farmer-like mannner.

Some fruit trees have been destroyed, and perhaps in this respect the defendant offended against his covenant to preserve them fron destruction. But he has replaced them by other and better ones, and the plaintiff must be taken to have waived his right to claim damages by accepting rent after knowledge of the destruction. It does not appear that the reversion will be injured by what has taken place.

The tenant was at liberty to cut standing timber for rails, buildings, and firewood, and he does not seem to have gone beyond this.

The tenant covenants to repair the buildings, fences, and gates erected, *or to be erected*, the lessor finding or allowing on the premises timber for the same or allowing the lessee to cut and fell so many timber trees as should be requisite. There is nothing here requiring the landlord's assent. *Allowing to cut or fell*, is a present allowance, a permission granted by the signing of the lease itself.

The covenant to repair the drains and ditches does not seem to have been violated. There is, it is true, a conflict of evidence on the subject, but the jury have found for the defendant.

I need not add anything further as I concur in the views the Chancellor has expressed.

A. H. F. L.

[CHANCERY DIVISION.]

WOODWARD v. CLEMENT ET AL.

Patent law—Infringement—Mechanical equivalent—Combination.

Where in an action to restrain infringement of a patent, brought against C., and H. who had been employed as a workman by C., it appeared that the only portion of the defendants' combination, which was not identical with the plaintiff's patented machine was a mere variation in arrangement, or a mechanical equivalent of a corresponding portion of the plaintiff's machine—a device containing no element of invention, but effecting the same purpose by a slightly different method.

Held, that the plaintiff was entitled to judgment for an injunction against both defendants, but to a reference as to damages only as against C.

Quære, whether it is correct to say that there can be no infringement of a combination unless the whole be pirated.

THIS was an action brought by Robert Woodward against Clement & Co. and W. J. Henderson, claiming damages for the infringement of a certain patent of invention by the defendants, and an injunction to restrain the same under the circumstances which are sufficiently set out in the judgment.

The action was tried on October 23rd, 1885, in Toronto, before Proudfoot, J.

Maclaren, for the plaintiff, cited *Curtis* on Patents, 4th Ed. s. 332; *Sellers* v. *Dickinson*, 5 Exch. 312.

Miller for the defendants Clement & Co. referred to *Walker* on Patents, secs. 349, 352, 359; *Goodeve's* Patent Cases, Ed. 1884, p. 144: *Curtis* v. *Platt*, 3 Ch. D. 135 n; *Le Fever* v. *Remington*, 13 Fed. R. 86; *Clark* v. *Adie*, L. R. 10 Ch. 667, 2 App. Cas. 315; *Lister* v. *Leather*, 8 E. & B. 1004; *White* v. *Fenn*, *Goodeve's* Patent Cases, 499.

Hall for the defendant Henderson cited *Bump* on Patents, p. 231; *Curtis* on Patents, 4th Ed. s. 290; *Delano* v. *Scott*, 1 Gilp. Penn. Dist. C. 489; *Betts* v. *De Vitre*, L. R. 3 Ch. 429; *United Nickel Co.* v. *Worthington*, 13 Fed. R. 392; *Walker* on Patents, p. 252; *Tyrrell* on Patents, p. 149, 189.

November 11th, 1885. PROUDFOOT, J.—Action for infringement of a patent for "Arnold's Improved Automatic Boiler," of which the plaintiff is assignee. The action is for infringing the second claim in the specification which is for "the combination with the boiler A and supply reservoir C of the condenser K covering the boiler and having an open bottom which rests over the supply reservoir." Clement is the person who has caused the articles alleged to be an infringement to be made, and Henderson is the workman who has made them upon Clement's order, and who derives no benefit from them but the price of his labor.

There is no doubt that the boiler and condenser of the defendants Clement & Co., are identical with the plaintiff's. But it was contended that the supply reservoir was different: that the device adopted was not a mechanical equivalent, and unless the whole combination be pirated that there is no infringement.

The plaintiff's supply reservoir is wider than the bottom of the condenser and open all round, so that the condensed steam dripping from the condenser falls into the reservoir at every point in its circumference.

The defendants' reservoir or receiver is not wider than the condenser, and a rim with a slight inclination, or sloping edge with channel, attached to the boiler, is made to catch the condensed steam and return it to the reservoir at one aperture.

I think this is a mere variation in arrangement, or a mechanical equivalent to attain the same end. The water drops from the condenser by the force of gravity, and the confining it to one aperture in returning it to the receiver is a device containing no element of invention, to effect the the same purpose by a slightly different method. In *Johnson* v. *Root*, reported in *Curtis* on Patents, in a note to sec. 332, 4th ed. p. 436, Sprague, J., explains the twofold meaning of the word "equivalent" in patent cases. He says, "You wish to produce a pressure downwards: well it can be done by a spring, or it can be done by a

weight. A machine is presented to a person conversant with machines. He sees that the force applied downward in the one before him is by a weight: from a knowledge of his art he can pass at once to another force, the spring, to press it downwards: and these are mechanical equivalents. But * * suppose in early days the problem was to get water from a well to the surface of the earth. One man takes a rope of grass and draws up a pail of water; another would see that, as a mechanical equivalent, a rope of hemp would accomplish the same result. But suppose another person comes and for the first time invents a pump. That is equivalent in the result of bringing the water to the surface of the ground; in that respect it is equivalent, as producing that result, to hauling it up by a rope. But it is not mechanically equivalent; it brings into operation very different powers and forces, and would require invention to introduce it."

In *Yates* v. *The Great Western R. W. Co.*, 2 A. R. 226, Moss, C. J., says at p. 230: "To the plaintiff belongs the credit of suggesting a method by which the end of keeping the nut in its place could be attained, and its great utility is established, not merely by argument, but by a great body of testimony. What, then, is this method? Was it the invention of any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement therein, within the scope and meaning of the Patent Laws? * * But the difficulty which appears to be insuperable is that there is no invention."

I think that is the insuperable difficulty in this case.

Being of that opinion, it is not necessary to consider the other argument that there can be no infringement of a combination unless the whole be pirated—a proposition that seems to require some qualification: *Sellers* v. *Dickinson*, 5 Exch. 312.

The defendant Henderson was only a workman employed by Clement, and he is not liable in damages. *Delano* v. *Scott*, 1 Gilpin 489. But he may be enjoined from making the article. Indeed, the ordinary form of

injunction applies not only to the principal, but to his servants, workmen and agents.

There will be judgment for the plaintiff—the defendants will be enjoined from manufacturing the automatic boiler having the combination of the second specification of the plaintiff's patent, and an enquiry as to damages against Clement, the plaintiff to have costs against Clement, but none as against Henderson.

A. H. F. L.

[CHANCERY DIVISION.]

RATTÈ V. BOOTH ET AL.

Riparian proprietor—Navigable stream—Reservation in patent.

J. A. was the patentee of a certain water lot on the River Ottawa, and the description in the patent covered the lot and two chains distant from the shore, but a reservation was contained therein "of the free uses, passage and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found in or under, or be flowing through, or upon any part of the said parcel of land hereby granted." The said water lot was subsequently conveyed to A. R. but the description in the deed to him only went to the water's edge.

In an action by A. R. against some owners of saw-mills on the river above his lot to prevent them from throwing saw dust, slabs, &c., into the river to his detriment in the use of his water lot. It was

Held, that the Ottawa River is a navigable stream in fact, and a riparian proprietor as such would therefore only be entitled to the water's edge. The reservation in the patent still left that part of the river a navigable stream, and did not convey an exclusive right to the grantee of the Crown, and the conveyance to the water's edge, did not carry the right further than to that edge. It is only by the special grant that a title passed to the two chains, and it still left the river with all its characteristics of a navigable stream.

The plaintiff also set up that he had a right by prescription to keep and use a boat house in front of his lot without being interfered with.

Held, that any structure on the water even if existing for twenty years, would be an interference with the free use of the river reserved by the Crown and the right to so interfere, could not be acquired by lapse of time. The action was therefore dismissed.

Warin v. *The London, &c., Loan and Agency Co.*, 7 O. R. 706, distinguished.

THIS was an action brought by Antoine Rattè against John Rodolphus Booth and several other mill owners on

the Ottawa River to prevent them from throwing their sawdust, slabs, &c., into the said river.

The plaintiff's statement of claim set out that the sawdust, slabs, &c., collected in front of his premises on the bank of the river, and prevented his using the same for his boating business and other purposes, which he had the right as a riparian owner to do without being interfered with, and claimed, as well, that he had acquired such a right by prescription from the previous user for such purposes of a boat house which he had there constructed.

The defendants' statements of defence set up the leave and license of the plaintiff, a right by prescription after twenty years' uninterrupted use, and that the channels and river were vested in and under the control of Her Majesty the Queen, and that the Attorney General was a necessary party.

The action came on for trial at the Ottawa Sittings on April 30th, and May 1st, 1885, before Proudfoot, J., when the evidence was taken and part of the argument was heard, and was then adjourned to Toronto, when the argument was finished on October 19th, 1885.

At the trial it appeared that the plaintiff claimed title through one Joseph Aumond who was the patentee from the Crown, and whose patent covered the water lot and two chains out into the Ottawa River from the shore, with a reservation "of the free uses, passage, and enjoyment of in, over, and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said parcel of land hereby granted," while the deed from the plaintiff's grantor only covered, the water lot to the water's edge.

Counsel for the defendants admitted that if the plaintiff, by reason of his being a riparian proprietor, was entitled to the two chains in the river, granted to Aumond, there should be a reference to ascertain the damages, and to that point the argument was principally confined.

Cassels, Q. C., for the plaintiff. The grant to the patentee, under whom the plaintiff claims, covered the

water out to the distance of two chains from the water's edge, and although the deed to the plaintiff only goes to the water's edge, still the plaintiff contends that the deed has the effect of conveying all the patentee's interest. In any event the evidence shews that the plaintiff has title by possession.

McCarthy, Q. C., and *Christie*, for the defendants, other than Bronson and Weston. The Ottawa river is a navigable stream: *Dixon* v. *Snetzinger*, 23 C. P. 235; *Warin* v. *The London &c., Loan and Agency Co.*, 7 O. R. 706. A grant of land would not cover the bed of the stream. A grant of water lots has been made lawful by statute: 23 Vic. c. 2, s. 35. The common law rule does not apply, if it did, the lot would go to the centre of the stream and at right angles to the bank. Here the patentee held under a distinct authority with a reservation in favour of the Crown, and he only granted to the plaintiff to the water's edge: *Lord* v. *The Commissioners, &c., of Sidney*, 12 Moo. P. C. 497-8; *Angell* on Watercourses, 7th ed. secs. 25, 26; *Robertson* v. *Watson*, 27 C. P. 579; *Crook* v. *Corporation of Seaforth*, L. R. 6 Ch. 553.

Gormully, for the defendants Bronson and Weston. A grant by the Crown to the water's edge would not have extended the limit to the middle of the stream. A private grant cannot carry it further. The plaintiff is not a riparian owner: *Cockburn* v. *Eager*, 24 Gr. 412; *Giles* v. *Campbell*, 19 Gr. 226. A trespasser, as the plaintiff is, cannot complain: *Rose* v. *Groves*, 5 M. & G. 613.

Cassels, Q. C., in reply. In *Cockburn* v. *Eager*, *supra*, the person complaining was not a riparian owner. By the act of the Crown the banks of the Ottawa are moved two chains into the river, and the patent and deed go to that edge. Riparian ownership does not depend on ownership of land. The plaintiff having the right of user has a right of action. I refer to *Coulson & Forbes's* Law of Waters, p. 566; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 672; *Warin* v. *The London, &c., Loan and Agency Co.*, 7 O. R. 706.

November 11, 1885. PROUDFOOT, J.—The Crown granted to Joseph Aumond on December 24th, 1850, a parcel of land in the town of Bytown, described as follows: Commencing where a stone monument has been planted on the west side of Metcalfe street, at the south-east angle of the said water lot, then north 23°30′ west, three chains more or less to where a monument has been planted at the north-east angle of the said water lot, then south 66°30′ west, four chains ten links more or less to a point in the Ottawa River, two chains distant from the shore, then southerly parallel to the general course of the said shore to a point in the northern limit of Cathcart street produced on a course of south 66°30′ west, distant two chains from the aforesaid shore of the River Ottawa, then north 66°30′ east, six chains ninety-six links more or less to the place of beginning.

The grant contained a reservation of the free uses, passage and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said parcel of land thereby granted.

By deed dated January 23rd, 1867, Amable Prevost. who claimed under Joseph Aumond, granted to Antoine Rattè, part of the land contained in that grant from the Crown, describing it as being composed of that part of water lot No. 1, &c., (which said water lot was by the Crown granted to Joseph Aumond) and commencing at a point ninety-nine feet from the boundary stone on the north-west side of said water lot, thence in a southerly direction parallel to Sussex street, a distance of ninety-nine feet to the intersection of the line between lots numbers 3 and 4, as laid down on the plan of the sub-division of said water lot filed in the Registry office, &c., thence along the said sub-division line produced in a westerly direction 132 feet, thence southerly parallel to Sussex street, ninety-nine feet to the line of Cathcart street, thence along the northerly line of Cathcart street in a westerly direction to the water's edge of the River Ottawa, thence along the said

water's edge down the stream in a northerly direction to the line of Bolton street, and thence in an easterly direction to the place of beginning.

The evidence in this case was taken before me on the 30th of April and 1st of May, 1885, and the case partially argued, when counsel for the defendants admitted that if plaintiff had a title to the two chains into the river there must be a reference to ascertain the damages. That question of title was deferred for argument to a future day, and was argued before me on the 19th of October, 1885.

The sole question is, whether the plaintiff, by reason of his being a riparian proprietor, is entitled to the two chains in the River Ottawa granted to Joseph Aumond.

It has been held that the common law rule, as to the flux and reflux of the tide being necessary to constitute a navigable river, does not apply to our great lakes and rivers: *Gage* v. *Bates*, 7 C. P. 116; *Dixon* v. *Snetsinger*, 23 C. P. 235, and these decisions are binding on me however much they may differ from the English law, and from a great number of American cases: *Coulson & Forbes's* Law of Waters, 58.

The rights of riparian owners on the banks of navigable rivers do not depend on the ownership of the soil of the stream, but so far as they relate to a natural stream, exist *jure naturæ*, because the land has by nature the advantage of being washed by the stream: *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662.

In a navigable river the soil is *primâ facie* in the Crown, and in rivers not navigable the soil is presumed to belong to the riparian owners to the middle line of the stream: *Bickett* v. *Morris*, L. R. 1 Sc. App. 47. But this ownership of the Crown is for the benefit of the subject, and could not be used in any way so as to derogate from or interfere with the right of navigation which belongs by law to the subjects of the realm: *Mayor, &c., of Colchester* v. *Brooke*, 7 Q. B. 339.

The statute 23 Vic. c. 2, s. 35, which recites that doubts

had been entertained as to the power vested in the Crown to dispose of and grant water lots in the harbours, rivers, and other navigable waters in Upper Canada, and it was desireable to set at rest any question which might arise in reference thereto, it was declared and enacted, that it had been heretofore and that it should be thereafter lawful for the Governor-in-Council to authorize sales, or appropriations, of such water lots under such conditions as it had been or might be deemed requisite to impose.

In *Warin* v. *London, &c., Loan and Agency Co.*, 7 O. R. 706, it was held that a grant of a water lot by the description, "land covered with water," was valid to pass to the grantee and his representatives, the soil and the *jus publicum* for navigation and the like in the water, which could be built upon, filled up, or otherwise dealt with as might be thought proper.

The Ottawa is a navigable stream in fact, and a riparian proprietor would therefore only be entitled to the water's edge. It was argued that the grant of a portion of the bed made it private property of the grantee, and that by his conveyance to the water's edge it passed so much of the bed of the stream as he owned; that as *Warin* v. *London Loan, &c., Agency Co., supra*, had held that the grantee of the Crown was at liberty to fill up the water lot to the limit of the grant, if he were to attempt to exercise this right, he would not be allowed to derogate from his own grant, and that the effect would be to give to the plaintiff the extremity of the grantees described portion of the bed as the water's edge.

But in the *Warin Case* there was no reservation of the free use, &c., of all navigable waters, as in this case; and there the lease to the plaintiff was not to the water's edge, but to the extremity of the water lot. These differences distinguish the present from the *Warin Case*. It is clear that in the present the grantee would have had no right to fill up the lot to the limit of his boundary, for that would have interfered with the free use of the water; the reservation still leaves that part of the Ottawa a navigable

stream and does not convey an exclusive right to the grantee of the Crown. It is rather difficult to conceive what benefit the grantee expects to obtain by such a grant unless possibly a right of fishery. Any erection he could have made over the water would have been a violation of the reserved right.

Being thus left a navigable stream, the conveyance to the water's edge would not carry the right farther than to that edge.

The right of a riparian proprietor to the middle thread even of a non-navigable river is only a *primâ facie* right and may be rebutted: *Coulson & Forbes's* Law of Waters, 95. The circumstances of this case would seem to shew that it was not intended to pass any right in the soil of the river bed to the plaintiff. The grant from the Crown covered two chains in the bed of the stream, while the deed to the plaintiff only describes the land to the water's edge. A grant from the Crown to the water's edge would not have carried the soil *ad medium filum*, and it is only by the special grant that a title passes to the two chains, and still leaving the river with all its characteristics of a navigable stream.

It was further urged on behalf of the plaintiff that he has had a floating wharf, with a boat-house on it, it is 140 feet long and 40 feet wide, for eleven years, with a smaller structure preceding it going back for twenty years, and has thus got a title by occupation. But if my view is correct this is an interference with the free use of the river, reserved to the Crown, and the right to do so cannot be acquired in that way. In fact it is liable to be removed as an obstruction to the free use of the river.

I think, therefore, the action must be dismissed; but as a great deal of expense has been incurred which might have been avoided if the objection had been presented at an early stage of the cause, the dismissal is without costs.

G. A. B.

[CHANCERY DIVISION.]

SCHRADER v. LILLIS.

Contract—Public policy—Restraint of trade—Restriction against employing union men—Liquidated damages—Penalty—Consideration.

On May 27th, 1885, certain individuals forming a Cigar Manufacturers Association, amongst whom was the defendant, considering themselves aggrieved by the members of the Cigar Makers union, who refused to lower the price of making a particular kind of cigar, entered into an agreement in writing between themselves of the first part and S. of the second part, as follows: "Whereas for the mutual advantage and protection of the parties hereto * * it has been agreed that the parties of the first part shall become severally bound to S. in the sum of $500, liquidated damages in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked * * with the labels of the Cigar Makers union, or shall use * * in connection with the manufacture of cigars by him any Cigar Makers union label, * * or shall permit * * any Cigar Makers union, or any union or set of men to compel him to hire or employ union men only, or to dismiss any employee. Now, therefore, * * the parties hereto of the first part severally covenant with S. each for himself that he will, in case he shall at any time hereafter violate any of the foregoing stipulations [setting them out] immediately pay to S. the sum of $500: the intention being that in case of a violation of all or any of the stipulations * * aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to S. the full sum of $500, * * because of his so offending, as liquidated and ascertained damages, (and not as a penalty) to be by S. applied, &c. * * The intention, also, being that the entire sum of $500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever, of any of the stipulations * * aforesaid on the part of any one of the parties of the first part."

The defendant having broken the above agreement in all respects, S. brought this action against him to recover $500 as liquidated damages.

Held, that the mutual obligations imposed by the contract constituted a sufficient consideration for it.

Held, also, that the agreement was not invalid, on grounds of public policy, and as in undue restraint of trade.

Collins v. *Locke*, L. R. 6 App. Cas. 674; and *Hornby* v. *Close*, L. R. 2 Q. B. 153, distinguished.

Held, also, that the sum of $500 was liquidated damages and not a penalty. Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is, that the sum named is not to be treated as a penalty, but as liquidated damages.

Moreover the stipulations resolved themselves into one—viz., that the defendant would not submit to the dictation of the cigar makers in carrying on his business. It was impossible to calculate the damage to the other members of the manufacturers association by non-compliance with the agreement. The case would therefore seem to come within the rule that when the agreement is for the performance of one act, and there is no adequate means of ascertaining the damages from a violation and the parties agree upon a sum as liquidated damages, it will not be treated as a penalty.

THIS was an action brought by Frederick Schrader against John S. Lillis to recover $500, as liquidated damages, under the circumstances set out in the judgment. The action was tried at Hamilton on October 5th and 6th, 1885, before Proudfoot, J.

Dalton McCarthy, Q. C., and *Muir*, for the plaintiff. There is here an express agreement that if in any one item its stipulations be violated the damages shall be $500; and if they all be violated the damages shall be same, as to which see *Atkyns* v. *Kinnier*, 4 Ex. 776; *Reynolds* v. *Franklin*, 6 E. & B. 528. In the case of none of the breaches here in question could the amount of damages be calculated. See *Wallis* v. *Smith*, 21 Ch. D. 243; *Craig* v. *Dillon*, 6 App. 116.

S. H. Blake, Q. C., and *E. Martin*, Q. C., for the defendant. The general rule is, that if there are several items of agreement, and a general sum named as damages, this sum is to be treated as a penalty. *Betts* v. *Burch*, 4 H. & N. 506, is the leading case here. *Wallis* v. *Smith* is inapplicable. In *Craig* v. *Dillon* the Court treated all that was to be done as one act. If the sum here is a penalty, how insignificant are some of the breaches which would involve a forfeiture of $500. See *Pollock* on Contracts, 3rd ed., p. 481 n. (*d*). Moreover, in the case of such an agreement as this, which restricts the manner in which the defendant is to carry on his business, the plaintiff must not only prove the agreement and its breach, but also the consideration for it and the reasonableness of it, and the evidence here shews that the agreement was unnecessary and unreasonable. It is against public policy because it excludes a body of workmen from their lawful occupation. Although combinations either of masters or workmen may be legal so far as to prevent any criminal proceedings, that has nothing to do with the case where they come to the Court to enforce the agreement. Moreover, the agreement is against public policy because it is unreasonable and unnecessary, so far as the manufacturers themselves are con-

cerned, as imposing a restriction on the mode of managing their business, and inasmuch as the evidence shews that the trade was not injured, excepting that of the defendants,' to prohibit the use of any union men was quite unnecessary. If there was consideration, which we deny, yet when one of the number was released all were released. If the consideration lay in all joining in the agreement, then one not joining destroyed the consideration. Again no damage has been shewn. We refer to *Pollock* on Contracts, 3rd ed., pp. 327, 328, 331; *Hilton* v. *Eckersley*, 6 E. & B. 47; *Collins* v. *Locke*, 4 App. Cas. 674; *In re Newman*, 4 Ch. D. 724; *Magee* v. *Lavell*, L. R. 9 C. P. 107; *Emden's* Dig. 1882, p. 324; *Hornby* v. *Close*, L. R. 2 Q. B. 153.

Dalton McCarthy, Q. C., in reply. *Betts* v. *Burch*, 4 H. & N. 506, was decided on grounds not applicable here, and *In re Newman* and *Magee* v. *Lamb*, can be referred to different grounds. See, also, *Green* v. *Price*, 13 M. & W. 695. The contract here does not militate against any of the rules as to contracts in restraint of trade: *Mitchel* v. *Reynolds*, 1 Sm. L. C. 417. The freedom of manufacturers here in carrying on their business was interfered with by the workmen, who had no right to insist upon their labelling their goods in a particular way: *The Ontario Salt Co.* v. *The Merchants Salt Co.*, 18 Gr. 540. The restraint was only partial and not unreasonable, and was mutually beneficial. The consideration was adequate. See *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345; *Hitchcock* v. *Coker*, 6 A. & E. 438. *Hilton* v. *Eckersley* is an entirely different case from this. There the majority was to determine what was to be done, here the parties themselves agree to what they are to do. The public is not interested in compelling the masters to employ union men. As to A. Blumenstiel not signing, all parties agreed to this. There has been no abandonment of the agreement here, nor is any such defence pleaded. See *Sidney Road Co.* v. *Holmes*, 16 Q. B. 268.

November 15th, 1885. PROUDFOOT, J.—The cigar manufacturers, and the cigar makers have each, for some time, had an association for mutual protection and benefit.

On the 8th of April, 1885, the secretary of the Cigar Manufacturers' association, with the approval of the defendant and other members, wrote to the secretary of the Cigar Makers' union a letter in the following terms:

HAMILTON, April 8, 1885.

To the Secretary of the Cigar Makers' union, Hamilton.

DEAR SIR,—I am instructed by the Cigar Mannfacturers' association to say that owing to the recent change in the tariff on cigars, and the fact that the manufacturers are unable to realize sufficient advance on a cigar made of scrap filler, considered by your union as a shape cigar, and costing the manufacturers $1.00 per 1,000 more than an ordinary straight cigar.

I would also say that a scrap shape cigar is not recognized in any other part of Canada. Therefore I would ask you to call a meeting of your union as soon as possible and give the above matter your careful consideration, and make the bill on scrap shape the same as on ordinary straight cigars. An early reply will oblige

Yours truly,

J. SCHWARZ,

Secretary of the Cigar Manufacturers' Association.

We, the undersigned manufacturers, approve of the above letter in duplicate to be sent to the Cigar Makers' union.

H. SIMONS,
W. G. REID,
BLUMENSTIEL BROS.,
J. S. LILLIS,
J. BLUMENSTIEL,
JOHN LAVELL,
F. SCHWARZ & SON.

In reply the Cigar Makers' union wrote on April 9th, as follows:

HAMILTON, April 9, 1885.

To the Secretary of the Cigar Manufacturers' Association, Hamilton.

DEAR SIR,—At a meeting of union the letter sent by you was read, and after due consideration the following resolutions were arrived at:

It was moved and seconded that the secretary inform the bosses that we take no action in the matter, that our prices are low enough now, and that further correspondence in the matter would be useless.

It was also resolved that we instruct your body that we consider ourselves out on strike against a reduction and lock out.

Yours truly

A. C. GIBB,
Cor. Sec. U. 55.

The Manufacturers' Association met on April 11th, when this letter from the Cigar Makers' union was discussed, and its terms not unnaturally caused annoyance. One member, Mr. Reid, said: "We had been cut decidedly short, and whatever action the majority carried he would stand by." Another, Mr. Schwarz, said "that in reply to the letter sent to the union the letter we received was an insult, and moreover, as no demand had been made, they have no cause for a strike, and as to a lock-out, it was ridiculous, as the only reason for the manufacturers closing down was on account of the dull times, in having too much stock on hand, and money was coming in too slow—in fact, business was in such a state that it was safer to reduce stocks on hand than make more goods." All present concurred in that view. It was resolved "that we give the union just what their letter asks for, that is, that we do not give them any further correspondence on this matter." It was also moved by Mr. Lillis (the defendant), seconded by Mr. Simons, and resolved, "That the letter received from the union be accepted and filed, and it is unanimously resolved that the shops remain as they are for the present and until the request of the manufacturers as to scrap-shape cigars is complied with."

At a meeting of the Cigar Manufacturers' association on the 19th of May, 1885, it was moved by Mr. Schwarz, and seconded by Mr. Reid, and carried, that on and after the 10th of June, 1885, no union labels be put on boxes of cigars by the members of the association. This resolution was signed by the defendant, and by Reid, Simons, Schwarz & Son, the two Blumenstiels and Lavell.

On the 27th of May, 1885, two papers were drawn up and signed. One termed a memorandum of agreement, the other the agreement,—both signed and sealed by the same parties. The memorandum was for the formation of an association of Cigar Manufacturers, and besides the matters contained in the agreement, had some others relative to the formation of the association. Both of these documents are set out in the statement of defence, but as I do

not think the memorandum qualifies the agreement in the matters in respect of which this action is brought, it is not necessary to refer to it further.

The agreement now in question was made on May 27th, 1885, between Frederick Schwarz, Henry Simons, John S. Lillis (the defendant), William G. Reid, A. Blumensteil, Isaac Blumensteil, John Lavell, and John Schwarz, of the City of Hamilton, cigar manufacturers, of the first part; and Frederick Schrader (the plaintiff), of the second part, and was as follows:

Whereas for the mutual advantage and protection of the parties hereto and for divers other good considerations it has been agreed that the parties of the first part shall become severally bound to the party of the second part in the sum of $500 as liquidated and ascertained damages in case any of them shall at any time during the continuance of this agreement either directly or indirectly buy or sell any cigars marked or branded with the labels of the Cigar Makers' union, or shall use or allow to be used in connection with the manufacture of cigars by him any Cigar Makers' union label, or any label sanctioned by the Cigar Makers' union, or any label in any way indicating that his cigars have been manufactured by union men or shall permit or allow any Cigar Makers' union or any union or set of men to compel him to hire or employ union men only, or to dismiss any employee.

Now therefore this agreement witnesseth, that in consideration of the premises, the parties hereto of the first part severally covenant with the party of the second part, each for himself, that he will in case he shall at any time hereafter violate any of the foregoing stipulations by buying or selling cigars marked or branded with the labels of the Cigar Makers' union or by using or allowing to be used in connection with the manufacture of cigars any Cigar Makers' union labels or any label sanctioned by the Cigar Makers' union, or any other union, or with any label in any way indicating that his cigars have been manufactured by union men, or by permitting or allowing any Cigar Makers' union or any union, or any set of men to compel him to hire or employ union men only, or to dismiss any employee, he shall immediately pay to the party of the second part the sum of $500, the intention being that in case of a violation of all or any of the stipulations provisions or conditions aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to the said party of the second part the full sum of $500 of lawful money of Canada because of his so offending as liquidated and ascertained damages (and not as a penalty) to be by said party of the second part applied in such manner as to "The Cigar Manufacturers' association of Hamilton," shall seem meet (the parties hereto being members of said association.) The intention also being that the entire sum of $500 shall be the amount of the ascertained and liquidated damages of any violation or

breach whatever of any of the stipulations provisoes or conditions aforesaid on the part of any one of the parties of the first part.

In witness whereof, etc.

It was signed by all the parties to it except A. Blumenstiel. On the same day a resolution was passed that in case A. Blumenstiel should not sign the bond Isaac Blumenstiel's name should be erased. And another resolution was that in case A. Blumenstiel refuse to sign the bond he ceases to be a member of the Association.

On the same day a paper was signed by the defendant and others allowing the Blumenstiels to use union stamps up to the 10th of June, 1885.

HAMILTON, May 27th, 1885.

It is hereby covenanted and agreed by the Cigar Manufacturers' association here assembled that the resolution carried yesterday, May the 26th, at a regular convened meeting of this association allowing Isaac Blumenstiel and Alexander Blumenstiel to use union stamp up to the 10th day of June. 1885, is to be in full force and effect notwithstanding the premises entered into by us this day, but on and after the above mentioned date the penalty for violation shall be in full force and effect binding on said Isaac Blumenstiel and Alex. Blumenstiel.

H. SIMON,
W. G. REID,
JOHN LAVELL,
J. S. LILLIS,
J. SCHWARZ,
F. J. SCHRADER,

On the 22nd of July, 1885, the defendant wrote to the Manufacturers' association that after due consideration he had concluded to inform them that he would withdraw from the association, as they were aware he had been trying to get a fair and impartial arbitration, which they were not willing to grant. On receipt of that letter the association met, considered it, and as the result of that consideration brought this action.

The defendant in his evidence says he broke the agreement in all respects. He used the labels of the Cigar Makers' union; sold cigars with the labels of the union; he dismissed non-union men, and employed union men only.

The defence sets up that various members of the Association who had signed the agreement of the 27th of May had been granted liberty by the plaintiff to buy and sell cigars with the labels of the union, and had been allowed to employ union men, and the whole object of the agreement was defeated.

That the agreement is without consideration, and is in restraint of trade; and

That the $500 is in the nature of a penalty.

There was no evidence that the agreement was not to be binding unless all the cigar manufacturers in Hamilton became members of the association. It was urged that Alex. Blumenstiel not having signed the agreement the others were not bound. But the paper of the 27th of May, signed by the defendant and others, shewed that it was contemplated he would not sign, and in that case he was to cease to be a member of the association. And there is no indication of any intention on the part of the others that in such case the agreement should terminate. So far from it the defendant considered himself bound up till the time of his attempted withdrawal (22nd of July). It was also urged that Lavell had been allowed to employ union workmen, but it turned out that Lavell had ceased to be a manufacturer, and had become manager for a manufacturer who did not belong to the association.

The agreement between these parties did not contemplate that any of them should be at liberty to withdraw at his pleasure. There is nothing in the writing, and nothing in the evidence, indicating any such contemplation. The only mode in which any one could withdraw would be by the consent of all the others. If any others have violated the agreement they would be liable to an action, but it would not have the effect of liberating the defendant from his engagement.

The mutual obligations imposed by the contract constitute a sufficient consideration.

The conditions of the agreement do not prevent the manufacture of cigars, but only require that when sold

they should not be sold with union brands or union labels All the parties to the agreement subjected themselves to the same restraint. It was an endeavor to protect themselves from the dictation of the cigar makers. There was no difficulty in procuring non-union workmen. The public were not interested in the matter. The only users of cigars affected by it were the union men and their friends, and they "boycotted" the non-union manufacturers, and published a list of the union manufacturers who alone were to be patronized. Another list was published of the non-union manufacturers, and workingmen and mechanics were warned agaiust purchasing from them or smoking any cigars without the union label. The restraint on the manufacturers was partial, preventing the sale with union brands or labels, and not to employ union men, others being easily to be had.

Then is the restraint reasonable. The sense in which the expression *reasonable* is to be used in this connection is explained by Tindal, C. J., in *Horner* v. *Graves*, 7 Bing. at p. 743, as quoted by Strong, V. C., in *The Ontario Salt Co.* v. *The Merchants Salt Co.*, 18 Gr. 540, 545: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."

To render an agreement void as being contrary to public policy, the contravention of public policy must be unquestionable, without doubt. Is the interference with the public interests by reason of this agreement of that character?

If the manufacture of cigars be a matter of public benefit, a trade in which the public are interested, this agreement does not interfere with it, except so far as the small portion of the public comprising the cigar makers and their friends are concerned, and they cannot complain, for they are themselves the cause of the difficulty. And even with regard to them they will not be deprived of the

enjoyment of a cheap luxury, as there are other manufacturers who employ only union men and use union labels. So that public interest would not appear to be injuriously affected by the agreement.

In *The Ontario Salt Co.* v. *The Merchants Salt Co.*, 18 Gr. 540, Strong, V. C., had occasion to consider most of the questions raised in the present case. In that case the Ontario Salt Co. and five other incorporated companies, and several individuals, and the defendants, entered into an agreement with the view of successfully working the business of salt manufacturing and to further develop and extend it, and for the purpose of procuring and assuring combined action and mutual protection in the business, to combine and amalgamate and unite as the Canadian Salt association for the purpose of selling on such terms as to secure as far as possible a fair share for their capital invested, and there were trustees appointed through whom all the parties to the agreement should sell all the salt manufactured by them, and should sell none except through these trustees. The bill was demurred to because the agreement was contrary to public policy as tending to a monopoly, that it was void as being in undue restraint of trade, that it was *ultra vires* of the defendants and the incorporated companies, that it was of such a peculiar nature that even though binding at law the court would not enforce it, and that the court should not interfere on the ground of hardship.

It will be observed that the conditions of that agreement were much more stringent than in this case, but all these grounds of objection were decided in favour of the plaintiffs. On the question of public policy after quoting the opinions of eminent Judges as to the care to be observed by courts of justice in determining what is and what is not against public policy, the learned Vice-Chancellor says, (p. 549) "Did I even think otherwise than I do, that this agreement was injurious to the public interests, I should hesitate much before I acted on such an opinion, for I should feel that I was called on to relieve

parties from a solemn contract, not by the mere application of some well established rule of law, but upon my own notions of what the public good required, in effect to arbitrarily make the law for the occasion. I can conceive no more objectionable instance of what is called Judge-made law than a decision by a single Judge in a new and doubtful case that a contract is not to bind on the ground of public policy."

The case of *Hilton* v. *Eckersley*, 6 E. & B. 47, which was much relied on before me is commented on and distinguished by the learned Vice-Chancellor. In that case a bond entered into by the mill owners of a certain district in Lancashire, conditioned to carry on their works in regard to wages, and the engaging of labourers, and time of work, according to the resolutions of a majority for a period of twelve months, was held void as being in undue restraint of trade, and so contrary to public policy. The Vice-Chancellor observes that each mill owner completely surrendered his right of carrying on trade without restraint to the majority of the associates, who could at any moment they thought fit close the mills altogether. At 18 Gr., p. 547, he says, "I think, therefore, that *Hilton* v. *Eckersley* may be disposed of by saying that the only proposition of law which it affirms is the familiar one that contracts in restraint of trade, though partial, are nevertheless void if unreasonable, that is against public policy." And he adds, what is equally applicable to the present case. "That the particular contract there in question was void on that ground, in no way assists to prove that the totally dissimilar contract in question here is also to be held bad."

In *Collins* v. *Locke*, L. R. 4 App. Cas. 674, it was held that an agreement parcelling out the stevedoring business of a particular port among the parties to it, and so to prevent competition at least among themselves, and also, it may be, to keep up the price to be paid for the work, was not invalid. But a provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants who should not choose to employ

the party entitled under the agreement, all the parties are deprived of the work, could not be justified. It was obviously detrimental to the public, and beyond anything the legitimate interests of the parties required, and utterly unprofitable and unnecessary, at least for any purpose that could be avowed. It is obvious that the present is very different from *Collins* v. *Locke*. In the circumstances contemplated by that part of the agreement the whole of the parties to it would be deprived of the work, with no benefit to themselves, and to the detriment of the public. There is nothing analogous to that in the present case.

Hornby v. *Close*, L. R. 2 Q. B. 153, was the case of a society of which one of the main objects was that of a trades' union and the support of members when on strike. It was held that this object was illegal, in the sense of not being enforceable at law, as being in restraint of trade That case would be an authority for the proposition that the combination of the cigar makers, binding themselves not to work except under certain conditions, is illegal, as being a restraint of trade. But it can have no application to the present, where the manufacturers were standing on on the defensive, and refusing to be "boycotted" into complying with the demands of the workmen. Their agreement was not to employ union men only. They never refused to accept union men if they chose to work where the union brands and labels were not used, and declined to be forced into the use of those brands and labels.

The remaining question is, whether the sum of $500 is to be considered a penalty or liquidated damages. The agreement itself takes every care to show the intention of the parties that this sum was to be paid on the breach of any of the three specified particulars, viz., "not directly or indirectly buy or sell any cigars marked or branded with the labels of said Cigar Makers' union; nor use nor allow to be used in connection with the manufacture of cigars any union label, or any label sanctioned by the Cigar Makers' union or any other union, or any label in any way indicating that his cigars have been manufactured by

union men; that he will not at any time permit or allow any Cigar Makers' union, or any union, or any set of men, to compel him to hire or employ union men only or to dismiss any employee." These are all negative provisions. None of them is for payment of money.

In *Craig* v. *Dillon*, 6 A.R. 116, our Court of Appeal, in March, 1881, formulated the rule of law on this subject in the following terms: "That where the same sum is stipulated as recoverable for the breach of several matters of various degrees of importance, it shall be regarded as a penalty and not as liquidated damages, even though the agreement states not only affirmatively that it shall be taken as liquidated damages, but negatively also, that it shall not be taken as a penalty." It was, perhaps, not necessary in that case to formulate the rule at all, as the Court held that the agreement in that case confined the stipulation as to the sum agreed upon as damages to the omission to perform a certain specified act by a time agreed on. The rule itself as so enunciated may no doubt be deduced from some of the very numerous cases on the subject. But at a more recent date (March, 1882) the subject underwent elaborate discussion by the Court of Appeal in England in *Wallis* v. *Smith*, L. R. 21 Ch. D. 243, where most of the cases cited to our Court of Appeal were commented on. The decision is one of the highest authority. The Judges were Sir George Jessel, M. R., Cotton and Lindley, L.JJ., affirming a decision of Fry, J. The statement of the rule in that case is this: "Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty, but as liquidated damages." And a *quære* is added: "Whether it would not be treated as a penalty if one of the stipulations was of very trivial importance." And it is said there is no decision determining that the triviality of the stipulation would make the sum stipulated a penalty, though there are *dicta* to that effect.

The stipulations in the present case, though apparently several, resolve themselves practically into one, viz.: That the defendant shall not submit to the dictation of the cigar makers in the mode of carrying on his business. This is a matter in which it is impossible to calculate the damages to the other members of the Manufacturers' association by compliance. It was said that a breach of the agreement would be effected by the purchase or sale of a single box of cigars with the union brand. But that purchase or sale involves much more than this act—it involves the submission to the cigar makers, the employment of union men only in the manufacture, for they will not work where non-union men are employed, and these in effect involve a breach of every one of the stipulations. It cannot be said these are matters of minor importance, and there is no mode by which the damage to the other members of the association can be calculated.

These stipulations are parts of one whole, steps in the the accomplishment of one end, and would therefore seem also to come within the rule that where the agreement is for the performance of one act, and there is no adequate means of ascertaining the damages from a violation and the parties agree upon a sum as liquidated damages, it will not be treated as a penalty. The language of the agreement in the present case is perfectly clear, the sum is not only mentioned as liquidated damages, but the intention for making it so is expressed.

I think the plaintiff entitled to judgment, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF ELIZABETHTOWN ET AL. v. THE CORPORATION OF THE TOWN OF BROCKVILLE ET AL.

Small-pox hospital—Erection thereof in adjoining municipality—Injunction —45 Vic. ch. 29, sec. 12. 14, (O.)—47 Vic. ch. 38, sec. 44, (O.)

Held, that under 45 Vic. ch. 29, sec. 12 (O)., the corporation of onemunicipality cannot erect or establish a small-pox hospital within the limits of another, either of a temporary or a permanent character, without the sanction of the corporation of the latter, and an injunction was granted to restrain the same.

THIS was a motion for an interim injunction in a certain action brought by the corporation of the township of Elizabethtown, J. A. Sharpe, and H. A. Bradfield, against the corporation of the town of Brockville, and the various members of the Board of Health for the said town of Brockville, to restrain the use of a certain building as a small-pox hospital under circumstances sufficiently appearing from the judgment.

The motion was made on December 2nd, 1885, before Boyd, C.

H. J. Scott, Q. C., for the plaintiff, cited *Attorney-General* v. *Birmingham*, 4 K. & J. 528; *High* on Injunctions, sec. 755; 45 Vic. ch. 29, sec 12 (O.)

C. Moss, Q. C., and *Reynolds*, for the defendants. The hospital is not *per se* a nuisance. The corporation, moreover, cannot complain of any danger, and the individual plaintiffs shew no greater danger than the rest of the public, and therefore the action should be by the Attorney General. If the hospital is a nuisance, it is a public one. The Act relied on by the plaintiffs only prohibits the permanent erection of a hospital, and does not extend to a temporary provision for a hospital, though in an adjoining township. We refer to *Baines* v. *Beker*, Ambler 158; *Anon* 3 Atk. 750; *Boom* v. *The City of Utica*, 2 Barb. 104;

Hill v. *Managers of the Metropolitan Asylum District*, 4 Q. B. D. 433, 6 App. Cas. 582; *Bessonies* v. *The City of Indianapolis*, 71 Md. 189; *Waupun* v. *Moore*, 17 Am. R. 446; *Mayor of the City of Hudson* v. *Thorne*, 7 Paige Ch. 261. As to the powers of the Provincial Inspector, see R. S, O. ch. 190; 47 Vic. ch. 38, (O); 48 Vic. ch. 45.

December 8th, 1885. BOYD, C.—The town of Brockville have rented and are occupying a house and farm premises containing thirty acres, situate in the township of Elizabethtown, as a small-pox hospital, under a lease expressed to be for six calendar months, to be computed from the 28th day of October, 1885. The Mayor of Brockville justifies this course in his affidavit, because he had for several weeks before been endeavouring to procure a place to establish such a hospital, and failed to find a suitable or available place within the limits of Brockville, and he finally decided on the house in question, as being by far the best and most suitable place that could be procured. I do not question the *bona fides* of the defendants, nor the suitability of the place in question; if the right to an injunction depended on either of these considerations, it would be proper to reserve them till the hearing. But the legality of the defendants' course is attacked by the plaintiffs, and it is contended under 45 Vic. ch. 29, sec. 12, that no hospital can be placed by one municipality within the limits of another municipality, without first obtaining the consent of the latter to that step. The words used in the latter part of that section are, that no such hospital "shall be *erected*" by one municipality, &c. Looking at the context, that word appears to be used synonymously with "*establish*," and it is not inconsistent with the general scope of the Acts relating to public health, to apply it to a temporary hospital or place of reception for the sick and infected. That however was the whole ground taken in argument by the defendants to justify the legality of their course by referring to sec. 14, providing for a temporary hospital, and

arguing that there was no restriction as to the site or locality of such a place, and that the hospital now used within the borders of the township was no more than a temporary hospital. But upon the facts in evidence before me, the town authorities do not claim that it is only a temporary hospital; nor do I think they could do so with success. It is the only hospital the town proposes to establish, and the six months was evidently contemplated as the period during which the anticipated epidemic would run its course and exhaust itself. Sec. 14 is extended and explained by 47 Vic. ch. 38, sec. 44, (O)., which is borrowed in substance from the English Public Health Act, 38-39 Vic. ch. 53, sec. 131. Sub-sec. 1 of that section in the Ontario Act speaks of the local Board of Health (in case the municipality has made no provision) themselves erecting hospital-tents, hospitals and places of reception. That is to say, the word "*erect*" is used as to places of a very temporary character, so that even if the action here taken in renting the farm had been by the Board of Health under sec. 14, and for a strictly temporary provision pending the action of the corporation of the town, I should still have thought that the manifest intention and direction of the law was that the local board should not, any more than the municipality itself, act beyond its own local limits. Can it be supposed that this hospital situate in the township, is to be subject to the local board of health for the town? That would evade and destroy the whole system of municipal government in so far as public health is concerned. The law does not contemplate such an invasion of municipal rights, unless it be by the permission of the municipality invaded, or by agreement to establish a common hospital under sec. 12, of 45 Vic. c. 29. In truth, it seems to me, the spirit of all this local sanitary legislation as to infectious disease, is manifested in one of the regulations passed by the central board of health for Quebec, in these words: "No small-pox patient shall be conveyed from one municipality into another without the permission of the Local Board of Health of the municipality to which the patient is being conveyed." (VIII. Legal News, November 14th, 1885, p. 367, No. 27.)

This is not a case for resting on any narrow meaning of the words "erect," "establish," "maintain." The question is, has one corporation placed its hospital within the limits of another, without the consent, and indeed in this case, against the will of that other—if so, the Act forbids it. See *Liverpool New Cattle Market* v. *Hodson*, L. R. 2 Q. B. 131.

While it is true that the establishment of such hospitals is not *per se*, a nuisance—for such a conclusion humanity forbids—yet it is true that the proximity of one to private property depreciates its value, and affords ground (if the act be illegal) for such an action as this. I do not deem it necessary to decide upon the right of the corporation to maintain this action alone—they sue in conjunction with private owners who suffer special injury from this illegal act of the defendants, and these individuals are proper plaintiffs.

The injunction is granted to restrain the further use of this building and farm as a small pox hospital; and, as I decide the matter upon a point of law, it should be with costs to the plaintiffs.

A. H. F. L.

[CHANCERY DIVISION.]

BANK OF TORONTO v. COBOURG, PETERBOROUGH AND MARMORA RAILWAY COMPANY ET AL.

Company—Directors—Issue of debentures to directors at a discount—Locus standi of other creditors—Master's office—Reference.

The judgment in an action by the Bank of Toronto against the C. Railway Company, directed a reference as to who, other than the plaintiffs, were the holders of bonds of the defendant company of the same class, and an account of what was due to such bondholders, and it appeared before the Master that the managing director of the company had issued a great number of debentures of the same class as the plaintiffs' to J. H. S., G. J. S., and J. B., who were themselves directors of the company at a discount of 25 per cent., in satisfaction of their claims against the company. The plaintiffs thereupon who had obtained their debentures subsequently, contended that these parties could only claim the amount actually advanced by them, and that they could not as directors, sell the debentures to themselves at a discount.

Held, affirming the decision of the Master-in-Ordinary, that inasmuch as the company did not complain of the transaction, nor any shareholders, and inasmuch as the transaction was not *ultra vires*, it was not competent for the holders of the debentures of the same class, such as the plaintiffs were, to impugn the position of J. H. S., G. J. S., and J. B.

If the directors abused their position so as to get an advantage at the expense of the company, it was for the corporation or its corporators to complain. To permit the plaintiffs to attack them on this ground would be to recognize the validity of the transfer of a right of action to complain of a fraud, actual or constructive.

THIS was an appeal from the report of the Master-in-Ordinary made pursuant to the judgment herein, reported 7 O. R. 1.

The circumstances out of which the present appeal arose fully appear from the judgment of the Master-in-Ordinary, which was delivered by him on January 8th, 1885, and was as follows:

MR. HODGINS, Q.C., MASTER-IN-ORDINARY.—The judgment directs an enquiry as to who other than the plaintiffs are the holders of the bonds of the same class of the defendant company, and an account of what is due to such bondholders.

These bonds or debentures to the amount of $300,000, were issued under 38 Vic. ch. 47, (O)., and are declared to be

a first charge upon the property of the company. The debentures were intended to be issued at a discount, and several of them were so issued, but others were taken by some of the present holders at par.

Debentures to the extent or $156,000 were issued by the managing director to John H. Schoenberger, G. J. Schoenberger, and Mrs. Butts, (the latter as for one Isaac Butts,) at a discount of 25 per cent. for moneys obtained by the defendant company, on the discount of notes made or endorsed by these parties for the benefit of the company.

At the time the proceeds of this discount were received by the company, the Shoenbergers and Butts were directors of the defendant company. In 1875 Butts died and his place at the board was taken by his son; and in that year these debentures issued as follows: 52 to John H. Shoenberger, 52 to G. K. Shoenberger, and 52 to Mrs. Butts, widow of Isaac Butts.

The plaintiffs contend that these parties, the Shoenbergers, as being directors, and Mrs. Butts as claiming under the will of Isaac Butts, can only claim the amount actually advanced by them to the defendant company; that they could not, as such directors, sell these debentures to themselves at a discount, nor could they claim to hold them at a profit beyond what the company owed them on the notes discounted for its benefit.

The Act authorizes the directors to issue debentures for such sums and at such rate of interest not exceeding eight per cent. per annum, "as they may deem expedient." And under that power I think the directors could lawfully issue debentures at a discount. The Act also makes these debentures a first charge on the property and franchises of the company, without preferment or priority of any one debenture, so to be issued, over any other debenture so to be issued. It further gives the debenture holders the right to foreclose; and it provides that "in case of a foreclosure each debenture holder shall be the owner of one share for each one hundred dollars of principal money due

to him in respect of the debentures" of the class foreclosing; and that "the capital stock of the new company shall, in case of a foreclosure, be the amount of the principal money due in respect of the debentures of the said last mentioned class."

The judgment provides for a sale instead of a foreclosure; but that cannot be held to alter the statutory rights expressly given to these debenture holders by the Act.

The plaintiffs as debenture holders are creditors of this company of the same class as the directors referred to. There is no fiduciary or trust relation between the plaintiffs and these directors, which would entitle the plaintiffs to invoke the equitable jurisdiction of the Court. As directors of the company they owed no trust or duty to the co-holders of debentures which would compel them to hold or dispose of these bonds or debentures for such co-debenture holders. These directors, obtained a title to these debentures before the plaintiffs became debenture holders. The plaintiffs, therefore, had no beneficial interest or claim in the debentures when these directors obtained theirs.

All holders stand on the same footing, *inter se*, as creditors of the company. Each debenture holder knows that he holds part of an issue of debentures for $300,000 *pari passu* with other holders; that they are all alike as to payment, rate of interest, and remedy; that there is no priority among them, and that they are in every way placed on an equality as between themselves.

The parties whose property is chargeable with, or which may be foreclosed or sold to pay these debentures—the company or its shareholders—are the proper parties to complain of these directors; but they do not complain. They, as the *cestuis que trustent* of these directors, are alone entitled to any profit, if profit there be, acquired by them as their trustees.

No case has been cited to shew that any such claim of a *cestui que trust* vests in, or can of right be enforced by, the creditors of such *cestui que trust*, as these plaintiffs

are. And it is well settled that a trustee's claim against a trust estate cannot be enforced by the creditors of such trustee: *Worrall* v. *Halford*, 8 Ves. 4. Any such claim would import a mischievous principle, giving strangers to a trust the right to sue for an administration of the trust estate: *Herriotts Hospital* v. *Ross*, 12 Cl. & Fin. 507; *Lewin* on Trusts, 530.

The point came up and was decided adversely to the contention now made in *Campbell's Case*, 4 Ch. D. 470, where it was held that a director taking debentures issued by his company at the same discount that others could obtain them at, was not liable to the company for such discount. Bacon, V. C., said that the case did not fall within the principle upon which the application was based, viz., "the principle which courts of equity have always adhered to, not to permit an agent or director, or any person in a fiduciary character, and having power and influence in the concern, to make a profit by his dealings with the concern."

See also *Regent's Canal Iron Works Co.*, 3 Ch. D. 43; *Re Anglo-Danubian Steam Navigation and Colliery Co.*, L. R. 20 Eq. 339; *Fountaine* v. *Carmarthen R. W. Co.*, L. R. 5 Eq. 316.

A similar rule prevails in the jurisprudence of the United States.

The purchase by a trustee of property of his *cestui que trust* is voidable at the option of the latter. But he may affirm the sale, or not impeach it; and if regular in other respects, it cannot be questioned by third parties, on the ground of its being a purchase by a trustee. It is the fiduciary relation to the beneficiaries of an estate which prevents a trustee from purchasing the estate. But a violation of his duty in this respect may or may not be questioned at the option of the beneficiaries, but not by persons who have not that relationship to the trust estate: *Baldwin* v. *Allison*, 45 Minn. 25.

So where the administratrix of an estate foreclosed (or sold under process of a court) certain lands which had been

mortgaged to the intestate, and purchased the lands for herself, it was held that although the sale might be set aside by the heirs, its validity could not be questioned by the creditors of the estate: *Kern* v. *Chalfant*, 7 Min. 487. See further on this point *Whoefer's Appeal*, 2 Pa. St. 71; *McKinley* v. *Irvine*, 13 Ala. 681; *McNish* v. *Pope*, 8 Rich. (S. C.) 112.

Nor is the assignee of a beneficiary or *cestui que trust* entitled to an account against trustees for a breach of trust, or to apply to a Court to avoid transactions between such *cestui que trust* and his trustee, on the ground of the fiduciary relationship between them: *Hill* v. *Boyle*, L. R. 4 Eq. 260; *Rice* v. *Cleghorn*, 21 Ind. 80. In the latter case the Judge said: "The purchase of trust property by a trustee is not void, but may be avoided by the *cestui que trust* within a reasonable time, in a direct proceeding for that purpose; but such a result cannot be effected at the suit of a third person."

Nor can one who holds possession of the trust estate, under the *cestui que trust*, invoke the fiduciary or trust relation to impeach a wrongful purchase made by the trustee of such trust estate. *Jackson* v. *Van Dalfsen*, 5 Johns. N. Y. 43, was a case where one McCarty was employed by one Ten Eyck as his agent to sell certain lots. He sold the same on the 26th of July to one V, who, on the 30th of July, conveyed them to himself. It was proved that the conveyances were made to V, and by V to one M., for the purpose of transferring the title in the lots to M. Ejectment was then brought against the tenant holding under Ten Eyck. The defendant contended that the sale to M. was a breach of trust, and was void; but the Court held that the defendant was a stranger to the transactions between the trustee and *cestui que trust*, and could not avail himself of the objection that M. had been guilty of a breach of trust in acquiring the title.

Besides, these directors are here as creditors enforcing their rights as such. Rightly or wrongly, as between them-

selves and the company, they have possession of these debentures as creditors, and this proceeding is not a proceeding to make them account as trustees: *Re United English and Scottish Assurance Co.*, L. R. 3 Ch. 787.

In no sense, therefore, can these directors be held to be trustees or agents for the plaintiffs or other co-debenture holders, or bound by any fiduciary or trust relation to account to them for their acquirement of these debentures.

In accordance with this judgment the Master by his report dated May 29th, 1885, fixed the various sums due, as bondholders, to John H. Schoenberger, George C. Schoenberger, and the administrators *cum testamento annexo* of Isaac Butts, deceased, for principal money and interest respectively.

The plaintiffs now appealed from this report on the ground, as set out in the appeal, that "the said Master should have found and reported that the said parties were not entitled to rank upon the estate of the said railway company in respect of the said bonds and interest, but if entitled at all they were only entitled to be paid the amounts actually advanced by them to the said company in respect to tbe same, and the said Master erred in allowing the said parties to prove as creditors to the full amount of the face value of the said bonds."

The appeal was argued on November 5th, 1885, before Boyd, C.

Moss, Q.C., and *T. P. Galt*, for appellants. The case *Sterling* v. *Riley*, 9 Gr. 343, shews the powers and duties of the Master on a reference, at all events in mortgage cases: (see at p. 346.) This has remained the law ever since. When a party comes to prove an incumbrance on lands, anyone interested in those lands may shew what is due, if anything, in respect of it. The only limit is that shewn in *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247, that a party coming

in, cannot in the Master's Office dispute the validity of the mortgage in respect of which judgment was given. Here the Master was directed to take an account of what was due the debenture holders. In *Penn* v. *Lockwood*, 1 Gr. 547, the matter was again considered. The Act 38 Vic. c. 47, (O)., s. 2, contemplates that these debentures shall be a charge on the property. We had a right to consider the circumstances under which these debentures, which we may call mortgages, were issued to the directors. If the Master is right, the company might have handed over these debentures as a gift, and yet we could not object, because the company is not objecting. *Worrall* v. *Halford*, 8 Ves. 4; *Herriotts Hospital* v. *Ross*, 12 Cl. & F. 507, cited by the Master, are cases where no question arose of persons coming in conflict with other creditors. Then the Master says the transaction must stand because the directors were at liberty to purchase debentures, and at a discount. It may be conceded for the purpose of this argument that when debentures are put on the market for public competition, directors may become purchasers in that way: see *Campbell's Case*, 4 Ch. D. 470. But this case is different. There was no putting these debentures on the market. There has been no such issue or negotiation of these bonds as was intended by the Act or the by-law. We are entitled to say that in the hands of the directors these bonds form no debt against the company at all. At the same time we are willing to concede that they may succeed to the extent of the moneys actually advanced by them. *The Attorney General* v. *Wilson*, 1 Cr. & Ph. 1, clearly shews that where money is devoted by an Act for a particular purpose and particular uses, there is no power to divert the moneys from the purposes of the Act. In *York and North Midland R. W. Co.* v. *Hudson*, 16 Beav. 485, the principles relating to these transactions are clearly laid down.

J. Maclennan, Q. C., and *T. Langton*, for the defendant Butts. If the company has to raise money to carry on its business, and if it has to issue debentures in order to pay

its debts, must it not pay these debentures? Is not paying its debts part of the business of the company? Our client is in exactly the same position as the Bank of Toronto. There being a good legal consideration, why should we not hold the debentures? This company was incorporated under C. S. C. c. 66, s. 9, sub-s. 11, and could dispose of its debentures at a discount. [BOYD, C.—You say then these debentures are not like mortgages: that you cannot go into the account of what is due on them, but having bought them you can prove for the full amount.] It depends on the agreement. Here the agreement was that these debentures were given for moneys advanced. As to *Sterling* v. *Riley*, 9 Gr. 343, that was a question between a mortgagor and a mortgagee. In the Master's Office the defendants desired to shew that the full amount was not advanced. The company has never questioned these transactions, and the company is a party here. How can the plaintiffs have a *locus standi* to upset this transaction when the company does not wish to do so, seeing that the only way in which it could be done would be by our being restored to our original position, and the money paid to us? The cases cited by the Master are extremely pertinent. The appellants imagine a case of our debentures being a mere gift. To imagine this case we must also imagine the company had the power to make a gift. Then they say this is not a case of debentures being put on the market and the directors buying like anyone else. But if they had been put on the market, no one would have bought. The evidence shews this. No doubt when an Act expressly points out how trust moneys are to be applied, that mode must be followed, but our Act does no such thing. All there is, is in the recital. It would be absurd and impossible for the Legislature to say this company should raise new money and apply it only on new works and new buildings, and leave old debts unpaid. Existing debts have a prior claim over later contracted debts in all cases.

Langton, on the same side, cited *Re Regents Canal Co.*, 3 Ch. D. 43. The position of the directors can only be

attacked by the company: *Perry* on Trusts, s. 198; *Lister* v. *Lister*, 6 Ves. 631*a*; *Campbell* v. *Walker*, 5 Ves. 678; *Rice* v. *Cleghorn*, 21 Ind. 80. The company must have proceeded within a reasonable time. Here ten years have elapsed and the position of directors has been changed: *Campbell* v. *Walker*, *supra*. As to the right of directors to exercise their rights as creditors in the same way as other creditors, see *Brice* on *Ultra Vires*, 2nd Am. ed. p. 478; *Buell* v. *Buckingham*, 16 Iowa 284, there cited; *Re Anglo-Danubian Steam Navigation and Colliery Co.*, 20 Eq., 339.

Moss, in reply. The plaintiffs' position is not identical with that of the respondents. The plaintiffs have only claimed to hold debentures held by them as security for what is actually due them. The respondents claim the full amount due on the face of their bonds and interest upon them. The Act makes all the debentures a charge without preference or priority, but the effect of the directors' action is to give these respondents a preference and priority. The plaintiffs have advanced $80,000 and the defendants only $40,000, and yet the Master has found larger sums due the defendants than the plaintiffs, thus giving the defendants a preference. The defendants cannot charge the lands of the company for any greater sum than they actually advanced in respect of the debentures held by them, and interest thereon. If the debts of the company had not been paid by the advances of the defendants, the creditors could only have recovered the amount due them. The claim of the defendants under the debentures is substituted for the claim of the creditors who have been paid by the advances, and cannot be enforced against the property of the company to any greater extent than could the claims of the creditors which have been so paid. So far as the Butts are concerned there is no distinction between this case and that of the others. Isaac Butt, it is true, was dead, but his son Isaac W. Butt succeeded as director in respect of his father's stock, and the issue of debentures to Mrs. Butt was made as representative of her husband,

and she was otherwise a mere volunteer, and can occupy no better position than her husband, if alive. Out of money advanced by the directors $13,212 was paid for interest due on the old bonds, which the directors themselves held. This sum was not used in a manner contemplated by the Act authorizing the issue of the debentures in question. The plaintiffs are willing that the defendants should prove for $100,732.

November 11th, 1885. BOYD, C.—This action was brought by the plaintiffs in a representative capacity, and on behalf of all holders of the debentures of the railway company. The respondents in this appeal were therefore substantially plaintiffs, as being holders of some of these securities, and it is not competent for the plaintiffs on this record to attack their *status*, and say that they cannot prove for anything. Though the argument was pressed thus far, it was nevertheless conceded that the bank was willing that the respondents should prove for so much of the money advanced by them as went into the road, or for its benefit; but it is disputed that they should prove for the face value of their debentures. The transaction between them and the managing director who was empowered to act for the company, is to be looked at. The bargain was, that they should take their securities in satisfaction and payment of their claims against the company. This involved the transfer of the debentures at some discount, but whatever this was, the transaction was not *ultra vires*, nor was it in any sense void. The company does not complain of it, nor does any shareholder. This being so, it is, in my opinion, not competent for the holders of other debentures of the same class to impugn the respondents' position.

The complaint is, that the directors abused their position so as to get an advantage at the expense of the company. If this be so, it is for the corporation or its corporators to complain. To permit the bank to attack on this ground, would be to recognize the validity of the

transfer of a right of action to complain of a fraud, actual or constructive.

In *Knight* v *Bowyer*, 23 Beav. 609, Romilly, M. R., held that if a solicitor purchases from a client, and institutes a suit against third parties to enforce his right, any objection on the ground of its being a purchase by a solicitor from his client, cannot be raised by such third parties.

With this agreed Turner, L. J., in appeal: 2 DeG. & J. 421, 444, who said that "in order to maintain such an objection it must be shewn that the purchase was illegal and void upon principles of public policy, upon ground far higher than the mere interests of the parties."

This same view was upheld in *Greenstreet* v. *Paris*, 21 Gr. 229, which involved the consideration of dealings between a director and his company, and it was held that if the security which he took was capable of being confirmed by the shareholders, and they did not nor did the company object, it was not for an outsider to complain. These securities were in the hands of the respondents before the defendants obtained those on which they sue, and no claim is presented in law or equity which entitles them to unravel the transaction long before concluded between the directors and the company.

Upon this ground alone I think that the appeal should be dismissed with costs as to the respondents who appeared on the appeal.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

RICHARDSON V. RANSOM.

Malicious prosecution—Appointment of Police Magistrates, R. S. O., ch. 72—Constitutional law.

In an action for falsely and maliciously charging the plaintiff with obtaining money from the defendant by false pretences, and for arresting and prosecuting him therefor before the Police Magistrate of Belleville, appointed by the Government of the Province of Ontario, and who, it was alleged, had no jurisdiction to act, it being contended that such appointment properly lay with the Dominion Government.

Held, that a person could not be considered a trespasser merely by laying an information before a Police Magistrate so appointed, charging another with a crime, and praying therein that a warrant might be issued for his arrest.

Per WILSON, C.J., that the power to appoint Police Magistrates rests with the Ontario Government.

ACTION for charging the plaintiff falsely and maliciously with false pretences in obtaining $125 from the defendant, and arresting him and prosecuting him therefor before John James Bleeker Flint, who assumed to act as Police Magistrate for the city of Belleville, but who had no jurisdiction, as alleged, so to act.

The defendant denied the allegations in the statement of claim contained, and alleged that he acted upon reasonable and probable cause, and without malice, and that the Police Magistrate had jurisdiction to act in the premises, and that the plaintiff consented to be tried upon the said charge by the Police Magistrate, who convicted the defendant of and for the said offence, and which conviction was affirmed, and remained in full force and effect.

The defendant also demurred on the ground that the statement of claim did not shew the plaintiff had any cause of action: that it was not shewn the defendant acted without reasonable and probable cause, nor was it shewn the charge was dismissed, or was ever determined or quashed, or was terminated in the plaintiff's favour.

The parties agreed as follows:

1. That the only authority John J. B. Flint had for

taking the information and issuing a warrant was under a commission from the Government of Ontario; and upon the facts stated and admitted at the trial at the last Fall Assizes held at Belleville before O'Connor, J., without a jury, the learned Judge gave judgment for the plaintiff with nominal damages.

The constitutional questions raised in the case were whether the appointment of John J. B. Flint, as Police Magistrate as aforesaid, by patent issued by the Lieutenant Governor of Ontario, was a valid appointment in law of the said John J. B Flint to the office of Police Magistrate

2. If the appointment of the said John J. B. Flint as Police Magistrate was valid, whether he was by reason thereof and by virtue of the statute in that behalf *ex officio* a Justice of the Peace in and for the county of Hastings.

3. Whether the said John J. B. Flint, being at the time of his appointment and for some years before, and from his appointment thence forward, a practising attorney and solicitor of the Supreme Court of Judicature of Ontario, could properly be appointed, or if appointed could lawfully act as such Police Magistrate, or as a Justice of the Peace.

Notices were served upon the Attorney-General of Ontario and the Minister of Justice of the Dominion of Canada of the intention of the parties in the action to argue the said constitutional questions.

December 3, 1885. *Burdett* moved to enter judgment for the defendant. The case of *Regina* v. *Bennett*, 1 O. R. 445, shews the Lieutenant Governor has the power to appoint Justices of the Peace under R. S. O. ch. 71, and if so ch. 72, respecting the appointment of Police Magistrates by the Lieutenant Governor, is valid also. The Lieutenant Governor has the appointment of the Judges in the different Provinces. There is nothing said of his appointment of Justices of the Peace. The B. N. A. Act, sec. 92, sub-secs. 14, 15, gives the Provinces the right

to provide for "the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, including procedure in civil matters in those Courts, and the imposition by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Another objection against the jurisdiction of the Police Magistrate is, that he was a practising attorney and solicitor at the time of his appointment, and he has been so ever since, and it is said the R. S. O. ch. 71, sec. 5, prevented him from acting as a Justice of the Peace for the county of Hastings while he was such practising attorney or solicitor; and as he could not be appointed a Justice of the Peace, nor act as such while he was so practising his profession of attorney or solicitor, even assuming he could be lawfully appointed a Police Magistrate, or could act as such while still practising his profession of the law, so he could not lawfully act as a Justice of the Peace for the county of Hastings by reason of his being Police Magistrate for the city of Belleville, under R. S. O. ch. 72, sec. 4.

The prohibition extends as well to Justices of the Peace *ex officio* as to justices who are specially appointed to be Justices of the Peace.

Johnson, for the Attorney-General and for the Police Magistrate. The appointment by the Lieutenant-Governor of the Police Magistrate was a valid appointment under the authority of the statutes referred to. See also 32 & 33 Vic. ch. 32, sec. 1 (D.) and 38 Vic. ch. 47 (D.); *Regina* v. *Coote*, L. R. 4 P. C. 599; *In re Boucher*, 4 A. R. 199; *West* v. *Smallwood*, 3 M. & W. 418; *Brown* v. *Chapman*, 6 C. B. 365; *Grinham* v. *Willey*, 4 H. & N. 496; *Austin* v. *Dowling*, L. R. 5 C. P. 534; *Regina* v. *Row*, 14 C. P. 307; *Hunt* v. *McArthur*, 24 U. C. R. 254. If Mr. Flint, as Police Magistrate of the city, had not *ex officio* the right to act as a Justice of the Peace of the county, yet having had general jurisdiction over the offence, the defendant is

not liable for the action of the magistrate: *Regina* v. *Horner*, 2 Steph. Dig. 450.

G. D. Dickson, Q.C., contra, for the plaintiff, referred to *Haacke* v. *Adamson*, 14 C. P. 201; Jud. Act, sec. 222; *Jones* v. *Williams*, 3 B. & C. 762; *West* v. *Smallwood*, 3 M. & W. 417; *Cushing* v. *Dupuy*, L. R. 5 App. 409; *Chitty* on Prerog. 76; *Regina* v. *Amer*, 42 U. C. R. 391; *Hardcastle* on Statutes, 180; *Lenoir* v. *Ritchie*, 3 S. C. R. 575; *Wilson* v. *McGuire*, 2 O. R. 118; *Regina* v. *Reno*, 4 P. R. 281; *Regina* v. *Bennett*, 1 O. R. 445, 462; B. N. A. Act, secs. 12, 55, 91, sub-sec. 27; *Regina* v. *O'Rourke*, 32 C. P. 388, 404, 405; 14 Geo. III. ch. 83, sec. 17; C. S. U. C. ch. 10, secs. 1, 5, ch. 11, sec. 41, ch. 12, secs. 1, 3; *Regina* v. *Row*, 14 C. P. 307; *Brown* v. *Chapman*, 6 C. B. 363; 32 & 33 Vic. ch. 30, secs. 1, 2 (D); *Grinham* v. *Willey*, 4 H. & N. 496; *Austin* v. *Dowling*, L. R. 5 C. P. 534; *Hunt* v. *McArthur*, 24 U. C. R. 254; *Macdonald* v. *Henwood*, 32 C. P. 433; *Holroyd* v. *Doncaster*, 3 Bing. 492; *Waterman* on Trespass, secs. 302 to 308, note (2) secs. 306, 312, 313.

Burdett, in reply, referred to *Hunter* v. *Gilkinson*, 7 O. R. 735. The R. S. O. ch. 27, sec. 20, constituted the commissioners and the different superintendents of the Indian Department, then or thereafter appointed, Justices of the Peace *ex officio* within the county in which they should be resident or be employed. This conviction has not been quashed: R. S. O. ch. 73, sec. 4. He referred also to 32 & 33 Vict. ch. 24, sec. 130 (D).

January 11, 1886. WILSON, C. J.—The only questions are:

1. Has the Lieutenant Governor of this Province power to appoint Police Magistrates? If he has, the appointment of Mr. Flint as Police Magistrate for the city of Belleville is valid. If he have not, the appointment is invalid.

2. If he had the power to appoint Mr. Flint Police Magistrate for the city of Belleville, has the Ontario Legis-

lature authority to enact, as has been done by the R. S. O. ch. 72, sec. 4, that "Every Police Magistrate shall, *ex officio*, be a Justice of the Peace for the city or town for which he holds office, and also for the whole county or union of counties in which either for judicial or municipal purposes such city or town is situate?"

It appears that at the common law certain persons had annexed to the offices which they held the power of conservators of the peace, while others were specially appointed to be conservators of the peace.

Those who were so, not by virtue of any office which they held, claimed that power in different ways; some by prescription, some by the tenure of their lands, and some by the election of the freeholders in the County Court before the sheriff.

And afterwards by stat 1 Edw. III. ch. 16, it was ordained that in every county good and lawful men be *assigned* to keep the peace. "And in this manner and upon this occasion was the election of the conservators of the peace taken from the people and given to the King, this *assignment* being construed to be by the King's commission; but still they were called only conservators of the peace till the stat. 34 Edw. III. ch. 1, gave them the power of trying felonies, and then they acquired the more honourable appellation of justices:" 1 Bl. Com. 350, 351; *Hawkins'* P. C. book II. ch. 8; Com. Dig. "Justices of the Peace" A. 1 to 6; Ch. Prer. 79. Whatever the office was formerly it seems that from the time of the 1 Edw. III. ch. 16, none but the King can appoint Justices of the Peace. By the 27 Hen. VIII. ch. 24, that power is expressly declared to be in the King, provided, however, that counties palatine, boroughs, &c., which had the power to have justices, were still to retain that authority: Com. Dig. "Justices of the Peace," A. 1, 5.

It seems to be quite settled that the appointment of Justices of the Peace is vested in the Crown. Of course they may be appointed by Act of Parliament, or persons holding certain offices may, on being appointed or elected

to such offices, become Justices of the Peace. How it is that Justices of the Peace were first appointed in this Province does not appear. They were probably appointed by commission by the Lieutenant-Governor in the exercise of the right of the Crown, which it was assumed he possessed in like manner as such power has ever since been exercised. There does not appear to have been any Act passed under the 31 Geo. III. ch. 31, our earliest constitutional statute which empowered the Lieutenant-Governor to make these appointments.

The appointment of Police Magistrates is expressly provided for by R. S. O. ch. 72, and the office is one which was created many years before that Act.

The Dominion Parliament has by section 91 of the B. N. A. Act power "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces." It is not necessary to enquire how far that enactment would enable the Dominion Parliament to legislate with respect to the appointment of Justices of the Peace and Police Magistrates in any Province of the Dominion, and to authorize the Governor General to make such appointments, as with relation to the Public Works, 32 & 33 Vic. ch. 24 sec. 7 (D), or to the management of Indian affairs, as by declaring that an Indian agent shall have the same power as a stipendiary magistrate, 45 Vic. ch. 30, sec. 3 (D).

These matters referred to are matters of a general and not merely of a local nature, and they are matters within the sole control of the Dominion Legislature, and are not within the powers conferred upon the Provincial Legislatures; and no one perhaps will doubt that the Dominion Parliament has full authority to legislate in such and the like cases.

But it would be quite another matter if the Dominion Parliament were to authorize the Governor General to appoint the Justices of the Peace or Police Magistrate for the city of Toronto, or for the county of York, or for the

entire Province; for there is not one word in the 91st section of the Act, excepting the few general words refering to the peace, order, and good government of Canada, which could in my opinion justify such an interference; and such words as these cannot be invoked while the peace, order, and good government of the Province are not disturbed.

Now, turning to the legislative powers of the Provinces in section 92, we find that the most extensive powers are granted to them for local purposes, among them the power to amend the constitution of the Province; to impose direct taxation; to borrow money on the credit of the Province; to manage and sell the public lands; to establish, maintain, and manage public and reformatory prisons, hospitals, &c.; to establish municipal institutions; to legislate with respect to marriage, and with respect to property and civil rights, and with respect to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts; and with respect to the imposition of punishment by fine, penalty, or imprisonment for enforcing any laws of the Province made in relation to any matter coming within any of the classes of subjects enumerated in the section; and generally with respect to all matters of a mere local or private nature in the Province.

After reading this grand array of liberal and almost unlimited powers granted to the Legislatures of the Provinces for local purposes, we are told that these powerful bodies entrusted with so widespread a jurisdiction cannot appoint a Justice of the Peace or a Police Magistrate.

It is useless to cite a long roll of decisions, very few of which have the slightest application in the face of these enumerated powers conferred upon the province; and the fact that the Governor-General has the power, by section 96, to appoint the Judges of the Superior, District, and County Courts in each province, is an argument strong in itself that the inferior offices of Justices

of the Peace and Police Magistrates were purposely left to be dealt with by the Provincial Legislatures.

The first objection taken that the Lieutenant-Governor cannot lawfully make the appointment of Mr. Flint, as Police Magistrate, in my opinion, must be over-ruled. It follows that as the provincial appointment of Police Magistrate is a valid appointment, the further power conferred upon the Police Magistrate by the statute of acting *ex officio* as a Justice of the Peace in the county of Hastings is a valid exercise of the legislative power.

The objection taken, however, is, that as Mr. Flint was a practising attorney and solicitor at the time of his appointment as Police Magistrate and as he has continued the practise of his profession ever since, and as the R. S. O. ch. 71 sec. 5, enacts that, "Except when otherwise provided by law, no attorney or solicitor in any Court whatever shall be a Justice of the Peace during the time he continues to practise as an attorney or solicitor," Mr. Flint could not lawfully act as a Justice of the Peace for the county, and it was in that capacity he acted in this case.

The question is, is Mr. Flint's case within the prohibition of that enactment?

I do not stop to enquire whether it would or would not render the defendant liable for the proceedings which the magistrate carried on upon his complaint against the plaintiff. The statute does not make the acts of such *de facto* Justices void, as the statute 1 Mary, Sess. 2, ch. 8, sec. 2, made the acts of sheriffs who acted as Justices of the Peace void, and I entertain the opinion that the proceedings of a *de facto* officer are not valid although they may be voidable.

The section of the R. S. O. referred to does not in unqualified terms disable all attorneys and solicitors, while practising their profession, from being Justices of the Peace, but only in cases where it should not be "otherwise specially provided." The words are, *except where otherwise specially provided by law.*

Now in this case it has been otherwise specially provided by law, because in R. S. O. ch. 72, sec. 4, it is expressly and specially provided by law that "Every Police Magistrate

shall *ex officio* be a Justice of the Peace for the city or town for which he holds office, and also for the whole county or union of counties in which for either judicial or municipal purposes such city or town is situate." That is a direct answer to the objection taken.

So, also, it is provided by the Municipal Act, R. S. O. ch. 174, sec. 395, that the head of every Council, and the reeve of every town and incorporated village, shall *ex officio* be Justices of the Peace for the whole county or union of counties in which their respective municipalities lie; and aldermen for cities shall be Justices of the Peace for such cities.

The action will be dismissed, with costs.

ARMOUR, J.—Ever since Confederation the Provincial Government has always exercised the power of appointing Police Magistrates such as Mr. Flint, and the Dominion Government has never since that time assumed to exercise it, or in any manner to interfere with the power so exercised by the Provincial Government. Prisoners convicted of crime by Police Magistrates so appointed have ever since that time been received into the Dominion Penitentiaries without question by the Dominion Government; and that Government has always acquiesced, so far as it could acquiesce, in the exercise of this power by the Provincial Government; and in the present case the Dominion Government refused to instruct counsel to appear in this Court and maintain their right, if such they have, to the exercise of this power. Under these circumstances I do not think a person could be held to be a trespasser merely by his having laid, as this defendant did, an information before a Police Magistrate so appointed, against a person accused of crime, and having therein prayed that a warrant might be issued for his arrest. I express no opinion as to where the power of appointment of Police Magistrates properly resides. In my opinion the action should be dismissed, with costs.

O'CONNOR, J., concurred with ARMOUR, J.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA v. KENNEDY.

Conviction under "Canada Temperance Act, 1878"—Sufficiency of evidence of commission of offence—Statement of previous conviction in information—Proof of prior conviction—Imposition of increased penalties—Costs against prosecutor.

The defendant was charged with selling liquor contrary to the provisions of the second part of the "Canada Temperance Act, 1878." The information charged a previous conviction for an offence under the said Act, as follows: "The informant says that the said James Kennedy was previously convicted of an offence against the said Act."

A certificate by the convicting magistrate of a prior conviction was put in at the trial under sec. 122, sub. sec. 2, of the Act, for the purpose of proving such previous conviction.

Held, that proof of the fact set out below constituted no evidence of any offence, and that the Police Magistrate had therefore no jurisdiction, and the right to *certiorari* was therefore not taken away by sec. 111 of the Act.

Held, also, that the conviction could not stand, inasmuch as it did not appear by the information on which it was founded what the nature of the previous offence was, or where it was committed, or that it was of a similar nature to the fresh offence charged by the information.

Held, also, that section 122, sub. sec. 2, does not dispense with strict proof by production of the original record or otherwise of previous convictions where it is sought to impose the increased penalty under sec. 100, and that the certificate mentioned in the section can only be admitted as proof of the number of such convictions.

Costs of the application to quash a conviction will be adjudged against a private prosecutor where he lays an information without having reasonable ground for believing that the charge will be sustained by proper evidence.

November 3, 1885. *Aylesworth* obtained an order *nisi* to quash the conviction on the following grounds:

1. That the said conviction was illegal, inasmuch as it appeared from the evidence and conviction that the said James Kennedy had not been convicted of a prior offence before he committed the alleged offence of which, by the said conviction, he was adjudged to be guilty.

2. That no information was laid authorizing the said Police Magistrate to deal with the matter of the said complaint as a second or subsequent offence.

3. That the said Police Magistrate had no jurisdiction to hear and determine the said complaint, inasmuch as there was no evidence given of any offence subsequent to

the conviction of the 11th August, 1885, and where there was no evidence whatever the magistrate acted without jurisdiction in making a conviction.

4. There was no legal evidence of any prior conviction of the said James Kennedy given before the said magistrate: the original conviction or a certified copy thereof should have been produced.

5. The said conviction shewed the first conviction to have been on 11th August, 1885, the sale in question to have been on the 8th day of August, 1885; and the magistrate under those circumstances exceeded his jurisdiction in convicting as for a second offence.

6. That the statement, in the said conviction, of the first conviction of the said James Kennedy was not supported by the evidence; the certificate of such first conviction put in before the magistrate was not admissible for that purpose, and if it were it did not contain the particulars set forth in the said conviction.

The information laid on the 13th day of August, 1885, by Richard Martin, of the town of Woodstock, Deputy Inspector, was as follows: "The informant says he is informed and believes that James Kennedy, between the first and thirteenth days of August, 1885, at the town of Woodstock, in the county of Oxford, unlawfully did sell intoxicating liquor, contrary to the provisions of the second part of 'The Canada Temperance Act, 1878,' then in force in the county of Oxford."

The said informant says, "that the said James Kennedy was previously convicted of an offence against said Act."

The defendant was summoned hereon and appeared.

The material part of the testimony, summarized, was as follows:

Andrew Murray, the first witness, knew nothing of the matter; had not been at the defendant's place that month.

John McKegan was there (at the North American hotel) in August; had several drinks there on Monday, a week ago treated once and paid for it; was treated once; asked for something to drink; they said it was blue ribbon; would

not say what he got; could not tell whether he was as sober after as before he drank; could not tell whether the drink he got was a mixture.

Angus Murray had a bottle of pop once or twice; did not know that he had a glass of mixture; not aware he had any intoxicating liquor; defendant gave him a glass of blue ribbon.

William Wilson had a drink of lemon pop one day with Angus Murray; did not know of any beer but blue ribbon beer since 1st August; was intoxicated from smoking a cigar; had a drink there (at defendant's) on the 8th and on the 10th; did not think he had anything intoxicating there since August 1st; had ginger ale; but had a drink of malt whiskey there yesterday from a man in the sitting room, who took a bottle out of his pocket and treated witness; he was not connected with the house.

Samuel Elton might have had a drink on Monday last at defendant's; Capt. Wilson and he were "full" on Tuesday, and on Monday; never had any blue ribbon that was intoxicating; if he was drunk on Monday it was on blue ribbon beer; never asked for intoxicating liquor at defendant's; asked for blue ribbon; thought he got what he asked for.

Robert Murray was at defendant's place this month; John Garbut treated there this month on the 1st; got a glass from defendant since then; on Tuesday had a drink there; had no intoxicating liquor at defendant's from the 1st August.

Cornelius Kerr was not at defendant's place this month; did not know that defendant sold intoxicating liquor.

Henry Hill, was at the North American this month; treated there; paid for drinks; had blue ribbon beer; nothing was in the beer; was not aware of having any intoxicating liquor there.

George Craig was in the North American on the 5th of this month; had something to drink over the bar; had ginger ale; nothing was in it intoxicating; did not know that he could tell the different liquors by the taste; was not an expert; had not taken any intoxicating liquor there.

This closed the oral testimony.

The prosecutor then put in a copy of the *Canada Gazette* to prove that the second part of the Act was in force; and the certificate of the same Police Magistrate, dated August 14, 1885, as follows:

"I hereby certify that James Kennedy, of the town of Woodstock, in the county of Oxford, on the eleventh day of August instant, was convicted before me, for that he did on or about the third day of August, A.D. 1885, at the said town of Woodstock, unlawfully sell intoxicating liquors contrary to the provisions of the second part of the 'Canada Temperance Act, 1878.'"

The case was then adjourned for decision to the 18th September, and again by two further adjournments till the 23rd September.

On that day the Police Magistrate convicted the defendant, for that he, the said James Kennedy, between the first and thirteenth days of August, to wit, on the 8th day of August, 1885, unlawfully did sell intoxicating liquor contrary to the provisions of the second part of "The Canada Temperance Act, 1878," then in force, &c.; "and it appearing to me that the said James Kennedy previously, to wit, on the 11th day of August, 1885, at the town of Woodstock aforesaid, unlawfully did sell intoxicating liquor contrary to the provisions of the second part of The 'Canada Temperance Act, 1878,' then in force in the said county of Oxford, Richard Martin being the informant, I adjudge the said James Kennedy for his said second offence (*sic.*) to forfeit and pay the sum of $100." There was then an award of costs to the prosecutor of $8.95, both sums to be paid on or before the 30th September inst.; that the said sums should be then levied by distress, &c., "and in default of sufficient distress," &c., said James Kennedy to be imprisoned in the common gaol, &c., for the space of thirty days, unless the said sums, &c., should be sooner paid.

Aylesworth, supported the order *nisi*.

Shepley, contra.

O'CONNOR, J.—I have no hesitation in making the rule *nisi* absolute to quash the conviction in this case.

To aver that the evidence supports the conviction, so far as it relates to the offence charged to have taken place on the 8th day of August or about that date, is equivalent to saying the law of evidence, or any rule thereof, does not apply to the case.

The inquiry by testimony is made a mere formality, a farce enacted to answer ceremonial prejudice! Not the slightest evidence is there that what the witnesses drank at the defendant's place, the "North American," was "spirituous or otherwise intoxicating;" the evidence is, as far as it goes, to the contrary. Some of the witnesses had drinks; of what, they did not say, and were not asked. Others had pop; some had ginger ale; others had blue ribbon beer; another, with a companion, was "full" on Monday and on Tuesday; "full," whether of spirituous liquor, pop, water, or wind, does not appear: he was not asked. No evidence was given—none was offered—to prove that pop, ginger ale, blue ribbon beer, or the mixture mentioned, contained "spirituous liquor," or that it was "otherwise intoxicating." The magistrate, indeed, appears to have had a sort of transcendental contempt of external evidence.

He, it seems, was satisfied, convinced, and required no evidence except that of his own psychological state. Probably he thought a conviction was safe, at all events, as the right of appeal and *certiorari* was taken away. But it is said, I hope truly, that there is no wrong without a remedy, and the law is keen, and the Courts in administering it are astute, to find a remedy for every serious wrong. There was literally no evidence whereon to found a conviction, and the magistrate, therefore, had no jurisdiction.

Then, as to the first alleged conviction. The information says that Kennedy "was previously convicted of an offence against the said Act."

The Act is divided into two parts, called the "First" and "Second." In the "First" part, under head of "Penalties"

five several offences are specified in section 64, with severe penalties. From section 65 to 69, both inclusive, eleven other offences, with penalties, are specified.

Under head, "Preservation of the Peace," other offences with penalties are mentioned.

Again, under head, "General Provisions," are other offences and penalties; and under head, 'Prevention of Corrupt Practices," is a long list of offences, with penalties.

In the "Second Part" several other offences are mentioned.

To which of all these offences in the whole Act does the second part or paragraph of the information relate? In what part of this broad Dominion was the offence committed? Where was the conviction made? By whom made? Who was the informant? Where was that conviction to be found? Is it necessary to say that the defendant could not be expected to meet that part of the information? But he had to appear and defend himself against the other accusation. The magistrate proceeded upon the information without amendment. In support of this vaguest of informations the certificate of the magistrate is received against objection; and although the offence stated therein is not as vague as the information, it is vague, and in my opinion is not, even if the information were sufficient, evidence of a previous conviction. Sub-section 1 of section 122 directs imperatively how the magistrate shall proceed.

The accused shall be asked whether he was previously convicted *as alleged in the information*, and if he answers that he was *so* previously convicted, he may be convicted accordingly.

As a test of the sufficiency and validity of the information, pause here. "Convicted" of what "accordingly"? He would be convicted of some *one*, of a score or more, of several different and distinct offences. But the statute clearly means not that, but a previous conviction of a like offence; that is, offences under sections 99 and 100.

On this ground also the conviction is bad. But sub-section 1 of section 122 proceeds: "But if he denies that he was so previously convicted, or stands mute of malice, &c.,

the magistrate shall then proceed to inquire concerning such previous conviction." This means that he shall inquire by means of competent legal evidence; that is, that he shall have adduced before him legal evidence of the previous conviction or convictions.

Sub-section 2, immediately following, makes the magistrate's certificate proof of the *number* of such previous convictions, not proof of such "previous conviction or convictions," (mark the use of the singular and the plural here), as the expression is at the end of sub-section 1, just before. I think the two expressions are essentially different, and are intentionally so formed to express different things, as they appear in juxta-position. The certificate is not evidence of a previous conviction, but of the number of such previous convictions, and there is no other evidence of the conviction as such.

Then, the present conviction cannot stand against this objection; and there are other objections not specially mentioned in the rule; for instance, there is no evidence that the James Kennedy of the previous conviction is the James Kennedy of the second offence; and I think there is a defect apparent on the face of the conviction which also is probably fatal to it; but in this instance it is superfluous; and for the same reason it is unnecessary to advert to other grounds of objection stated in the rule *nisi*, though when required they will be found worthy of serious consideration.

It is but fair to say that Mr. Shepley, in the course of his able and ingenious effort to sustain the conviction, offered to put in a copy of the information, dated August 5th, (certified by the same magistrate, without date, however) upon which the first conviction was said to have taken place, in order to shew that it was laid before the second alleged offence was committed. I rejected it, as it was no part of the return to the writ of *certiorari*, and was not amongst the papers returned therewith; and also because in my view of the case it was immaterial; and I also thought the certificate ought by a date to shew when it was given.

The conviction must be quashed.

Costs are asked, and I have to consider the question.

The prosecutor here is not a public officer under the Act, charged with the duty of seeing to its execution, and is therefore informant only, as any other person may be. He is not, then, entitled to any peculiar protection or favor, as a public officer discharging a duty of his office might be entitled. The Act is a stringent one, capable of being used, as it has been in this instance, vexatiously, if not indeed tyrannically, under the delusion that the right of appeal and of *certiorari* is taken away in all cases wherein the magistrate even assumes to convict under the Act, whether with or without evidence.

It is, therefore, in my opinion necessary and proper to construe and apply the Act strictly, and to keep parties who invoke or administer it not only within its provisions, but to the reasonable observance of those provisions. While the strict observance of the law should be enforced, it should be enforced in only a legitimate way, and not made oppressive and odious by a sinister and improper use of it. Section 107 of the Act directs that every offence against the second part of it may be prosecuted in the manner directed by the "Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders." Can it be said that that direction has been followed in this case?

A prosecutor under that Act, proceeding without reasonable cause and failing, is visited with costs as the penalty of his temerity. It is quite clear in this case that the prosecutor, when he laid the information, had no personal knowledge of the offence; and it seems also evident that he had no reasonable or credible information that the offence charged had been committed. This is shewn by the fact that the testimony offered was wholly of a discovering or fishing character. The first witness knew nothing of the matter charged, and the others disproved rather than proved the charge. On the other hand, other evidence necessary to a conviction was not even tendered;

apparently, was not thought of. I do not hesitate to say that no man should have been, or should be, called on to answer such an information and such testimony (evidence it is not) as we have here.

Nothing can be more vexatious and unwarrantable, except the conviction founded thereon.

No prosecutor should be permitted to proceed at haphazard, as he did here. He should be taught that it is his duty to know that he has reasonable ground for proceeding, and he should have reasonable ground for, at least, believing that the charge will be sustained by proper evidence before he lays his information. I know of no way of inculcating this lesson but by visiting the prosecutor with costs when he proceeds without the reasonable precaution just mentioned. Probably, when he knows that he proceeds at the risk of being compelled to pay costs upon failing to make out a reasonable case, he will proceed more cautiously and less vexatiously.

In this case the magistrate is by no means blameless, and I am not by any means sure that he should not be subjected to the payment of costs; but for the present I give him the benefit of a possible doubt.

The conviction will be quashed, with costs to be paid by the prosecuter to the defendant.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

THE PEOPLE'S MILLING COMPANY AND THE COUNCIL OF MEAFORD.

Municipal by-law—Exemption—Taxation—Manufacturing and General business—Power of Municipal Council to repeal—Consolidated Municipal Act, 1883, sec. 368.

C. applied to the corporation of the town of Meaford for a lease of a certain lot of land owned by the corporation, alleging that he and others proposed to erect thereon a mill and other buildings for the purpose of carrying on the business of a flour and grist mill, and a general grain business; they petitioned also for exemption from taxation upon the mill for ten years. Under a by-law passed the 4th of March, 1885, a lease to the applicants was executed by the corporation of the lot in question for twenty-one years, reserving a nominal rent, and containing covenants on the part of the lessees in reference to the nature of the buildings to be erected, to pay taxes, and other provisions. Another by-law was subsequently passed exempting the "manufacturing establishment of C. and others (naming them), established for the purpose of carrying on the milling and grain merchant business, including the lands leased, &c., and the mill and all buildings and property to be erected and placed upon the said land for the purpose of the said business," subject to the performance by the lessees of the stipulations in the lease as to maintaining and working the mill. Upon the faith of this by-law and lease, C. and others, the lessees, purchased a large amount of material, and entered into building contracts for the purpose of erecting the proposed mill, and proceeded to erect the same, and further contracted for the purchase of machinery, the whole involving an outlay, as was alleged, of some $17,000. Upon the 20th of July following the council by by-law repealed the by-law exempting from taxation.

Upon an application by C. and others, to quash the repealing by-law, upon the ground that the same was a fraud upon the applicants and a breach of contract, it appeared that there were other tax payers of the same town engaged in the same business, and having large amounts of capital invested therein, whose interests were injuriously affected by the repealed by-law.

Held, (1) that inasmuch as the applicants were treated in the lease and by-law as carrying on two distinct kinds of business, viz.: the manufacturing or milling business, and the general grain merchant business, the first only of which the council had power to exempt from taxation, the by-law exempting from taxation was bad; (2) that the by-law was also bad in exempting all the land leased, and not the mill only, from taxation, as other buildings, suitable alone for the grain business, might be erected thereon; (3) the fact that other large milling establishments within the same municipality were discriminated against also made the by-law illegal and bad; (4) the repealed by-law being therefore illegal, the council had a right to repeal, or to go through the form of repealing it in order to prevent trouble and expense.

November 13th, 1885. *Lash*, Q. C., obtained an order *nisi* calling on the Municipal Council of the town of Mea-

ford to shew cause why by-law No. 15, purporting to repeal by-laws Nos. 6 and 7 for 1885, should not be quashed, with costs, on the ground that the said company were induced by by-law Nos. 6 and 7, and by the said council, to expend large sums of money, and to incur large liabilities, and to change their position, and that the passing of the said by-law No. 15 was unfair and unjust to said company and a fraud upon them, and a breach of contract between the company and the corporation, and on grounds disclosed in affidavits and papers filed.

The following were the facts:

On the 16th February, 1885, one William Cook, of the town of Meaford, applied to the Mayor and Council for a lease from the corporation of a lot owned by the corporation in that town. He stated that he had arranged a company for the purpose of erecting a mill in which to carry on flouring and gristing and general grain business in that town; and he also asked that the council would exempt the mill from taxes for ten years.

The application was referred to the public property committee of the council. On the 18th of February the committee reported to the council.

The report contained eight clauses. It stated that the committee had obtained from Mr. Cook a description of the mill proposed to be erected, and which was to cost from $10,000 to $12,000.

They recommended the granting of the lease of the lot mentioned for a term of twenty-one years at a nominal rent, renewable on certain terms; and, by clause 7, that the mill and machinery should be exempted from taxation for the term of ten years. At the meeting a motion was made to adopt the report, but upon a motion in amendment the council went into committee of the whole to consider the report.

The report was then referred to the council, on resuming as amended, and the 1st, 2nd, 3rd, 4th, 5th, and 6th clauses were severally marked "carried," but the 7th and 8th clauses were not so marked, the 7th clause being the

one which recommended exemption from taxation. The report was then adopted by resolution of the council.

On the 4th of March, a by-law, No. 5, was passed, authorizing the mayor to execute the proposed lease, and at the same time another by-law, No. 6, was passed, which was as follows, viz.: "Be it enacted by the corporation of the town of Meaford, that the mill and all the appurtenances connected therewith about to be erected by the proposed, 'The People's Milling Company' of Meaford on a part of the wharf property on the west side of Big Head River, and the site thereof, as leased or about to be leased by the corporation to the company, or to certain parties as trustees for the said proposed company (the said mill being intended to be a manufacturing establishment,) shall be exempt from taxation for a period of ten years from and including the present year 1885, provided the said mill be conducted and worked according to the provisions of the lease about to be granted to the said company or to trustees as aforesaid."

On the 5th of March the lease to Cook and other persons named therein, and styled trustees for the proposed "People's Milling Company of Meaford," was executed by the mayor, on behalf of the corporation, and by the lessees, for the term of twenty-one years at the rent of one dollar a year.

The lessees bound themselves not to build or erect on the demised lands "any buildings other than the said proposed mill, and such buildings and appendages as may be found to be necessary for carrying on the business of the said mill, and the general grain trade, without leave" of the corporation; and they also covenanted to pay taxes. The lease contained stipulations for renewal or payment for improvements, and various other provisions. Only eleven of the twelve members who composed the council of Meaford were present when by-law No. 6, exempting from taxation, was passed, and there were seven for and four against the by-law.

It was afterwards discovered that the law required that

a by-law of that kind should be passed by two thirds of the council, and that the by-law was therefore invalid.

It was also thought that the description and other matters in the by-law were ambiguous, and on the 16th of the March another by-law, No. 7, was passed unanimously, or at least without a division, at a meeting whereat eleven of the council were present.

That by-law was as follows: "Be it enacted by the corporation of the town of Meaford, that the by-law No. 6 for 1885 be amended as follows, that is to say, by striking out all the words and figures in said by-law No. 6 occurring after the word 'Meaford,' in the second line thereof, to and including the word 'aforesaid' in the 19th line thereof, and by substituting therefor the words and figures following: 'That manufacturing establishment of William Cook," &c., (naming the promoters) 'promoters of the People's Milling Company of Meaford (proposed to be transferred to the said company upon its incorporation), established for the purpose of carrying on the milling and grain merchant business, including the lands leased to the said promoters, in pursuance of by-law No. 5 for 1885 of the said corporation, and the mill and all buildings and property to be erected and placed upon the said land for the purpose of the said business be exempted from taxation for a period of ten consecutive years, commencing with and including the current year, so long as the said promoters, their executors, administrators, and assigns shall perform, observe and keep all the covenants and provisoes as to constructing, maintaining and working the said mill and business in the said lease contained and by the said party to be observed and kept."

Mr. Cook, in the 9th paragraph of his affidavit made in this matter, said that on the faith of that report and the resolution adopting it, the promoters purchased a quantity of material for the purpose of erecting a mill in pursuance of the said objects of incorporation, and also executed the lease and applied for letters patent incorporating the said company and incurred other expenses for the purpose of

the said building; and in the 10th paragraph he said that upon the faith of the said by-law No. 7 the company by agreement, dated 21st May, 1885, entered into contracts with the firm of McCann & Sparling, and Thomas Avis, mason, all of Meaford, to erect the said mill at a cost of $3,850; and the erection of the said mill was proceeded with and the brick-work of the said mill was about half finished before the passing of by-law No. 15, being that complained of. In succeeding paragraphs of the same affidavit it was stated that the promoters, by indenture dated 5th September, 1885, assigned all their interest in the lease to the company: that in the interval between the passing of by-law No. 7, and by-law No. 15, the company made purchases of machinery, and that the cost thereof and of putting the same in the mill was upwards of $11,000; and that the company had expended $400 for the purchase of a hay house which had formerly stood on the said mill site; and had varied the building contract so as to increase the cost to upwards of $6,000: that instead of $11,000, as originally intended, the mill would, when completed, cost upwards of $17,000, the increased cost as well as the originally intended cost being incurred on the faith of the said by-law No. 7: that the council on 20th July passed by-law No. 15 repealing by-laws Nos. 6 and 7.

These statements were for the most part corroborated by the affidavits of others, and the facts were not disputed, although the motives were not admitted by the other side.

Affidavits were filed in reply. Hugh Chisholm of Meaford, said he was a ratepayer and carried on business as a grain merchant at Meaford: that for the purposes of his said business he and his partners had erected a grain elevator at a cost of $5,000, and used it for eleven months past: that he and his partners paid taxes for the same at the same rate as others paid for their property, and that they had not asked or received any remission of taxes.

William Train of Meaford said he carried on the merchant milling business in the town, and purchased grain for the purposes of his milling business: that his mill was

worth $10,000, and that he purchased it in 1881: that he had continued the business since and expended $12,000 in improvements, and had expended in the whole $22,000, and contracted for further improvements to the amount of $1,200, which would increase his milling capacity from 25 to 30 barrels a day: that he had milling capacity to grind 100 barrels of flour per day, and storage capacity in the mill for 25,000 bushels of grain, and for 5,000 bushels in the store house: that he had milling and storage capacity sufficient to dispose of all the grain that usually went to Meaford: that he had received no remission of or exemption from taxes, and that he never applied for such until it was said that the People's Milling Company was said to have received exemption, and that his application was refused by the council.

Lash, Q. C., supported the motion, and referred to *Wright* v. *Synod of Huron*, 29 Grant 348; *Re Cameron and East Nissouri*, 13 U. C. R. 190; *Re Bryant and Corporation of Pittsburg*, 13 U. C. R. 348; *Welch* v. *Cook*, 97 U. S. R. 541; *New Jersey* v. *Yard*, 95 U. S. R. 104; *Tucker* v. *Ferguson*, 22 Wallace 527; *Salt Co.* v. *East Saginaw*, 13 Wallace, 373.

Aylesworth, contra, cited *Pirie and Town of Dundas*, 29 U. C. R. 401, Municipal Act 31 Vic., ch. 30, s. 44, (O.); *Jones* v. *Gilbert*, 5 S. C. 356.

December 18th, 1885. O'CONNOR, J.—In a case between individuals, acting *sui juris*, I should be inclined to hold with the applicant upon the grounds stated in the order *nisi*, and I think the authorities sustain that position. Yet some of the cases cited as authorities supporting the contention of the applicants seem to have an opposite tendency.

The St. Louis Iron Mountain and Southern R. W. Co. v. *Loftin*, Collector, 30 Arkansas R. 693, 711, as far as it bears on this case, seems favourable rather than opposed to the corporation, and *Tucker* v. *Ferguson*, 22 Wallace 575, there cited.

Welch v. *Cook*, 97 U. S. R. 541, is, I think, decidedly, in so far as the cases are analogous, against the mill company's contention herein. In the judgment, at p. 543, it is said that the exemption of manufacturing property was a bounty revocable at any time by the Legislature; and in that case, as in this, the plaintiff—party complaining—had expended large sums of money on the faith, as he claimed, of the enactment. At p. 542 Mr. Justice Hunt says: "This is a bounty law, which is good as long as it remains unrepealed; but there is no pledge that it shall not be repealed at any time;" and he cites the *Salt Company* v. *East Saginaw*, 13 Wallace 373, in support of this position. It is to be observed, however, that these cases have reference to the powers of Legislatures, possessing, in greater or less degree, inherent governmental powers.

But municipal councils are only trustees for the corporations which they represent, with limited powers; and they can act only as trustees, and within the scope of the powers given them. The powers, by virtue of which they act, are conferred on them by Act of the Legislature, and they are to be construed strictly. The rule in this respect seems well laid down in *Dillon* on Municipal Corporations, 2nd ed., vol. 2, p. 717, sec. 616, thus: "As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied unless so clearly granted as to be free from fair doubt." But if statutes are to be so construed, *a fortiori* ough by-laws of a corporation be kept within the abnormal statutory power.

Section 368 of the "Consolidated Municipal Act, 1883," 46 Vic. ch. 18, (O.), gives to every municipal council, "the power of exempting any manufacturing establishment, in whole or in part, for any period not longer than ten years." The expression is, "any manufacturing establishment"; at least, this is the only expression having reference to the present case.

The first question is: "What is it that by-law No. 7 exempts from taxation?

The application of the 16th of February by Mr. Cook to the council states that he has "arranged a company for the purpose of erecting a mill in which to carry on flouring and gristing and general grain business;" and he asks a grant of sufficient ground for the mill, and that the mill be exempt from taxes for ten years. It is unnecessary to speak of by-law No. 6, as by-law No. 7 was substituted for it. By-law No. 7 provides that the manufacturing establishment of William Cook, &c., established for the purpose of carrying on the milling and grain merchant business, including the lands leased to the promoters in pursuance of by-law No. 5 for 1885 of the said corporation, and the mill and all buildings and property to be erected and placed upon the said land for the purposes of the said business, be exempt from taxation, &c.

In the lease granted by the corporation the lessees covenant "not to build or erect" (without leave) on the said lands "any buildings other than the said proposed mill, and such buildings and appendages as may be found necessary for carrying on the business of the said mill, and the general grain trade." It is, therefore, indisputable that two distinct kinds of businesses were proposed and are to be carried on by the company, namely, (1) the milling business, and (2) the general grain trade. This is what was proposed by the application of the 16th of February. It is stated in the lease and power to erect buildings for both purposes is reserved therein to the lessees; and the by-law No. 7, although it speaks of the "manufacturing establishment of William Cook, &c.," immediately defines that as "established for the purpose of carrying on the milling and grain merchant business," and it keeps up and continues the same distinction. Furthermore, the by-law continues the exemption, not for ten years absolutely, but so long only as the company "shall perform, observe, and keep all the covenants and provisos as to constructing, maintaining and working the said mill and business in the said lease contained," and by the company to be performed and kept.

The mill, with its appendages and appurtenances proper, would, I think, come under the designation, "manufacturing establishment," meant by the Act; but "the general grain business" certainly would not; and it is impossible, in the state of matters in this case, to say which of the two kinds of business, rated in the usual way, would be liable to the greater amount of taxes, or whether they would or not be rated equally, even if they could be separated, which they could not. On this ground alone I think the council has exceeded its powers, and that the by-law No. 7 could not, if moved against, be sustained. Then the same by-law is, as it appears to me, objectionable in this, that it exempts all the land leased, and not only the mill, but all buildings and property to be erected and placed on the said land for the said *business*.

What business? The mill business, or the grain merchant business?

The latter is the only "business" mentioned before in the by-law.

It is in this respect either ambiguous, or the buildings and property to be erected are for the purposes of the grain business, and therefore add force to the first objection.

Then it appears that there is at least one other mill, a mill, too, of large capacity in the town; and also that there is there another established grain merchant business, having connected with it an elevator, and that these establishments are liable to and pay taxes like other rateable property. On this ground also by-law No. 7 is objectionable and bad, according to the decision in *Pirie and The Corporation of the Town of Dundas*, 29 U. C. R. 401.

Exempting the property of one person from taxation means an additional charge on the property of others liable to be rated, and therefore the power to exempt is an invidious one, to be watched with jealousy, and exercised strictly.

On the other hand, exempting one or more of a class of business men from taxation gives an undue and unfair

advantage over the others of the same class, and tends to create a monopoly, to the detriment of those who are not exempted. In fact, by such exemption persons in a particular line of business who are not exempted from taxation are compelled to contribute to the advancement of others in the same line, who are in competition with themselves. Such exemption operates, therefore, in a manner which is unnatural, unreasonable, unjust, and, I think, illegal. I therefore think that if by-law No. 7 had been moved against it would have been quashed. Then the action of the council in entering into an agreement and passing the by-law exempting the property in question from taxation was illegal, or at least unwarrantable, and, therefore, I do not see how the grounds stated in the order *nisi* to quash by-law No. 15, and pressed by Mr. Lash in the argument, can preveil.

There can hardly be a doubt, I should say, that the council has a right to repeal, or to go through the form of repealing, an illegal by-law in order to prevent trouble and expense. No contract could be founded on such a by-law, nor can it protect the company or any person from the consequences of expenditure or change of position incurred or effected on the faith of it.

I must discharge the order *nisi* with costs.

Order nisi, discharged, with costs.

[QUEEN'S BENCH DIVISION.]

KLOEPFER v. GARDNER.

Assignment for benefit of creditors—Disputing assignment—Right to recover dividend.

In an action by a creditor of an insolvent against the assignee under an assignment for the benefit of creditors to recover the amount of the dividend declared upon his claim, the defendant pleaded as a defence that the plaintiff disputing the validity of said assignment had, as an execution creditor of the insolvent, caused the goods assigned to be seized, and on the trial of an interpleader issue directed had endeavored to impeach the said assignment, and that having thus repudiated the assignment he could not now claim the benefit of it.

Held, [O'CONNOR, J., dissenting], a good defence and that the plaintiffs not entitled to recover.

It was contended for the plaintiffs that the said action not having been tried upon the merits, the Court having held that the plaintiffs being assenting parties to the assignment were estopped from afterwards impeaching it, this defence formed no bar to the plaintiff's right to rank as a creditor upon the estate of the insolvent.

Held, that the mere bringing of the action was a sufficient repudiation to disentitle the plaintiffs from recovering.

Per O'CONNOR, J., that by the judgment of the Court the plaintiffs were relegated to their position and status under the assignment, and therefore to the benefit of it.

THIS was an action by a creditor against the assignee for the benefit of creditors to recover $962,64, being the ratable share of a dividend declared by the assignee.

The defence was, that the plaintiffs, while assenting parties to the deed of assignment, disputed its validity by setting up their rights as execution creditors of the insolvents against the assignment to which they were parties; and that having repudiated this assignment, although they had failed in their attempt, they could not claim the benefit of the assignment which they repudiated and attempted to invalidate.

The interpleader suit, in which the plaintiffs set up their claim as execution creditors against the assignment, was decided against them, upon the ground that they were estopped from setting up such a claim against the assignment to which they were assenting parties.

The suit was thus not tried upon the merits whether they were entitled to priority or not.

The present action went down to the last Brampton Assizes before Wilson, C. J., when a formal judgment was entered in favour of the defendant.

June 3, 1885. *W. Nesbitt* moved to set aside the judgment for the defendant.

Creasor, Q.C., shewed cause, contending that under the old law the plaintiff would have forfeited his right, and R.S.O. ch. 118, does not allow him to attack the assignment and then avail himself of it. He referred to *Joseph* v. *Bostwick*, 7 Gr. 332; *Field* v. *Lord Donoughmore*, 1 Dr. & War. 227; *S. C.* 2 Dr. & Walsh. 630; *Watson* v. *Knight*, 19 Beav. 369; *Brandling* v. *Plummer*, 6 W. R. 117; *White & Tud.* 4th ed. 259.

W. Nesbitt, contra, reviewed the authorities cited, and stated that the whole argument that could be addressed to the Court was to be found in 1 C. L. T. 675.

January 11, 1886. WILSON, C. J.—It is said that as the plaintiffs were prevented by an estoppel from disputing the validity of the assignment, they are not precluded now from still claiming the benefit of it.

That must depend upon the fact what it is which prevents a party from getting the benefit of such an assignment after disputing its validity. Is it the mere fact of disclaimer or repudiation, as by bringing an action to question its validity? or by the trial of that action on the merits?

If a landlord have the election to take advantage of a forfeiture or not, and he bring an action claiming the forfeiture, he cannot after the mere bringing of the action change his mind and claim not to forfeit: *Jones* v. *Carter*, 15 M. & W. 718. So a tenant forfeits his term for years if he bring an action or set up a defence adverse to his landlord's title, for such a proceeding is a solemn act and amounts to a disclaimer.

In my opinion the repudiation of the assignment was as complete by the mere bringing of an action for that pur-

pose as it could have been by any other act, and it is of no consequence whether that action was tried or not, or how it was disposed of.

Suppose the interpleader had been brought and was pending when the present action was brought, could not the defendant have pleaded in this action the pending of the interpleader disclaiming and repudiating the assignment? I think he could.

Mr. Creasor has since the argument referred to *Meredith* v. *Facey*, 29 Ch. D. 745.

In my opinion the order should be dismissed, with costs.

O'CONNOR, J.—As the case stands on the pleadings the defence is formidable, and under the authority of *Joseph* v. *Bostwick*, 7 Gr. 332, and other cases, is decisive against the plaintiff. But there is an important ingredient in the case which is not disclosed by the pleadings, but which is disclosed by the evidence and admissions, and which, in my opinion, saves this case from the operation of the rule pointed at by the authorities alluded to.

It was stated, and seemed to be at least tacitly admitted throughout the proceedings, and especially on the argument, and it is doubtless the fact, that these plaintiffs failed in the interpleader issue, not on the merits, but because they were estopped from attacking the assignment, on the ground that they had by their conduct and language approved and accepted the assignment, and that they could not afterwards be heard objecting to its validity—that they had, in fact, approved and accepted the assignment, and ranked on the insolvent estate as creditors, and could not afterwards repudiate the assignment. The Court told the plaintiffs in effect that they had approved and accepted the assignment, acted upon it, and placed themselves in a position to claim and receive, *pro rata*, whatever amount they might be entitled to on the amount of their claim, as creditors under the assignment, and that they could not afterwards repudiate that position.

The Court by its decision, therefore, debarred them from

attacking the assignment and from the chance of getting their debt in full, which would be the result had they been allowed to attack the assignment and succeeded; but the Court relegated them back to their position and status under the assignment, and therefore to the benefit thereof

I do not see, then, how this Court can now say that the plaintiffs shall not take, receive, or obtain any benefit from the assignment, as creditors of the estate, because they attempted, or proposed rather, though they were not permitted, to destroy the assignment. They were, in fact, estopped from making the attempt. Such a decision would, I venture to say, be the result of reasoning in a vicious circle with a vengeance. The Court can do nothing so palpably absurd and unjust. The *pro forma* verdict entered for the defendant should be set aside and verdict and judgment be entered for the plaintiffs for $962 64, and the costs of the action. In the leading case relied on by the defence, wherein the plaintiff was held to have forfeited his right to share as a creditor under the assignment, the plaintiff had attempted to destroy the assignment, had had full opportunity, had had the full benefit of his chance for all or nothing, had been defeated on the merits, and had to be satisfied with nothing, because had made his election, had never approved or accepted the assignment, had from the outset repudiated it, and run his chance to get his debt in full.

Such a case was *Joseph* v. *Bostwick*, which followed *Field* v. *Lord Donoughmore*, 1 Dr. & War. 227, another case of the same kind.

ARMOUR, J., concurred with WILSON, C. J.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

MILLER V. REID.

Master and servant—Negligence—Injury to servant—Contributory Negligence—Non-liability of master.

Held, in an action by a servant against his master for an injury he had sustained, in consequence of the guard being out of place in working a circular saw which he had to attend, that it was not sufficient to shew that the master knew the saw was not guarded; but it must also appear that the servant was ignorant of that fact, and as the servant was skilled in the use of the saw, and did not look to see whether the guard was on or off, as it was his duty to have done, he could not, therefore, make his master responsible to him for the consequences of his own neglect of duty.

THE plaintiff in his statement alleged: (2) that the defendant was at the time of the injury thereinafter referred to the proprietor of a saw mill and manufactory of wood, in which machinery was extensively used: (3) that the defendant on or about the 11th November, 1884, hired the plaintiff to work for him in said saw mill or manufactory: (4) that on the first day of such engagement, while the plaintiff was wholly ignorant of the nature of the said machinery, defendant directed the plaintiff to assist him, the defendant, in and about a certain machine circular saw then in motion in the said mill, known as "Jones' Patent combined shingle and beading sawing machine;" and shortly after they had commenced working at the said machine the defendant directed and instructed plaintiff to go round the same and take or throw the belt off, which the plaintiff, in pursuance of such instructions and directions, was attempting to do when the said saw, being in rapid motion, caught his left arm and cut it in the elbow joint and injured it so severely that it became necessary to amputate, and the said arm was amputated above the elbow: (5) that the said machine or circular saw had, as a part of it, a metal guard, which, when in its proper position on the machine encircled that portion of the said saw not for the moment cutting the wood, and protecting the workmen and others from the dangers of accident or injury by the said

saw: (6) that the defendant had himself on the morning or before the happening of the said injury to the plaintiff removed the said metal guard and detached it from the said machine and circular saw and directed and instructed the plaintiff to work at and with the said machine or circular saw, of which fact the plaintiff was ignorant until after he was injured: (7) that the said machine or circular saw had not on the said day any good, sufficient, or substantial guard to prevent persons being in the said saw mill or manufactory from coming in contact therewith: (8) that the defendant at the said time and place negligently and carelessly unmindful of his duty in that behalf, omitted to take due, proper and reasonable care of the plaintiff in the matter of and in his said employment and work, and improperly exposed him, the plaintiff, to unreasonable risk, and the plaintiff entered into and upon said employment and assisted and was assisting the defendant in the working of the said circular saw or machine at at the said time and place, understanding or believing that and relying upon the belief that he the defendant had and would take and use all reasonable and proper means to protect him from risk or injury, and would in all respects fulfil his duty to the plaintiff: (9) and the plaintiff charged that it was the duty of the defendant towards him, the plaintiff, to exercise due care in order to have this machinery with and around which he required him the plaimtiff to work in a safe and proper condition to protect him from unnecessary risk, and that the defendant unmindful of his duty neglected his duty in that behalf, whereby the plaintiff was injured as aforesaid.

The defendant in his statement (1) denied the allegations in the plaintiff's statement; and (2) stated that he did not in any way or through any neglect or default cause or contribute to the injury complained of by the plaintiff; (3) that the plaintiff contributed and caused the injury to himself by his own negligence and misconduct in managing the said circular saw: (4) that plaintiff, representing himself to be a skilled workman

in managing and running saws and saw mill machinery, hired to the defendant to run and work such machinery, which was properly constructed and in good order and condition, and the plaintiff well knew and could see the state and condition of the same, and commenced working a saw, and while so working the same and desiring to stop the same, which was being propelled by steam, and well knowing the proper way to stop the same, improperly and against the defendant's direction attempted to move the belt from the pulley which connected with the said saw to give it motion, and in so doing went into a position in reference to said saw in which no skilled, prudent, or careful man would place himself, and while in such position was, by his own negligence and improper conduct injured, without any fault on the part of the plaintiff.

Issue.

The case was tried at the last Spring Assizes at Belleville before Rose, J., with a jury.

It appeared that the defendant was the owner of a steam saw mill, and in 1882 he purchased a shingle machine, called "Jones's Patent Combined Shingle and Beading Machine," and set it up in his mill, and the plaintiff fitted up the saw. There was a guard belonging to this machine, which when in position served as a protection against the saw at its back, or opposite to the side where the sawing was done. This guard seemed to have been of very recent introduction, and to have been peculiar to this machine, for the plaintiff said he had worked at over fifty shingle machines, and had never seen a guard on one till he saw this, and the plaintiff was an experienced sawyer, who had worked as such for about forty-seven years. Several other witnesses of experience testified to the same effect, and none to the contrary. When the machine was purchased the guard was on, and when it was set up the plaintiff took off the guard to file the saw, and having done so replaced it. No work was done with the machine while it stood in that position, and in 1883 the defendant moved it to another part of the mill, and commenced to use it with

the guard, but finding that the effect of the guard being on, as was said, was to throw the sawdust in the sawyer's eyes, the defendant took it off and laid it to one side near the machine, and it was not used again till after the injury.

In 1883 the plaintiff worked for the defendant as a sawyer for a month, about August, and during that month sawed with this machine on and off for in all three or four days, and during this time the guard was off. In the fall of 1884 the plaintiff was again hired as a sawyer to run this machine, and he went to work in the morning, and the machine being started he cut a block, and the saw would not work right, and the defendant then tried it, and still it did not work right, and the defendant gave the plaintiff a stick and told him to throw the belt off the pulley and file the saw. The plaintiff tried to do it in front of the saw, and the defendant motioned to him to go round to the back of the saw and do it. The plaintiff in his evidence said: "I then went round and put my stick inside the side of the belt which was running upwards towards the pulley, the stick was in my left hand, and my back was towards the saw, I can give no reason why I had the stick in my left hand. I had it in that way and I went around and kept it in that hand." Being asked, "How was it that your arm came on the saw?" he said "I was never looking at the saw, I was just looking at the belt;" and again being asked, "Did you know whether the guard was on or off that morning?" he said, "I did not know whether it was on or off, I never looked at it;" and on cross-examination being asked, "When you got your arm cut did you pay any attention to the saw at all?" he said, "I looked at it after I was cut." "Q. Why, didn't you look at it before you were cut?" "A. No, I never looked at it; if I had been looking at it I would have kept away from it; I put the pole through against the side of the belt that was running upwards; I could not get the belt off by putting it to the side that was running downwards." "Q. Did you not try three or four times to take it off here?" "A. I could take it off very quick down there, but he told me to

go round the other way." "Q. Hadn't you gone round often and taken the belt off before?" "A. I had never taken the belt off before at the back where he told me to go." "Q. Why didn't you stand here with your back to the balance wheel and take the belt off?" "A. If I had been looking at the saw I would have stood there; if I had been looking at the saw I could have taken it off." In re-examination he said that he had never taken the belt off that saw before.

Percy Thomson, a witness called for the plaintiff, said that the proper place to go to throw the belt off the pulley was behind the saw; that there was not a bit of danger for a man with ordinary care to go round and get it off; that if a man went round there and got his arm cut he would say it was his own carelessness; that he did not think there was any necessity for a man going round and standing with his back to the saw to shove it off; he should stand on the side next to the balance wheel and shove it off; that he did not know that a man could hurt himself from inside there, if that guard was on. Q. So if the guard was on there would not be any carelessness in a man going in the way he said he did to take the belt off, would there? A. A man would watch the saw if he had any sense about him. Q. But I am asking you if it would be carelessness in him to go there where he said he did if that guard had been on? A. I do not know whether it would or not. Q. He could not have got hurt if the guard had been on, could he? A. I don't know as he could. Q. Would any experienced sawyer go there to get the belt off where he went whether the guard was on or off? A. He would not. Q. Is that a proper place to go? A. It is not.

Joseph Bryan, another witness for the plaintiff, was asked: Q. "Have you frequently run this saw?" A. "I frequently ran it last summer." Q. "Frequently taken the belt off?" A. "Yes." Q. "Where is the proper place to take the belt from it?" A. "I always go round behind, but I do not use the same hand as he does. I go round and pull it off this way." Q. "Could any man with

ordinary skill go round there and take the belt off without danger?" A. "He could if he did not go too close to the saw. I always freed the saw because I used that hand." Q. "Should any man go round there to take it off without keeping his eye on the saw?" A. "Well, I would not." Q. "Should any man of ordinary care go round there and take it off without keeping his eye on the saw?" A. "I would not."

All the other witnesses who spoke on the subject agreed that the proper place to go to throw the belt off was behind the saw, and they all agreed that the way the plaintiff stood with his back to the saw was improper. The evidence showed that if the guard had been on the injury would not have been occasioned.

The learned Judge left questions to the jury which, with their answers to them, were as follow: (1) "Did the plaintiff Miller, at the time he went to take the belt off, know that the guard was not on the machine?" "No." (2) "Was the defendant Reed guilty of any neglect of duty towards the plaintiff Miller in not having the saw guarded at the time of the accident?" "Yes." (3) "Was the accident the result of such neglect of duty?" "Yes." (4) "Could Miller have avoided the accident by the exercise of ordinary care and caution?" "We think so." (5) "What would be a fair sum for Reed to pay Miller by way of damages if he is liable to pay anything?" "$150."

When the jury brought in this verdict the following conversation took place:

The Court.—"Do you find that he could have avoided the accident by the exercise of ordinary care and caution because you think he ought to have looked to see whether the guard was on or not?" The jury.—"Yes." The Court.—"You think it was carelessness in him not to have ascertained whether it was on or not?" The jury.—"Yes."

On these findings the learned Judge directed judgment for the defendant without costs, by consent of defendant's counsel if judgment acquiesced in, but if not and judgment sustained, then with costs.

On 27th of May, 1885, *Dickson*, Q.C., obtained an order *nisi* to set aside the verdict and judgment for the defendant and to enter them for the plaintiff, upon the following grounds: (1) that the plaintiff was entitled upon the facts found by the jury to have the verdict entered for him: (2) that the finding of the jury upon the fifth question submitted was contrary to the evidence and the weight of evidence, and inconsistent with their finding in answer to the first question: (3) that the learned Judge improperly admitted evidence of opinion by the witnesses sworn: (4) for non-direction on the part of the learned Judge in not asking the jury to find, as requested by the plaintiff's counsel, whether or not the plaintiff was a volunteer going where he did, or if he went under the immediate direction and control of the defendant at the time and in the place where the accident happened; (5) and upon grounds disclosed in the affidavits of Richard Miller and Joseph Bryne filed on this motion.

December 4th, 1885, *G. D. Dickson*, Q. C., supported the order *nisi*, contending that the employee was not bound to look if the machinery was in a safe condition, and that forgetfulness was not contributory negligence. He cited *Peart* v. *Grand Trunk R. W. Co.*, 10 A. R. 191; *Copeland* v. *Corporation of Blenheim*, 9 O. R. 19; *Holmes* v. *Clarke*, 6 H. & N. 349.

Burdett contra.

January 11th, 1884. ARMOUR, J.—In my opinion there was no evidence to go to a jury to justify a recovery against the defendant in this cause.

In order to entitle the plaintiff to recover it was incumbent upon him to establish not merely that the defendant knew that the guard was off the saw, but also that the plaintiff was ignorant that it was off.

It was not sufficient for him to prove as he did that he did not know whether the guard was on or off—that he never looked at it; for it was his duty to have looked at it,

and if he had looked he would have seen that the guard was off.

He knew that there was a guard for the saw, and he knew, also, that the saw had been run without it, for he had himself run it the previous year without the guard.

He was an experienced sawyer, and he was hired to run this very saw, and if the guard ought to have been on it was his duty to have put it on, and he cannot make the defendant responsible to him for the consequences of his own neglect of duty.

In *Priestley* v. *Fowler*, 3 M. & W., it is said, at p. 6: "But in truth the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

In *Dynen* v. *Leach*, 26 L. J., Ex. 221, Bramwell, B., said: "It may be inhuman (for an employer) so to carry on his works as to expose his workmen to the peril of their lives, but it does not create a right of action for an injury which it may occasion, when the workman has known all the facts, and is as well acquainted as the master with the machinery, and voluntarily uses it."

In *Williams* v. *Clough*, 3 H. & N. 258, Bramwell, B., said: "I abide by the opinion I expressed in the case referred to (*Dynen* v. *Leach*), that a master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master has.

I refer also to *Griffiths* v. *London and St. Katharine Docks Co.*, 12 Q. B. D. 403, *S. C.* 13 Q. B. D. 259.

The finding, however, that the defendant was guilty of negligence causing the injury is of no service to the plaintiff, for the jury found also that the plaintiff could have avoided the accident by the exercise of ordinary care and caution, and this finding is entirely supported, I might almost say conclusively proved, by the evidence.

The objections as to the improper admission of evidence

and as to misdirection were not insisted on and are clearly untenable, and if they were no substantial wrong or miscarriage was thereby occasioned.

In my opinion the order *nisi* should be discharged, with costs, and the action dismissed, with costs.

WILSON, C. J.—Upon the finding of the jury it is impossible that the plaintiff can recover, and that finding, so far as it is favourable for the defendant, fully supports the finding of the jury.

A verdict for the plaintiff upon such evidence would make the employer absolutely responsible to his workmen for any injury they sustained in his service however wilfully and carelessly on their part that injury had been caused.

The defendant must receive his costs, for the event of the action is in his favour, and there is no good cause which disentitles him to his costs. I agree with the judgment of my brother Armour.

O'CONNOR, J., concurred.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

LANCEY v. BRAKE.

Receipts for money—Parol agreement—Inadmissibility of evidence of to contradict written contract—Statute of Frauds—Setting aside verdict of jury for the defendant and entering judgment for plaintiff.

Defendant got from plaintiff six different sums of money, amounting together to $3,000, for which he gave receipts. Three of these stated that defendant received so much money from plaintiff, "loan on oil, usual rate of interest." The remaining three were similar to the others, but concluded, "payable within one year from date, with interest at 9 per cent. per annum." Defendant set up a parol agreement with plaintiff, by which defendant had the right at any time to require plaintiff to take in payment of the moneys so lent the oil which defendant had in plaintiff's tanks at the market price at the time when defendant so required plaintiff to take the oil.

Held, that such a parol agreement could not be set up to alter the terms of the receipts which shewed such loans were to be repaid in money; and although the jury found the parol agreement to have been made, the Court having all the facts before them set aside the verdict and judgment for defendant and directed judgment to be entered for the amount of the plaintiff's claim.

ACTION for the recovery of $3,000, money lent by the plaintiff to the defendant at 9 per cent interest.

The loans were made as follows:

On the 12th October, 1881.....	$400 00
" 10th November.....	600 00
" 28th "	500 00

These three sums were not said to have been payable at any particular time.

On the 19th December, 1881, in one year.....	400 00
" 3rd January, 1882, " "	300 00
" 20th " " "	800 00
	$3000 00

The statement of defence was that it was agreed between the plaintiff and the defendant that the defendant should deliver to the plaintiff all the petroleum oil then or thereafter had on hand; and in consideration thereof that the plaintiff would from time to time advance to the defendant, on account of such oil, such reasonable sums of money as the defendant should require, with interest at 9

per cent; and that the plaintiff would buy from the defendant, or any time the defendant should require him so to do, whatever quantity of such oil the defendant might then have so delivered to the plaintiff at the market price of oil, or at the time of such requisition; and that the plaintiff would then credit the defendant with the value of such oil, at such price, against the amount of the said advance.

That the plaintiff advanced the said sum of $3,000 claimed by him, in pursuance of the said agreement.

That afterwards, on the 22nd of November, 1882, the defendant signified to the plaintiff his election to sell to the plaintiff the said oil so delivered to the plaintiff at $1.50 a barrel, the market price of the same; and the defendant thereupon became entitled to a credit for the said oil against the said advance so made by the plaintiff.

The value of the said oil, after deducting all charges against the same, amounted to $2,804.

The interest upon the advances was $261.47, and there was payable by the defendant to the plaintiff, upon the said 22nd of November, 1882, $453.81, and no more; and the last named sum, with interest thereon from the 22nd of November, the defendant tendered to the plaintiff before the commencement of this action, which the plaintiff refused to accept; and the defendant had always been ready and willing to pay the same to the plaintiff, and he brought into Court the sum of $529.49.

The defendant pleaded the oil so alleged to have been required by him to be taken by the plaintiff, and which he alleged the plaintiff should have accepted and taken as a purchase, but refused to take, by way of counter-claim.

The plaintiff denied the counter-claim, and he said the sum paid into Court was not sufficient, and he joined issue on the residue of the statement of defence.

The cause was tried at the last Spring Assizes at London, before Cameron, C. J., and a jury, who found in favour of the defendant, and the learned Chief Justice thereupon gave judgment for the defendant in accordance with their findings.

A notice of motion was given on behalf of the plaintiff against the judgment of the learned Chief Justice, and an order *nisi* was also obtained by the plaintiff's counsel, in Trinity term last, to set aside the verdict for the defendant, and for a new trial; or to enter judgment for the plaintiff, upon the grounds:

1. That the verdict was against evidence, and the weight of evidence, for it was against the written documents and the other evidence of the plaintiff, and was supported only by the evidence of the defendant.

2. That the verdict was founded upon the written documents being varied by a contemporaneous verbal agreement.

3. That the questions left to the jury were properly questions of law, and not of fact.

4. And for the reception of improper evidence.

November 28th, 1885. *Osler*, Q. C., and *Moncrieff* supported the motion and order *nisi*.

The claim of the plaintiff was proved by the signature of the defendant to the separate loans of money which the plaintiff made to the defendant. They are all expressly stated to be *loans on oil* bearing interest. The first three name no day for repayment. The last three are all payable within one year from date. The evidence given by the defendant was that the sums received by him were advances made by the plaintiff upon the oil which the plaintiff had in his tanks belonging to the defendant, and that the defendant was not to repay that money at any time, but had the option, whenever he chose to exercise it, of requiring the plaintiff to take the oil he had in the plaintiff's tanks, or any part of it, at the then market price, and to have the oil at the price then current credited to him against the advances made. That evidence was in contradiction of the receipts given for the money. The plaintiff had the oil of the defendant in his tanks, and it was argued for the defendant that such an agreement as he set up was not within

the Statute of Frauds, because the plaintiff had the possession of the oil; but the plaintiff had the possession as warehouseman only, and his character as warehouseman cannot be converted into that of purchaser without plain evidence to that effect. They referred to *Edan* v. *Dudfield*, 1 Q. B. 302; *Lillywhite* v. *Devereux*, 15 M. & W. 285; *Campbell* on Sales, 172.

If the plaintiff would not take the oil when it was offered to him, he may be liable to any loss the defendant may have sustained by reason of such refusal, but he cannot make the plaintiff purchaser against his will; and in this case there was no damage sustained, because the defendant could only have got the then market price from the plaintiff, and he could have got that price from any other purchaser at the time: *Jordan* v. *Norton*, 4 M. & W. 155.

Evidence should not have been received of the contemporaneous parol bargain to vary the terms of the written contract of the defendant: *Porteous* v. *Muir*, 8 O. R. 127; *Mason* v. *Scott*, 22 Grant. 592, in App.; *Gilroy* v. *McMillan*, 6 O. R. 120; *McNeely* v. *McWilliams*, 9 O. R. 728; *Fitzgerald* v. *Grand Trunk R. W. Co.*, 27 C. P. 528, 28 C. P. 586, affirmed in 5 S. C. 204; *Lumsden* v. *Davies*, 46 U. C. R. 1, affirmed in 11 A. R. 585; *Williams* v. *Burgess*, 10 A. & E. 499.

W. R. Meredith, Q. C., contra. It is admitted the money was a loan, but a loan is an advance. The plaintiff was at liberty to advance on the oil or not as he pleased, but if he did advance he was to be paid by the defendant in oil, which he had in the plaintiff's tanks, at the then market price, whenever the defendant required the plaintiff to take the oil. It was not an unreasonable bargain, because the plaintiff was receiving nine per cent. upon his advances, and storage for keeping the oil in his tanks, and an allowance for shrinkage of the oil while in the tanks, and besides the plaintiff was not obliged to receive the oil to be tanked from the defendant. The evidence may be said to have rested upon that which was given by the plaintiff and by

the defendant. The evidence of the plaintiff's two witnesses, English and Pratt, did not support the plaintiff's case. There had been a former dealing between the parties just before the one in question began, and it was closed by the plaintiff buying all the defendant's oil in the plaintiff's tanks, and paying to the defendant in cash the balance going to him after crediting him with the oil at the then market price. The Statute of Frauds does not apply here, because the agreement that the plaintiff should take the oil on account of the advances, whenever the defendant required him to do so, was all part of the one transaction, by which, and on account of which, the plaintiff was to make the advances. But if the Statute of Frauds does apply it has not been replied by the plaintiff, and there is no case in which a party has been allowed to set up the statute at this stage of the cause against the justice of such a defence as this. The plaintiff had no right to refuse to take the oil whenever the defendant required him to take it and apply it against the advance.

He referred to, as shewing verdicts should not lightly be set aside: *Jenkins* v. *Norris*, 14 Ch. D. at p. 684; *Solomon* v. *Bitton*, 8 Q. B. D. 176; *Williams* v, *Burgess*, 10 A. & E. 499; *Fay* v. *Wheeler*, 44 Vermont 292; *Elphick* v. *Barnes*, 5 C. P. D. 321; *Futcher* v. *Futcher*, 50 L. J. Ch. 735; *Clarke* v. *Callow*, 46 L. J. Q. B. 53; *Towle* v. *Topham*, 37 L. T. N. S. 308; *Pullen* v. *Snelus*, 48 L. J. C. P. 394. As to contracts to be performed within a year: *Wells* v. *Horton*, 4 Bing. 43; *Smith* v. *Neall*, 2 C. B. N. S. 67; *Addison* on Contracts, 8th ed., pp. 172, 273.

Osler, Q. C., in reply. The evidence shews the plaintiff was never asked by the defendant to take the oil while the market price was at $1.50 a barrel; that is, on the 22nd of November, 1882, the plaintiff says he would have taken it if he had been asked to do so, as he was buying oil at that time and at that price.

If necessary, the plaintiff should now be allowed to reply the Statute of Frauds.

January 11, 1886. WILSON, C. J.—The principal question is, whether instruments in writing signed by the defendant—"Received from H. W. Lancey the sum of four hundred dollars loan on oil, usual rate of interest;" or, as some of them are, "Received from H. W. Lancey the sum of four hundred dollars loan on oil, payable within one year from date, with interest at 9 per cent per annum,"—can be shewn, especially the three last receipts, which are expressed to be "payable within one year from date," to have been payable back, not in money, but in oil, at the defendant's option, at whatever time he required the plaintiff to take the oil at the market price at the time.

The term *loan* is used. There may be a loan of anything—a horse, a carriage, a book, or of any kind of goods as well as money. The meaning attached to it invariably is, that it is something which the receiver of the article is to return to the vendor, either the specific article, or by substituting for it some article of the like kind, as grain, oil, or the like, for the grain or oil, &c., which was lent.

It is said that the moneys given to the defendant, although called loans, were more properly *advances*, and that an advance is a loan.

An *advance*, I should say, is more correctly applied when the money or the like which is given is a part of that which the receiver at a future time is to be entitled to receive.

The merchant makes advances to a lumberman in goods or in money to enable him to get out lumber for the merchant, the advances so made being a part of the price the merchant has to pay to the lumberman when the work is done. It is so much of that sum which is paid before it is earned, or in other words, it is so much on account which is paid in advance for the lumber which is to be delivered to the merchant when it is fit for delivery.

The latter arrangement is made in all kinds of trades, and advances are in like manner made to children and others under family settlements and wills of a part of the

provision or bequest which the recipient of the payment is ultimately to get.

None of these payments or advances are properly loans, nor are they commonly described as loans. There is much force, therefore, to be placed on the term loan being used in every one of these receipts; and the effect of that word is increased by the words in the three last receipts expressly stating that the *loan is to be paid within one year from date.*

By the terms of the receipts it appears to me the money mentioned in them is to be repaid in money, and that it was money which was paid on the security of the oil which the defendant had stored with the plaintiff.

Is the defendant at liberty to say there was a special agreement between him and the plaintiff by which the defendant was not to pay in money the sums he had received, but that he had the right to require the plaintiff at any time to take the oil he held in tank for the defendant at the then market price, and credit against the money which had been paid? Can such an agreement stand consistently with the terms of the written instruments of the loan which the defendant has signed?

Many cases were cited on the argument, and many more may also be referred to.

In *Porteous* v. *Muir*, 8 O. R. 127, it was decided that a promissory note, payable on demand, could not be shown to be one which was not to be paid for two years.

In *Mason* v. *Scott*, 22 Grant 592, in appeal, the lease required the lessee to do that which by the parol agreement was to be done by the lessor: held, the parol agreement could not vary the written agreement.

In *Williams* v. *Burgess*, 10 A. & E. 499, by parol agreement the plaintiff sold the defendant a mare for £20, subject to the condition that if the mare proved with foal the defendant should give the mare to the plaintiff again for £12. The mare did prove with foal. The plaintiff tendered the £12 to the defendant and demanded the mare. The defendant refused to give her up. Held, the whole

was one contract; it was a sale on condition, and the delivery by the plaintiff to the defendant of the mare was a sufficient act to take the whole agreement out of the operation of the Statute of Frauds.

In *Laroche* v. *O'Hagan*, 1 O. R. 300, Held, a verbal warranty was admissible on the sale in writing of a vessel—that it did not alter or vary the writings.

A written hiring by the week was not allowed to be varied by showing that the hiring was intended to be for a year: *Evans* v. *Roe*, L. R. 7 C. P. 138.

The case before us is not one in which the defendant's agreement is set up as collateral to the written agreement as to the loan of money by the plaintiff. If it were collateral, it would require a consideration to support it, as in *Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Erskine* v. *Adeane*, L. R. 8 Ch. 756.

In both these cases the landlords refused to put the disputed terms into the lease, but they promised expressly, and assented to the terms outside of the lease.

In this last case Mellish, L. J., at p. 766, said: "This being a case between landlord and tenant, if there had been no evidence except Mr. Bennett's own evidence, and the agreement had been alleged to have been made in an interview between him and Mr. Adeane, when nobody was present, I should have probably thought it would have been the duty of the Court to say that this was not satisfactory enough for the Court to act upon."

Abrey v. *Crux*, L. R. 5 C. P. 37, determined that the terms of a bill of exchange could not be varied by proof of a contemporaneous verbal agreement that the plaintiff was not to sue upon the bill if not paid at maturity, but was first to proceed upon certain securities given to him when the bill was made.

Bovill, C. J., said: "That which the plea attempts to set up is, that the defendant, at the time he signed the bill as drawee, entered into a contract under which the payment was to be made at a different time and in a different manner from that which the bill imports; an agreement, in

short, which contradicts the written contract, and oral evidence of which is inadmissible, according to the authority of numerous decisions." See also *Mosely* v. *Hanford*, 10 B. & C. 729.

In *Lindley* v. *Lacy*, 17 C. B. N. S. 578, it was decided that upon a negociation by parol for the sale of pictures, &c., which was afterwards reduced to writing, there being a distinct agreement made between the parties, plaintiff and defendant, that in consideration of the plaintiff signing the agreement the defendant would settle an action then pending against the plaintiff at the suit of one C., that the evidence of the prior oral agreement was admissible, notwithstanding the written agreement contained an authorization to the defendant to settle C.'s action out of the purchase money.

Erle. C. J., in giving judgment said: "If the instrument shews it was meant to contain the whole agreement between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there; but if it be clear that the written instrument does not contain the whole, and the jury find there was a distinct collateral agreement between the parties not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced." Several cases are referred to in support of that decision.

It appears to be clear, when the bargain between the parties is in writing and contains the whole bargain between them, that no parol testimony can be given to vary or contradict it. And also when the agreement between the parties is in writing and is a complete and perfect agreement by itself, there may nevertheless be a contemporaneous oral agreement between the parties relating to the matter of the written agreement which may subsist with their agreement so long as the oral agreement does not contradict or vary the written agreement. And further that, although there be a written agreement, but that agreement does not contain, and was not intended to contain the whole of the contract, evidence may be

given to shew the verbal part of the contract, and the written and verbal agreement will be construed together as the actual contract.

Upon these authorities I am of the opinion the receipts signed by the defendant, each one of them describing the amount received by him as a loan on oil, and three of them stating the loans were "to be paid within one year from date," and all of them with interest, although three of them do not specify any day for payment, are to be construed as an agreement on the defendant's part to pay these loans in money, and that the defendant is not at liberty to prove he was not to repay the loans in money, but that he had the option to pay in oil at the then market price of the oil, and had the right to compel the plaintiff to take the oil at any time the defendant pleased, however soon after the loan was made, or however long after the expiration of his year within which the last time loans were made expressly payable; and that the plaintiff, as a consequence, cannot recall his money, and cannot at any time tell whether he will ever get his money or get the oil, as his own; for until the defendant chooses to say whether he will pay in money or in oil, the oil remains the property of the defendant, the plaintiff having a lien only upon it for the loans he has made.

It is not pretended this was a collateral agreement, and it is quite clear it is no part of the written agreement or receipts; and it certainly does vary and contradict these writings.

If it can be supported it can only be because it was and is part of the original agreement, and because the receipts do not shew the whole of the contract between the parties. But that cannot be maintained, for that is absolutely opposed to the whole tenor of the receipts, which contain a perfect liability on the part of the defendant.

The next part of the case is, assuming the bargain to have been just as the defendant represents it to be, that the defendant had the option to pay in oil or money, and he did tender the oil to the plaintiff, and he refused to

accept it—is that a bar to the action? Or does it render the plaintiff liable only to damages, to be reckoned in the usual manner at the difference between the price of oil at the time of the refusal and the market price at that time? If it be a bar, the defendant, upon the assumption before stated, has a good defence. If the refusal of the plaintiff entitles the defendant to damages only, there can be no such damages in this case, because the plaintiff was to pay the market price only, and as he refused, according to the defendant's case, to accept the oil, the defendant would have got the same market price quite readily from others who were buying oil at the time.

The defendant says it was not an agreement between him and the plaintiff that the defendant would sell the oil and the plaintiff would buy it whenever the defendant required the plaintiff to take it, in which case there would be an agreement merely of sale and purchase; but it was an agreement in which the plaintiff had no voice whether he would buy or not buy, for it rested altogether with the defendant not properly whether he would sell to the plaintiff, but whether he would require the plaintiff to take oil in place of money in payment of the loans he had made. The defendant does not say the plaintiff was bound to take and pay for all the oil the defendant stored with him, but only to take such a quantity of oil which the defendant required him to take and credit the defendant with the same "against the amount of the said advance;" that is, in effect in payment of such advances

If there was was such a bargain and it could be set up, the plaintiff could not refuse to take the oil when it was offered to him. It would be either an ordinary stock note, payable in goods, or in money at the payee's election: *Waddell* v. *McCabe*, 3 O. S. 502; *Teal* v. *Clarkson*, 4 O. S. 372. Assumpsit on the common counts is maintainable for goods and chattels as well as for money: *Earl of Falmouth* v. *Penrose*, 6 B. & C. 385.

If it had been properly an agreement for sale and purchase, the defendant could not have forced the plaintiff to

take the oil; he could have recovered only damages to the extent of the loss (if any) he had suffered by reason of the plaintiff's refusal, which, in this case, would have been nothing, for if he could not get the market price from the plaintiff, he could have got it from another. The plaintiff, if entitled to judgment, cannot have it upon the ground that the defence set up is one of an agreement for sale and purchase. If it had been so set up, the plaintiff would manifestly have been entitled to judgment for his demand, and the defendant to judgment for his damages for the non-acceptance of the oil, which would have been *nil*. As the case now stands, the plaintiff is still entitled to judgment, for in my opinion the agreement set up by the defendant is in contradiction of, and a variance, of the written receipts.

If the plaintiff were not entitled to judgment upon that ground we should have to consider whether he was not at any rate entitled to a new trial; and I think he would be, because the receipts, if they could be varied to the extent contended for, are of themselves cogent evidence against the defendant; and that coupled with the plaintiff's own testimony, greatly outweigh the effect of the defendant's personal testimony. The evidence for the plaintiff is much stronger than the mere opposing personal evidence of the plaintiff and defendant referred to in *Erskine* v. *Adeane*, L. R. 8 Ch. at p. 766, where Mellish, L. J., said: "I should have probably thought it would have been the duty of the Court to say that this was not satisfactory enough for the Court to act upon."

The defendant said that the course of dealing, which was followed in these last oil transactions between him and the plaintiff, was the same as that which had been pursued in their former dealings.

The mode of dealing between the immediate parties in former transactions is admissible as evidence of their mode of dealing in later transactions: *Cumming* v. *Shand*, 5 H. & N. 95. So also that others of the trade have dealt in like manner as the plaintiff and defendant are alleged to have

dealt is admissible for the purpose of shewing that such a course of dealing is not unreasonable: *Rowcliffe* v. *Leigh*, 5 Ch. Div. at p. 261. But generally how other people carry on business is not admissible: *Hollingham* v. *Head*, 4 C. B. N. S. 388; *Howard* v. *Sheward*, L. R. 2 C. P. 148.

An important part of the evidence which the defendant relied upon in this action to shew there was the agreement subsisting which he set up, and which was to be inferred from their prior dealings, was that when the parties closed their former transactions, in September, 1881, the plaintiff took from the defendant all the oil of the defendant which the plaintiff then had in store for him, and paid the defendant the balance, then going to him, of $500.

But that, it appears to me, is proving too much, for the defendant does not now say the plaintiff is bound to buy, whenever he (the defendant) desires him, all the oil the defendant stores with him, but only to the extent of the advances which the plaintiff may have made upon the oil. And when the plaintiff was asked why he bought at that time from the defendant more oil than the amount of the money he had lent he said, because he was buying oil at the time, and he took it.

It is not quite easy to understand why the plaintiff should have refused to take the oil the defendant had in store on the 22nd of November, 1882, at $1.50 a barrel, as that was the market price of the day, if he were buying oil. as he says, at that time. The plaintiff says he never did refuse to take it, because it was never offered to him, and he never heard the defendant assert he had offered it to him, and not until it had gone down greatly in price below the $1.50.

The defendant does not say very much about what happened on the 22nd of November, 1882. He said he then elected to sell, and he communicated that to Mr. Lancey, and he did not hear any more about it till sometime through the following winter: that Mr. Lancey then wrote to him for money, and he, the defendant, went to him and

told him that treating the oil as his, the defendant's, was not the agreement, and after that he did not hear anything more from the plaintiff until shortly before the action.

The defendant did not ask then to have a settlement of accounts with the plaintiff he happened to owe the plaintiff at the time if the accounts had been closed at the $1.50 a barrel. He did in September, 1881, ask to have the account closed, and it happened then as the plaintiff took the oil there was a balance in favour of the defendant.

There is a part of the evidence which is not at all satisfactory, and it is that part of it which relates to the pass book which the defendant says is lost. He said he took a pass book from time to time to the plaintiff's clerk to have all the entries put in it; and he said it would not shew the account any truer than was then shewn in Court. He was asked where it was, when he said: "I don't know where it is. The last I saw of it might be in December or August. I can't tell you how many days before I was served with a writ that I saw the book. I am not certain I had it in Mr. Griffith's office after I was sued. I will not swear I had not. I don't know how I lost it. The last I remember of having it was in Mr. Griffith's office—in his law office. I cannot produce it. I have asked Mr. Griffith for it, and searched for it, and I have not got it." And Mr. English, the plaintiff's bookkeeper, said the entries of oil received from, and money paid to, the defendant were entered in that pass book, and the money paid was, he thinks, entered as money lent. He would follow the wording of the receipts which he wrote, and he never heard from the defendant the plaintiff had bought the oil and was getting an advance upon it and not a loan; and he never heard of the defendant coming in November, 1882, and offering the oil to the plaintiff; never heard of it till about a year ago (that is, in the Spring of 1884), just before the suit. The putting forward another pass book in substitution of the supposed lost one is not satisfactory either.

There is something connected with the 1,400 barrels of oil which the defendant got a warehouse receipt for from

the plaintiff, that he might transfer it to a Mr. Bussey, to whom the defendant had sold it, which tells also against the defendant; for if the defendant had sold all the oil in the plaintiff's tanks to the plaintiff, he had no right to dispose of 1,400 barrels of it to any one else. By deducting that quantity from 2,706 barrels the total quantity the defendant then had, left the plaintiff with only 1,306 barrels as security for $3,500 which he had then lent to the defendant upon the oil, and he required the defendant to replace the 1,400 barrels, or an equivalent for it. The defendant then put in 651 barrels of oil, and repaid to the plaintiff the last loan of $500 he had got, and in that way the 1,400 barrels were considered as replaced.

If the question was a new trial or no new trial, I should say there ought to be a new trial, for the evidence is most unsatisfactory for the defendant, and the verdict is really against the evidence. But in my opinion there is no necessity for a new trial, the case of the plaintiff being proved by the defendants own written declarations, which need no kind of explanation; and the answer which the defendant sets up to them is so utterly opposed to their plain meaning, and so great a variation of them and the true construction of them, that it is inadmissible by the rules of ordinary dealing, as well as the rules of law. An allegation that a loan is not a loan, but is something else, and that money to be repaid at a given day is not to be repaid in money, but in oil, at the borrower's election, and that such election is to be exercised at any time, and not within the time fixed for repayment, is certainly not the agreement which the receipts represent, but something wholly different from it.

We think we have before us all the materials necessary for finally determining the question in dispute, and as we are of opinion that evidence cannot be given to contradict the terms of the receipts in question, and to set up a contract of a wholly different kind from them; we direct that judgment be at once entered upon the evidence, even against the finding of the jury, for the plaintiff, for the

amount of his claim, with interest at 9 per cent. up to the maturity of the last receipt, and at six per cent. upon the principal sum from that time; and that the order *nisi* be made absolute to that extent, with the costs of the action, and of this motion.

ARMOUR, J., not having been present at the argument, took no part in the judgment.

O'CONNOR, J.—I concur with the conclusion herein arrived at.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

HYMAN V. CUTHBERTSON.

Chattel mortgage—Validity of—Fraud.

C., a retail trader, being indebted to H. & Co., wholesale merchants, gave them a chattel mortgage to secure such indebtedness, and also a further sum of about the same amount, advanced to him by H. & Co. at the time of the giving of the mortgage, which C. represented was sufficient to pay off in full all his other creditors. C.'s indebtedness to H. & Co. was covered by his promissory notes, which at the time of the execution of the mortgage were on discount with H. & Co.'s bankers. During the currency of the mortgage, C. having allowed his property to be seized for rent, H. & Co. took possession under their mortgage. C. being unable to pay his creditors, the plaintiffs, who were creditors, but had not recovered judgment or execution, took action to set aside the chattel mortgage.

Held, affirming the judgment of Armour, J., that under the evidence set out below there was no fraud.

Held, also, following *Hepburn* v. *Park*, 6 O. R. 472, that the fact of the promissory notes in question being held by H. & Co.'s bankers on discount did not invalidate the mortgage.

Held, also, following *Parkes* v. *St. George*, 10 A. R. 496, that the plaintiffs, not being execution creditors, could not maintain an action to set aside the mortgage, on the ground that the debt was incorrectly stated therein.

THIS was an action tried before Armour, J., without a jury, who dismissed the action with costs.

Gibbons, for the plaintiff, gave notice he would move to set aside the judgment for the defendant, and to enter it

for the plaintiff, on the ground that the judgment was contrary to law and to the facts agreed upon at the trial.

The facts so agreed upon were contained in the examination of W. D. Hepburn, one of the defendants. He said the chattel mortgage, dated the 13th of March, 1885, was given to W. D. Hepburn & Co., to secure them the amount of certain promissory notes made by the mortgagor Cuthbertson, payable to W. D. Hepburn & Co.; and also to secure them in the sum of $800 just before the giving of the mortgage lent by them to Cuthbertson to enable him to pay off all his other creditors. At the time of giving the mortgage the notes for $742.63 were under discount in the bank. Hepburn & Co. afterwards took up all these notes but one for $160.20, which Cuthbertson took up. Cuthbertson represented his stock, at the time he gave the mortgage, as worth $3,500. When Hepburn & Co. took possession of the stock it was worth $2,100, and it sold for from 67 cents to 70 cents on the dollar, the total being $1,470. Their claim was $1,382.50. At the time of the sale Cuthbertson was insolvent, but he was not at the time he gave the mortgage, if what he represented to Hepburn & Co. was true. Hepburn & Co. had to pay the rent of Cuthbertson for his premises. That was paid out of the sales of the goods before the general sale of them took place, and was not a deduction from the $1,470. All the notes had matured before Hepburn & Co. took possession excepting two of them, which had been renewed. The $800 was a loan at six months.

Cuthbertson was a boot and shoe dealer who carried on business at Woodstock. Hepburn & Co. were wholesale manufacturers of and wholesale dealers in boots and shoes at the village of Preston, and the plaintiffs were wholesale boot and shoe dealers carrying on business at London.

The mortgage set out the notes, amounting to $742.63, and stated they were then under discount with Hepburn & Co., bankers, and that the $800 was an advance in cash made to the debtor, "provided he secures them by a chattel mortgage on all his stock in trade for the full sum of

the said notes and bills of exchange, as well as the said sum of $800."

The mortgagees had the power "at any time while the said notes shall be unpaid to enter the said premises and take possession of the said goods and chattels, and also the goods and chattels hereafter acquired." It was also provided that "in case the said goods and chattels, or any part thereof, are seized for rent * * or in case the mortgagor shall cease to keep the said goods and chattels up to the value of $3,000, then all moneys hereby secured, whether by bill of exchange, notes or otherwise, shall become due and payable, and it shall be lawful for the mortgagees at any time during the day to enter into and upon the premises where the said goods and chattels, or any part thereof, may be, and take possession and remove the same * * and to sell the same by auction or private sale, and to apply the monies," &c.

November 25, 1885, *Gibbons* supported the motion. The debt of $746.63 was not due when the mortgage was given, and besides the notes representing that claim were not then held by Hepburn & Co., but had been negotiated by them with their bankers.

The mortgage did not state truly that Cuthbertson was indebted to Hepurn & Co. in the sum of $742.63 on the promissory notes mentioned therein, for it also states that the said notes "are now under discount with the mortgagee's banker." Nor did the affidavit of W. D. Hepburn state the fact truly when he stated that Cuthbertson was "justly and truly indebted to me and to Jane Hepburn, under the firm of W. D. Hepburn & Co., in the sum of $1,542.63 mentioned therein."

He referred to *Hepburn* v. *Park et al.*, 6 O. R. 442; *Parkes* v. *St. George*, 2 O. R. 342, *S. C.*, 10 A. R. 496.

Blackstock, contra. There is here a *debitum in presenti*, although it may be also *solvendum in futuro*, and the cases referred to show the action was rightly disposed of.

January 11, 1886. WILSON, C. J.—The case of *Hepburn* v. *Park*, 6 O. R. 442, shews the discounting of the notes does

not necessarily shew they were as between the mortgagor and mortgagees paid, and that the amount of the debt on the mortgage including the notes so discounted, cannot be said to be untruly stated. And the case of *Parkes* v. *St. George*, 10 A. R. 496, shews the plaintiff, when not an execution creditor, cannot dispute the validity of the mortgage, on the ground that the notes on discount are not while on discount a debt due to the mortgagees, assuming that the discounting of them has such an effect, and that the taking of actual possession by the mortgagees of the goods mortgaged before any execution or other mortgage creditor intervened has given the mortgagees upon that ground alone a valid title, as there is not the slightest evidence that the mortgage was taken to defeat or to delay creditors, or to give the mortgagees a fraudulent preference over other creditors; on the contrary, the evidence shews the mortgagees made a special advance of a sum more than their prior claim against the debtor for the purpose of enabling him to pay off all his other creditors, and to continue carrying on his business.

We must, therefore, dismiss the motion, with costs.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

O'CONNOR, J., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

ROSS V. GRAND TRUNK RAILWAY COMPANY..

Railways and railway companies—Compensation for lands taken—Statute of Limitations—R. S. O. c. 108, s. 23.

Held, that the right of compensation for land taken by a railway company is not barred short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years.

Per ARMOUR, J., the plaintiff's claim to compensation was not money secured by lien, or otherwise charged on land, within s. 23 of R. S. O. ch. 108, and he had not a vendor's lien, for the relation of vendor and purchaser never arose between him and the company.

THE plaintiff by his statement of claim alleged (1) that he was, on the 1st of July, 1872, and had ever since been, and still was owner in fee simple of city lot lettered C, on the east side of Flora street, and lot lettered C on the west side of Flora street, in the city of St. Thomas, being parts of lot number 4, in the 9th concession of Yarmouth: (2) that on or about the 1st July, 1872, the defendants, their servants and workmen, took possession of, and appropriated to their own use all the lands above mentioned without permission and to the loss and detriment of the owner, that is to say, the plaintiff: (3) that the plaintiff thereupon claimed full compensation for loss and damage by being deprived of the use of the said lands during the term of nine years; for interest on the value of the said land for the term of nine years at the rate of six per centum per annum; and for the value of the said land, which the plaintiff claimed to have been at the time of the taking possession by the defendants, $600: (4) that the plaintiff on the 27th of May, 1881, gave notice in writing to the defendants to appoint arbitrators to settle the value of the said lands, and received an answer thereto from the defendants' solicitors, that the defendants would not arbitrate nor pay any sum whatever, and the defendants denied the title of the plaintiff to the said lands: (5) that the plaintiff thereupon claimed the sum of $600 for the price of

the lands, with interest thereon, and the plaintiff had offered and was ready and willing to convey the said lands to the defendants upon being paid the value thereof. (6) The plaintiff also claimed judgment of this Court declaring him to be the owner in fee simple of the said lands, and an order for the delivery of possession thereof to him by the defendants. (7) The plaintiff also claimed a writ of mandamus, or order of this Court, directing and requiring the defendants to appoint an arbitrator on their behalf under the provisions of the law relating thereto, to determine the compensation to be paid to the plaintiff for the said lands, and to take all necessary and proper steps on their part for determining and paying the compensation to be paid by the defendants to the plaintiff for the said lands, or that the said compensation might be determined and ordered to be paid by the defendants in such other manner as to this Court might seem meet; and the plaintiff claimed such further and other relief as might be proper in the premises.

The defendants by their statement of defence said: (1) that as to city lot lettered C, on the East side of Flora street, in the statement of claim mentioned, they denied that they took possession of and appropriated the same to their own use, and they said that the said lot was, on the said 1st of July, 1872, and had ever since been lying in common: that they were not and never had been in the occupation of the same, nor had they ever claimed, nor did they claim possession thereof: (2) that under the various statutes affecting them they did, for the purpose of their railway, on or before the 1st of May, 1871, enter into and upon, and occupy and construct their railway upon and across lot number 4, in the 9th concession of Yarmouth, in the statement of claim mentioned, and that portion thereof referred to in the said statement of claim as lot lettered C on the west side of Flora street, and had ever since without interruption occupied the same; and they denied that the plaintiff was the owner thereof, and they said that they themselves were the owners thereof

under and by virtue of the said statutes, including all and every the statute or statutes respecting the limitation of actions applicable to the circumstances of this case.

Issue.

The cause was tried by Proudfoot, J., at the Chancery Sittings, at London, on the 16th of January, 1885.

The plaintiff proved his title to lot C. on the west side of Flora street, (the only lot in dispute, the defendant's having disclaimed lot C. on the east side of Flora street) and that the original defendants, the Great Western Railway, had constructed their Air Line Railway through it, and that they had done so without his knowledge, consent, or acquiescence, and that he did not know that the railway occupied it till he made his claim in 1881: that on the 28th of June, 1881, he caused the defendants, the Great Western Railway Company, to be served with notice that he was the owner of the city lot lettered C. on the east side of Flora street, and of city lot lettered C. on the east side of Flora street, in the city of St. Thomas, being parts of lot number four, in the ninth concession of the township of Yarmouth, in the county of Elgin, in the Province of Ontario, surveyed and laid out into town lots as shewn upon a plan of the village of Millersburg, made by John D. Barber, and registered in the registry office of the county of Elgin, and containing one-sixth of an acre each, which said lots had been taken possession of and were in the occupation of the Great Western Railway Company, and by which he declared that he was in readiness to accept the sum of six hundred dollars as compensation for the said lands, and to give a clear deed to the said company for the same on being paid the said sum; and that he had appointed William J. White, of St. Thomas, attorney-at-law, as his arbitrator, if his offer should not be accepted.

This notice had been previously sent along with a similar one by a Mr. Yarwood, in respect of other lots to Mr. Barker, the then solicitor of the Great Western Railway Company, with a request that he would accept services

thereof, and both notices were returned by him with the following letter:

"HAMILTON, 23rd June, 1881.

"EDWARD HORTON, Esq.,
"*Barrister, St. Thomas:*

"I have not had an opportunity to consult Mr. Broughton as to the notices you wish me to accept service of, and as he is unexpectedly detained in New York I cannot say on what day I shall be able to see him. In any case, however, any acceptance would be without prejudice, as the company are not likely to admit that there is anything for them to agree or disagree upon with either Mr. Yarwood or Mr. Ross. As to two parcels of the land referred to you have long known that the company claims them as its own, and that for reasons already explained to you it will look to you personally to hold it harmless against any claims by either Mr. Ross or Mr. Yarwood. As to those parts of the property you may thereupon expect every opposition to any attempt to claim compensation or to enter into an arbitration. As to the other part of the land I am under the impression, partly derived through you, that if Mr. Ross ever did own it he can have had no claim or title since a period long before the construction of the railway. Whether the company owns it or not, therefore, I think an attempt on the part of Mr. Ross to refer any question as to that lot to arbitration will be resisted, but I shall have more information as to the title on Mr. Gillie's return from Sarnia by way of St. Thomas. Perhaps under the circumstances you would prefer that I should return the papers to you so that you may take the first opportunity to serve them in the ordinary course.

"Yours truly,

"SAMUEL BARKER."

"P.S.—On referring to your letter of the 8th instant I see that you ask me to return them. I therefore do so.

"S. B."

It appeared that the lot in question was, at the time of the construction of the air line enclosed by a fence with other lands, and that a man named Sinclair was in possession thereof as tenant to Messrs. Yarwood, Hughes, and Horton, who jointly owned part of the land so enclosed: that Sinclair's term ended on the 1st of April, 1872: that on the 6th of June, 1871, he paid his year's rent due on the 1st of April, 1871, but never paid his last year's rent, although he occupied the land till the fall of 1871, alleging as a reason his occupation being interfered with by the Great Western Railway Company throwing down his fences during last year. Sinclair said that the grading

was done through his enclosure in 1871. It appeared that when the railway company went upon this enclosed land for the purpose of grading the railway they would take down the fence in the morning and put it up again at night, and that the fence remained up with this exception till the fall of 1871. It was not shewn when the plans of the railway were filed, but it was shewn that the railway company entered into a contract for the construction of the air line from Glencoe to Aylmer (which would include that part of their railway running across the lot in question) on the 9th of September, 1870, and that immediately afterwards and during the fall of 1870 they did some grading through the lot in question. It did not appear what, if anything, was done on that part of the railway running through the lot in question in 1871, but it appeared that the work went on continuously, and that the grading over the whole line was not completed until some time in 1872, and the railway was not fenced till afterwards. There were 13 $\frac{3}{33}$ feet of the southerly part of the lot which were not taken by the railway. The learned Judge declared the plaintiff entitled to this, and dismissed the action with costs.

On the 20th November, 1885, *W. R. Meredith*, Q.C., moved to set aside the judgment and to enter it for the plaintiff on amongst other grounds, the following: (1) That the plaintiff's title to the land in question was proved, and that the defendant was not entitled to succeed upon the defence of the Statute of Limitations. (2) That at all events the plaintiff was entitled to a mandamus to the defendants' commanding them to appoint an arbitrator to determine the compensation to be paid to the plaintiff for the land taken by the defendants under the provisions of the Railway Act, or to a reference to ascertain the amount of such compensation, according to the practice of the Court. (3) That the learned Judge who tried the action, erroneously held that the plaintiff's right to recover compensation was barred after the lapse of six years, while in law such claim was not barred until the lapse of twenty years. (4) That the

plaintiff was at all events entitled to recover the southerly 13$\frac{3}{12}$ feet of the land in question, and that judgment should have been given for the recovery thereof and costs of suit. In support of his motion he submitted that the main question was whether the plaintiff's claim to the land or to the compensation was barred by the lapse of time, referring to 4 Wm. IV., ch. 29, sec. 11. There was no possession by the company for 20 years of the *locus in quo*. It is an entry by the true owner each day which prevents the statute running. The company were wrong-doers, and ejectment might have been brought. See *Corporation of Welland* v. *Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147. After the right to ejectment was gone there was the right to compensation; *Starling* v. *Grand Trunk R. W. Co.*, 30 C. P. 247; *Tapping* on Mandamus, 291. 20 years is the limit of time: *Cork and Bandon R. W. Co.* v. *Good*, 13 C. B. 826; *Great Northern R. W. Co.* v. *Shepherd*, 8 Ex. 30; *Allan* v. *McTavish*, 2 A. R. 278; *Boice* v. *O'Loane*, 3 A. R. 167; *Sutton* v. *Sutton*, 20 Ch. D. 511; *Fearnside* v. *Flint*, 22 Ch. D. 579; *Scanlon* v. *London and Port Stanley R. W. Co.*, 23 Gr. 559; *Marsh* v. *Huron College*, 27 Gr. 623.

Lash, Q. C., contra, cited, in addition to many of the cases already referred to, *Somers* v. *Kenny*, 20 C. L. J. 7; *Thompson* v. *Canada Central R. W. Co.*, 3 O. R. 136.

January 11, 1886. ARMOUR, J.—If the person who occupied the land in question when the railway company entered upon it had been the plaintiff's tenant, I do not think the railway company would have had such exclusive possession until after the tenant had ceased to occupy it as would have enured to extinguish the plaintiff's title to it. But the person who occupied the land was not the plaintiff's tenant, but the tenant of the Messrs. Yarwood, Hughes, and Horton, and when the railway company entered upon the land in the fall of 1870 the plaintiff was out of possession and has remained out of possession ever since, and I think therefore that his title to the land in question was

extinguished in ten years after the railway company entered, and that would be in the fall of 1880, and the plaintiff's claim for compensation was not made till June, 1881, and his action was not brought till August, 1881.

And it was argued that because his title to the land is extinguished, his claim for compensation is extinguished also, because, it is said, he cannot claim compensation for what is not his.

This argument, although specious, is not sound, for it supposes that his right to compensation arose when his claim was made or his action was brought, and then he had no title, for it was extinguished; whereas it did not arise then, but it arose when the railway company took the land and then he had title to it, being the owner of it in fee.

The moment the company took the plaintiff's land they became liable under the statute to pay him compensation, and he became entitled under the statute to get compensation from the company. They had the land, he had the right to compensation. Whatever they did with the land, mortgage it, as they no doubt did, or otherwise part with it, it did not affect his right to compensation. His right to compensation was not against the land, but was against the company. His title to the land being extinguished did not therefore extinguish his right to compensation. His right to compensation is a statutory right, their liability to pay compensation is a statutory liability. The right and liability still exist, and nothing has happened to destroy them. The railway company have the land. The plaintiff has never had his compensation, he has the right to it, and is entitled to recover it, unless his right to recover it is barred by some statute, and if there is no statute barring it we cannot make one.

It was argued that the plaintiff's claim to compensation was within the R. S. O. c. 108, s. 23, and was money secured by lien or otherwise charged upon or payable out of land, and was therefore barred, and that he had a vendor's lien for it; but it is obvious that his claim is not

within the words of this section, and he never had a vendor's lien, for he never was a vendor, and the relation of vendor and purchaser never arose between him and the company. See *Fry* Spec. Per., 2nd ed, p. 49.

The plaintiff's right to compensation being a statutory right, an action to enforce it would, in my opinion, not be barred except by the lapse of twenty years after the cause of action arose, and this period had not elapsed when this action was brought. See *The Cork and Bandon R. W. Co.* v. *Goode*, 13 C. B. 826. I also refer to *Wood* v. *Lowndes*, 1 El. and El. 940; *Delaware, Lackawanna and Western R. W. Co.* v. *Burson*, 61 Penn. St. 369; *McClinton* v. *Pittsburg, Ft. Wayne and Chicago R. W. Co.*, 66 Penn. St. 404.

It was also argued that R. S. O. ch. 82 sec. 5, had not been complied with, in that it was not alleged in the statement of claim that performance of the duty had been demanded and had been refused or neglected. The statement of claim may now be amended in that respect, as the evidence clearly shewed that performance had been demanded and had been refused or neglected. The notice given by the plaintiff was a proper notice under 4th William IV. ch. 29 sec. 3, one of the Acts governing the Great Western Railway Company, and taking it and the answer to it contained in Mr. Barker's letter of the 23rd June, I think there was a sufficient demand and refusal or neglect. It is quite clear from the conduct of the parties that a more formal demand would have been an idle ceremony. Besides all this the defendants raise no objection on this ground in their statement of defence.

It may be that no such demand was necessary, having regard to the jurisdiction exercised by the Court of Equity (which this Court now has) in enforcing statutory obligations of this kind. See *Scanlon* v. *Great Western R. W. Co.*, 23 Gr. 559, and *Marsh* v. *Huron College*, 27 Gr. 623.

In my opinion the judgment must be set aside and judgment entered for the plaintiff, with full costs of suit, and a mandamus issue; but inasmuch as defend-

ant's counsel said on the trial that if the defendant's liability to go to arbitration existed they would assent to a reference, there will be a reference to the Master of this Court at St. Thomas to enquire, ascertain and state what compensation the plaintiff was entitled to for the exercise by the railway company of their powers in respect to this land in the fall of 1870, when they entered upon the said land; and also to ascertain and state the amount of interest on the amount of such compensation from that time till the date of his report, and further directions and subsequent costs will be reserved until after the said Master shall have made his report.

WILSON, C. J.—The company has had possession of the land a sufficient length of time to give them a title as against the owner by length of possession.

The company took the land without the consent of the owner, and without having arbitrated concerning it, and the owner thereby became entitled to be compensated for the land. He has delayed his procceding to obtain compensation until the day of the commencement of this action, although the company began their work upon the land in the fall of 1871.

It is not clear that the compensation for the land taken does not remain a charge upon it until payment, for the Act of 1834, ch. 29, sec. 4, provides that if the company do not pay within three months the sum awarded their right to the property shall wholly cease, and the proprietor may resume his occupation, and his rights and privileges in respect thereof, free from any claim or interference from the company.

It would seem from that provision the compensation was a charge upon the land.

The company apparently had not the right to take the land without the consent of the owner, sections 3, 11. They did so, however, and have now a title by possession Is the plaintiff still entitled to claim his compensation? It does not follow because he has lost his right to a charge

upon the land that he has lost also his right to be compensated for it.

There is no express limitation against his demand for a mandamus to ascertain his compensation, unless it be that it is a statutory right, and therefor not barred by less than twenty years from the time his claim to compensation first occurred. *The Cork and Bandon R. W. Co.* v. *Goode*, 13 Ch. 826; *Sheppard* v. *Hills*, 11 Ex. 55.

The prerogative writ would not be granted unless it was applied for within a reasonable time. See *Tapping* on Mandamus.

The plaintiff should not be excluded from recovering compensation even at this late day, unless the law is clearly against him, for the defendants have got his land and have paid nothing for it.

O'CONNOR, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

WANNAMAKER V. GREEN ET AL.

Municipal law—46 Vic. ch. 18, sec. 546, (O.)—Closing up highway—Notice of intended by-law—Conditions precedent—Uncertainty.

A municipal corporation passed a by-law to close up a highway, but the notices of the intended by-law required to be given under the "Consolidated Municipal Act, 1883," were only published for three successive weeks in a newspaper instead of four, as required by section 546 of that Act, and it was not shewn when the six notices required to be posted up, were posted, nor what they or the advertisement contained.

Held, in an action for breaking down fences across the road closed up under the by-law, that the notices required to be given were conditions precedent, the due performance of which were essential to the validity of the by-law.

Held, also, that a by-law closing a road across a lot when there was more than one road was void for uncertainty in not shewing which road was meant.

The plaintiff in his statement alleged (1) that he was the owner and occupier of the west half of lot 15, in the 7th concession of Sidney: (2) that for sometime before 1st of June, 1885, a road had been used and travelled by the public as a highway running in an angular direction across and upon his said farm, and which user the plaintiff had before this permitted and allowed for the accommodation of the public until another road should be opened and established by the municipality of Sidney: (3) that on or about 28th of April, 1884, an application was made by and on behalf of the plaintiff to the municipal council of Sidney, by petition, praying them to take the necessary steps to have the said road changed to run on the line beween the farms of the plaintiff and one Anson Defoe; (4) that a notice of such application and petition was duly given by said council according to law that a by-law would be passed changing the said road in compliance therewith: (5) that on 26th May, 1885, the said council duly passed a by-law numbered 277, enacting that the said road in the 7th concession, Sidney, across said lot number 15, should be closed up and should cease to be a public highway: (6) that the said council on the same day,

duly passed another by-law numbered 278, enacting and opening a new road across said lot number 15, in 7th concession, Sidney, being across plaintiff's said land, and in compliance with the prayer of said petition of the plaintiff and in lieu of the old road above mentioned—of all which the defendants had full notice, and the said new road so opened in lieu of the said old road was opened out and available, and a good road for public use. The 7 and 8 paragraphs set out an agreement between the plaintiff and the Municipal Council of Sidney, by which in consideration of the building of a new road by the plaintiff the old road was to be vested in him, and also a resolution of the council to the same effect vesting the said road in the plaintiff and giving up possession of the same to him. The 9th paragraph set out the plaintiff's resumption of possession of the old road, and the repeated trespasses of the defendants by throwing down the fences placed across it, and injuring the plaintiff's crops in claiming to use the the old road.

The defendants in their statement of defence alleged: (1) that the highway in the second paragraph of the plaintiff's statement mentioned was and had been continuously up to and at, and for many years immediately preceding this action a common and public highway as defined by section 524 of the "Consolidated Municipal Act, 1883," and was during all that time vested in the municipality of Sidney: (2) that the said highway was laid out as a highway about twenty-five years ago by one Thomas Wood, who was then acting as road surveyor for Sidney, and the same was then dedicated by the then owners of said land to the use of the public as a common and public highway, and was thenceforth until the same was obstructed by the plaintiff on or about the 1st of June, 1885, continuously used by the public as a common and public highway: (3) that between the time the said road was laid out as aforesaid, and the said obstruction, large sums of public money had been expended on the said highway for opening the same, and statute labour had been usually performed on the same dur-

ing the whole of said period by the plaintiff and the former owners of said land, through whom he claimed, as well as by many other residents of the said municipality: (4) that notice of the intention of the council to pass the alleged by-laws 277 and 278, and set forth in the statement of claim were not posted up one month previously to the passing of the same in six of the most public places in the immediate neighborhood of said highway, nor were they published weekly in any newspaper previous to the passing of the same, as prescribed in section 546, and sub-sections 1 and 2 thereof of the "Consolidated Municipal Act of 1883," nor were the defendants, or either of them, heard by the said council either in person or by counsel or attorney at the time of passing the said alleged by-laws in reference to the same, although they and each of their lands were prejudicially affected thereby: (5) that the defendants had not, nor had either of them, any notice of the intention of the Council to pass, as they did, the said alleged by-laws either on or before 26th of May, 1885, nor had they or either of them an opportunity of approving the same either in person or by counsel or attorney: (6) that the said by-laws were contrary to public interest and did not in any way benefit the public: (7) that the alleged by-laws were uncertain and indefinite, inasmuch as they did not respectively, definitely and certainly describe the direction, bounds, length, width, and locality of the highway by said alleged by-law, numbered 277, alleged to be closed, nor by said alleged by-law, numbered 278, alleged to be opened and established: (8) that the by-laws were not made under the corporate seal of the said municipality, as required by the statute in that behalf made and provided: (9) that the municipality were never petitioned, nor was there any application made to them, to close up the said highway: (10) that if the said highway should be closed up the defendants would thereby be excluded from ingress and egress over the said highway to and from their lands and places of residence: (11) that no compensation had been awarded by the said Council to the defendants, or

either of them, for the closing up of said highway, no other convenient road or way of access to the lands and residences of the defendants or of either of them was in existence at the time of the alleged trespass, nor did the same then exist; and the said Council had not at the time of the alleged trespass, nor had they yet provided any other convenient road or way of access to the lands and residences of the defendants, or either of them: (12) that the said alleged by-laws were absolutely void, invalid, and of no effect for the reasons aforesaid, amongst others; wherefore the said highway had not been legally stopped up, and the public and defendants had a vested right to continue the use of the said highway, as was then and had been their right since the aforesaid dedication thereof: (13) that some of the alleged trespasses were committed after 10th of June, 1885: (14) that the said alleged new road alleged to have been opened and established as aforesaid by said alleged by-law, No. 278, was not made in accordance with the plaintiff' alleged agreement with the said Council, and was so insufficient for the passage over the same for the defendants' horses, carts, and waggons, and was so badly constructed as to render the use of it by the defendants for the purposes aforesaid very dangerous to the defendants' said property: (15) that the defendants Dennis Green the elder, and Dennis Green the younger, denied that they ever committed any of the alleged trespasses: (16) that the said close comprised in the said old road was not then and never had been the property of the plaintiff, and he had not then and never had any right to the possession thereof as against the defendants, or to maintain this action: (17) that the defendant Robert Green at such times as the plaintiff might shew he entered upon said highway on or after 1st of June, 1885, then required to use the same for the passage thereover as a public highway of his horses, waggons and carts, as he and his co-defendants had then the right to do, and at such times found the same thus obstructed by fences standing across said highway; and because the said highway was then

thus obstructed and thereby kept shut and closed by the plaintiff, and he then required to use it for the aforesaid purposes, he thereupon necessarily for the said purpose threw down said fences, and for that purpose he used no greater force or violence, and did thereby and by the use of the said highway at such times no greater damage to plaintiff's fences and close than was necessary for the assertion of the defendants' right to use as aforesaid the said old road as a highway.

Issue.

The cause was tried at the last Fall Assizes at Belleville, by O'Connor, J., with a jury.

It appeared that the road in question across the west half of lot 15, 7th concession of Sidney, was part of a road which extended from the Bay of Quinte to the Frankford and Sterling Gravel Road, between lots 15 and 16, at the rear of the 7th concession, and which had been a public travelled road for at least twenty-five years, and upon which statute labour had been annually performed: that the west half of lot 15, in the 7th concession of Sidney, was granted by the Crown to Thomas McCann, on the 18th of November, 1878, and that Thomas McCann conveyed the same to the plaintiff on 31st December, 1878: that prior to the issue of the patent, Thomas McCann and his father from whom he claimed, had been in possession of the said half lot, and that such possession had continued from the year 1855: that shortly after the plaintiff got his deed from McCann he cleared up the part of his land through which the road was, and which had been previously in woods, and fenced the road on both sides from the rest of his land, thus leaving it open to the public, who continued to use it as before until the passing of the by-law in May, 1885. The following proceedings of the council were put in: "7th April, 1884. Mr. Bird presented the petition of Silas Wannamaker and others, asking the council to change a road in the 7th concession. Moved by Bird, and seconded by Bleeker, that the above be laid over, and the clerk give the necessary notices on application.—Carried." "5th of

May, 1884. Moved and seconded that Messrs. Smith and Green be heard in reference to road in 7th concession.—Carried." "Moved by Bleeker, seconded by Bird, that the road surveyor be ordered to examine the road described in the petition of Silas Wannamaker and others, and also the old road proposed to be changed, and report to the council as to the advisability of the change.—Carried." "26th May. Extract from road surveyor's report: 'I also examined the road in the 7th concession, leading north from said concession road, in the centre of 15. I think the travelling public would prefer leaving the road where it is, as it is a good level road, and easily kept in repair. I also found quite a strong opposition to changing the road.'—Report laid on the table for the present. Moved by Reid, and seconded by Bleeker, that the petition of Silas Wannamaker and others be granted on the following conditions: when the new road is made satisfactory to the road surveyor or committee of the council a by-law will be passed closing the old road—Carried." "4th August, 1884. Extract from road surveyor's report: 'I have examined the new road in the 7th concession between Wannamaker and Defoe, constructed by them, and I find a very good road with the exception of a little on each end, which is not so smooth as it should be.'" "6th October, 1884. Mr. Bleeker presented the petition of Robert Green and others asking the council not to close the old road across the west half of 15 in the 7th concession. Moved and seconded that the above be laid on the table —Carried." "Mr. Holgate presented the petition of Silas Wannamaker and others asking the council to change the road on lot 15 in the 7th concession. Moved and seconded that the above be laid over for further consideration—Carried." "Moved by Holgate and seconded by Bleeker that the petition of Silas Wannamaker and others be laid over until the next meeting of the council, and that the council be a committee of the whole to examine the road and report, and that the said council go free of cost—Carried." "1st December, 1884. Moved by Bird and seconded by Venn that the prayer of the petition of Defoe

and Wannamaker be granted, and that this council consent to the change of road between Messrs. Wannamaker and Defoe in the 7th concession of Sidney in lieu of the public road now travelled across Mr. Wannamaker's place, on condition the new line is put in condition for public travel equal to the old line in road surveyor's report—Carried." "26th May, 1885. Extract from road surveyor's report: I have examined the new road in the 7th concession, between Defoe and Wannamaker, and find it a very good road, which, I think, is fit for public travel. By-laws passed closing the old and establishing the new road." 8th June, a resolution was passed which is set out in the 8th paragraph of the plaintiff's statement. The following by-laws were put in:

"BY-LAW No. 277."

"Passed 26th May, 1885."

"Entitled a By-law to close a certain road in the Township of Sydney." "Whereas certain electors of the township of Sydney have, by their petition, prayed that a certain road in the township of Sydney running across lot 15, in the 7th concession.

"Therefore the municipal corporation of the township of Sydney, by virtue of the authority by Act of Parliament in said corporation vested, enacts as follows: that the road referred to in the preamble to this by-law set forth, be and is hereby closed as a public highway from this date.

"F. B. PRIOR, "Clerk." "SAMUEL T. WILMOT "Reeve."

"BY-LAW No. 278."

"Passed 26th May, 1885."

"Entitled a By-law to open and establish a road in the 7th concession of Sydney, running through the centre of lot 15, in the township of Sidney, in the county of Hastings. Whereas certain electors have, by their petition, prayed that the council open and establish a certain road running through the centre of lot No. 15, on the line between John Wannamaker and Anson Defoe, in the 7th concession of Sidney, and whereas said road having been advertised and reported upon by the Road Surveyor."

"It is hereby enacted by the municipal corporation of the township of Sydney, that the road referred to in the preamble to this by-law is hereby opened and established as a public highway from this date.

"F. B. PRIOR, "Clerk." "SAMUEL T. WILMOT, "Reeve."

The clerk of the council proved that he had the petitions filed upon the application to change the road, the first one being dated the 7th April, 1884, and having two signatures: that Smith and Green were heard, and recommended to get a counter petition; and on the 6th of October, 1884, the petition of Green and others was presented to the council asking them not to close the road: that this petition had fifteen signatures: that there was a second petition of Green signed by forty-six persons, and a second petition of Silas Wannamaker. None of these petitions were put in. The clerk also proved that he advertised the road in the *Belleville Intelligencer*: that he ordered four insertions: that the first came out on 1st May, 1884, the second on the 8th of May, and the third on the 15th of May; but that the fourth never came out; it ought to have appeared on the 22nd of May, but was not inserted in that issue, and although four insertions were paid for only three were published. No copy of this notice was put in. Anson Defoe proved that he put up six in the most public places in the locality: that he put one near Mr. Green's residence: that he put two near his place: that he did not remember the day, but he put them up the next day after he got them: that it was the next day after he got them: that it was in May, 1884: that he thought it was May but he would not swear to it. It did not appear when he got them, and no copy of them was put in. It was proved that the following notice was served on the defendant Robert Green on 10th June, 1885.

"Town Hall, Sidney, 9th June, 1885.

"*Mr. Robert Green:*

"SIR:—Take notice that the municipal council of the township of Sidney did, on the 16th day of May, 1885, pass a by-law closing the old travelled road across lot number 15 in the 7th concession, and have also passed a by-law opening and establishing the new road on the line between Mr. John Wannamaker and Anson Defoe on lot No. 15 in the 7th concession. The council have also passed a resolution giving possession to Mr. John Wannamaker of the old road in lieu of the new one to his own use and benefit; from and after this date you will therefore please govern yourself accordingly."

On the same day a copy of the resolution set out in

the 8th paragraph of the plaintiff's statement of claim was given to the plaintiff by the road surveyor, who at the same time gave the plaintiff possession of the old road. The following was given by the clerk of the council to the plaintiff on 26th May, 1885, the day the by-law was passed:

"Town Hall, Sidney, 26th May, 1885.

"This is to certify that a by-law has been passed this day, closing the old road across lot No. 15, in the 7th concession, also a by-law to open and establish the new road through the centre of lot No. 15, on the line between John Wannamaker and Anson Defoe, both by-laws to come into force from this date, and the right of old road is vested in John Wannamaker, in lieu of new road.

"F. B. PRIOR, *Clerk.*"

It was not shewn that any of the defendants were ever at any meetings of the council when the subject of the road in question was discussed, except on 5th of May, 1884, when the defendant, Robert Green, was there; nor was it shewn that any of them knew that the by-laws were to be passed, nor that any of them was present when they were passed. The plaintiff was, however, present when they were passed. The day after the by-laws were passed, the defendant, Darius Green, the elder, went to the clerk's office and asked the clerk if they passed the by-law yesterday, and said, you will never close the road. The clerk said, the council had done everything the law required, and warned him that he might get his fingers burned.

The sheriff, immediately after the passing of the by-laws, fenced up the old road, and on 1st of June the defendant, Robert Green, threw the fence down, and it being again put up, the defendants, Robert and Darius Green, the younger, on 11th June, threw it down, and it being put up again, the defendant, Robert Green, on 15th of June, threw it down again, the defendant, Darius Green, the elder, being present, but taking no part in throwing it down, and on 16th of June this action was brought. At the close of the plaintiff's case a nonsuit was moved for, and after some discussion the damages were assessed

by consent at $50, and the learned Judge directed a verdict for that amount, with leave to the defendants to move.

November 17th, 1885, *Sherry* obtained an order *nisi* to set aside the verdict and enter a nonsuit.

December 4th, 1885, *Sherry* supported the order *nisi*, citing *Purdy* v. *Farley*, 10 U. C. R. 545; *Lafferty* v. *Stock*, 3 C. P. 1; *Winter* v. *Keown*, 22 U. C. R. 341; *Re Birdsall et al. and Corporation of Asphodel*, 45 U. C. R. 149; *Re Smith and The Municipal Council of Euphemia*, 8 U. C. R. 222; *Dennis* v. *Hughes*, 8 U. C. R. 444; *Adams and Corporation of East Whitby*, 2 O. R. 473; *Re Morton and Corporation of St. Thomas*, 6 A. R. 335; *Pells* v. *Boswell*, 8 O. R. 687; *Secord and Corporation of Lincoln*, 24 U. C. R 147.

G. Henderson, Q. C., contra.

January 11, 1886. ARMOUR, J.—The road of which the road in question formed part, was, in my opinion, a common and public highway by virtue of the "Consolidated Municipal Act, 1883," which was passed after the patent from the Crown had been issued for the west half of lot 15, in the 7th concession of Sidney, upon which the road in question was, because it was, at the time of passing that Act, a road whereon the statute labour had been usually performed, and came within the express words of section 524 of that Act.

There was also evidence from which a dedication of the road in question might be presumed.

The user by the public since the issue of the patent from the Crown in 1878, the fencing it out by the plaintiff when he cleared the surrounding land, his application to the council to close it, and his statement in evidence at the trial that it was a public travelled road, nothing being shewn to the contrary, were, in my opinion, sufficient evidence from which a dedication to the public ought to be presumed.

Assuming then that the road in question was a common and public highway, were the provisions of the "Consoli-

dated Municipal Act," 1883, section 546, sufficiently complied with to enable the council to pass the by-law No. 277, depriving the public of their right to it as a common and public highway ?

The words of this section are very strong, and seem to me to be imperative. "No Council shall pass a by-law for stopping up, altering, widening, diverting, or selling any original allowance for road, or for establishing, opening, stopping up, altering, widening, diverting, or selling any other public highway, road, street, or lane: (1) until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the immediate neighbourhood of such original allowance for road, street, or other highway, road, street, or lane: (2) and published weekly for at least four successive weeks in some newspaper, if there be any, published in the municipality, or if there be no such newspaper then in a newspaper published in some neighbouring municipality, and in either case in the county town, if any such there be:" (3) Nor, &c., &c.

It was proved that six notices were posted up in connection with this by-law in the most public places in the locality, but it was not shewn when they were posted up, nor what they contained. It was also proved that a notice was published weekly, but not for at least four successive weeks, but only for three successive weeks, in the *Weekly Intelligencer*, a newspaper published in Belleville, the county town; but it was not shewn what that notice contained.

It is clear, therefore, that the provisions of this section as to the posting up and publishing of the notices were not proved to have been complied with; and if these provisions, as to posting up and publishing the notices, were conditions precedent to the right of the Council to pass this by-law the by-law must fall, and this action, which is based solely on this by-law, must fall, too.

I think they must be held to be conditions precedent to the right of the council to pass such a by-law, and that

they have not been sufficiently complied with to enable the council to pass this by-law.

It is to be borne in mind that this is not the case of an application by the defendants to quash the by-law in question where the Court might or might not give effect to the objection as to the posting up and publishing of the notices although I think they ought; but it is the case of a plaintiff bringing an action which he can maintain only by establishing this to be a valid by-law, and to do this it is necessary for him to shew that the conditions precedent to the right of the council to pass this by-law have been complied with.

In *Lafferty* v. *Stock*, 3 C. P. 1, the defendants justified the alleged trespasses as having been committed under a by-law establishing a road, the passing of which was governed by 12 Vic. ch. 81, sec. 192, in terms similar to the section under discussion, and Macaulay, C. J., there says: "I think it a valid objection to the pleas that they do not shew that a calendar month's notice was given previous to the passing of the by-law. * * The defendant sets it up as a lawful by-law; the statute says it shall not be lawful to make such a by-law unless the previous notices are given. Although therefore the Court will not (when this by-law is assailed and sought to be quashed) presume they were not given, yet when it is advanced as a valid by-law, the existence of the facts without which it could not be lawful should be averred."

In *Winter* v. *Keown et al.*, 22 U. C. R. 341, which was ejectment brought for an allowance of road alleged to have been stopped up by by-law, McLean, C. J., at p. 346, says: "The plaintiff on the trial proved no notice of the intended by-law as required by the 8th section of 20 Vic. ch. 69, under which the council profess to have acted, nor any notice under the 308th section of 22 Vic. ch. 99, (which latter section is in terms similar to that under discussion); and as their authority to pass any by-law under these Acts for selling an original allowance for road, depended upon such notice being given, I think that we cannot dispense

with clear proof, not only that a by-law was passed, but that it was passed with an observance of all the terms on which their power to pass such a by-law depended." Hagarty, J., at p. 337, said: "I agree, however, with the Chief Justice in holding that it was necessary to give some evidence of the statutable notice having been given. The Legislature has given a certain power to the municipality, and it seems to me that such a power must be strictly executed."

See also *Grand Hotel* v. *Cross*, 44 U. C. R. 153; *Cameron* v. *Wait*, 3 A. R. at p. 184; *Rex* v. *Sanderson*, 3 O. S. 103; *Regina* v. *Great Western R. W. Co.*, 506; *Regina* v. *Justices of Worcestershire*, 3 El. & Bl. 477, and *Regina* v. *The Justices of Surrey*, L. R. 5 Q. B. 466.

I think by-law number 277 is void also for uncertainty, for the fact is, that the road in question is not the only road running across lot 15, in the 7th concession of Sidney, and there is nothing in the by-law to shew which road is meant.

It never was the intention of the council to do more than close up the road running across the west half of lot 15, in the 7th concession of Sidney, but by this by-law they have assumed to close up the road running across the whole lot, and the effect of this would be a contravention of section 544 of the "Consolidated Municipal Act 1883."

There are many other objections made to this by-law of a more or less formidable character, but it is unnecessary in the view I have taken to pursue them further.

It was contended that it was not open to the defendants to object to the by-law as long as it had not been quashed, and section 340 was relied on, but this contention is clearly untenable as this action is not brought for anything done under this by-law.

In my opinion the order *nisi* should be absolute to set aside the verdict and dismiss this action, with costs.

WILSON, C.J., and O'CONNOR, J., concurred.

Order nisi absolute, with costs.

[QUEEN'S BENCH DIVISION.]

WRIGHT V. JACKSON ET AL.

Deed of land—"Excepting and reserving a right of way or road allowance"—Trespass.

In an action of trespass *q. c. f.* the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title and in which the description of property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot."

Held, that this was only a reservation of a right of way to the grantor and not an exception of the soil.

TRESPASS *quare clausum fregit* to lot number 8, 17th concession of Goderich.

The defendants justified under the so-called reservation or exception in the deed, dated May 23rd, 1870, hereinafter set forth.

The cause was tried by Cameron, C. J., at the last Spring Assizes at Goderich, with a jury.

It appeared that one Joseph Whitehead, being seised in fee of the said lot, conveyed the same lot in fee simple to one David Wright, under whom the plaintiff claimed title, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot number eight."

At the time of the making of this conveyance the said Joseph Whitehead was interested in lots 53, 54, 65, and 66, in the Maitland concession of the township of Goderich, in the manner shewn in the Act 36 Vic. ch. 158 (O.)

Prior to the making of this indenture Whitehead had a sawmill on lot 53 or 54, and he made the road in question for the convenience of driving lumber from the sawmill, and, as he said, for the convenience of those who occupied the lots 53, 54, 65, and 66.

At the time of the making of this conveyance the sawmill had ceased to be used, and in the fall of 1873 a huge tree fell across the road and it thenceforward ceased to be

used except by persons on foot, and a bridge which was across a stream which crossed it, had rotted away, and a new bridge was put across this stream to the east of the road by an occupier of lot 8.

Some three years before the trespass for which this action was brought the plaintiff had passed across this road, and in the fall of 1884 the defendants Jackson and Holmes, acting under the authority of the defendant McDonald, drove through this road and over the bridge to the east of it with a buggy, throwing down the fences, and this was the trespass complained of.

It was shewn that after the passing of the Act 36 Vic. ch. 158, (O.,) lots 53, 54, 65, and 66, passed by several conveyances thereof to the defendant McDonald.

After this action was commenced, and on the 17th of January, 1885, Whitehead purported to convey this road to the defendant McDonald.

The learned Chief Justice at the close of the case made the following endorsement on the pleadings: "On the evidence it appears to me that the road allowance in question was at the time this action was brought the property of Joseph Whitehead, which, since the commencement of this action, he has conveyed to the defendant Frances McDonald. I am of the opinion the provision in the deed from Whitehead to the plaintiff's father was an exception of the two rods mentioned therein, and constituting the alleged way or allowance for road, and not merely the reservation of a right of way. I therefore direct the jury to find for the plaintiff for $1 damages, as I think the defendants Jackson and Holmes were not acting under the authority or command of any one at the time the trespass was committed who had a right to authorize the act, and there is no evidence of an exclusive possession in the plaintiff for the period of ten years so as to give him a statutory title; but he had at the time of the alleged trespass the actual possession and was entitled to maintain trespass against wrongdoers, which I think the defendants as matter of strict law were. They

were, however, acting in the assertion of a right which the owner of the land apparently intended to give to the defendant Frances McDonald, but by an oversight in making the conveyance this road allowance was not conveyed, and the plaintiff knew that they were so acting. I think, therefore, he is not entitled to costs, and so direct judgment to be entered for the plaintiff for the said sum of $1, without costs to either party, and this judgment is not to operate as an estoppel of title. If I am wrong in holding the deed to the plaintiff's father did not except the two rods, but only amounted to a reservation of a right of way, the plaintiff would, in my judgment, be entitled to costs, and I make this note of that opinion in order that the plaintiff may have the benefit of it should it hereafter be found my opinion is wrong."

May 21, 1885. *Aylesworth* obtained an order *nisi* to set aside the judgment for the plaintiff in so far as it awarded no costs to the plaintiff, and to enter a judgment for the plaintiff for the damages assessed, with full costs of suit, including the costs of this motion, upon the ground that this action was one tried by a jury, and that no application was made at the trial by the defendants to deprive the plaintiff of his costs in the action, and that no good cause was shewn or existed for so depriving the plaintiff of costs; and upon the ground that the land upon which the trespass for which this action is brought was committed was the property of the plaintiff, subject at most to a right of way over the same reserved by Isaac Whitehead, the former owner thereof, the provision as to the strip of land mentioned in the deed from the said Whitehead to the plaintiff's father being a mere reservation of a right of way over said strip of land and not an exception thereof, or for such other order in the premises as to the Court should seem fit. He also gave notice of motion to the same effect.

On 11th of December, 1885, *Lount*, Q.C., shewed cause, and *Aylesworth* supported the order and motion.

January 11th, 1886. ARMOUR, J.—I am of opinion that the land upon which "the right of way or road allowance" was situated, was not excepted in the conveyance from Whitehead to the plaintiff's father of "lot number eight in the seventeenth concession of Goderich."

Although the words, "except the reservation hereinafter mentioned," coming after the words "eighty acres," and before the words "be the same more or less," would lead one to expect that when he came to the "reservation hereinafter mentioned," he would find that some "acres" were reserved, yet when he comes to such reservation he finds that this is not the case, but that the "reservation" is "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot number eight."

If it had been intended to except the land, it could have been effectually done by excepting two rods in width along the south side of number eight; and that it was not so intended is shewn by excepting merely a right of way or road allowance of two rods in width along the south side of lot number eight.

The words, "road allowance," have no greater effect than the words "right of way," and they are used as original terms.

Every exception and reservation shall be taken strictly against the grantor, and beneficially for the grantee, for the words of exception and reservation are the words of the grantor and his acts, and thereupon shall not be extended beyond the words. See *Lofield's Case*, 10 Co. 106.

The view of the learned Chief Justice being that if the words referred to did not constitute an exception, the plaintiff should have his costs, we must give effect to that view.

I am not, however, to be understood as agreeing that if this view of the learned Chief Justice as to these words had prevailed he had any judicial discretion, or that he

ought to have exercised any under the circumstances of this case to deprive the plaintiff of his costs.

The order *nisi* and motion will be absolute, with costs.

I refer to *White* v. *Crawford*, 10 Mass. 183; *Hart* v. *Chalker*, 5 Conn. 311; *Durham and Sunderland R.W. Co.* v. *Walker*, 2 Q. B. 941; *Doe Douglas* v. *Lock*, 2 Ad. & El. 705; *Wickham* v. *Hawker*, 7 M. & W. 63; *Pannell* v. *Mill*, 3 C. B. 625; *Casselman* v. *Hersey*, 32 U. C. R. 333; *Duke of Hamilton* v. *Graham*, L. R. 2 Sc. App. 166; *Proud* v. *Bates*, 34 L. J. N. S. Chy. 406, 11 Jur. N. S. 441.

WILSON, C. J.—The words "excepting and reserving a right of way or road allowance of two rods in width," &c., mean just what they express—that a *right of way* is excepted or a *road allowance* is excepted.

The latter term is stronger than the former, and if the latter term had alone been used it may be the land would have been excepted. But the words are a right of way *or* a road allowance, and these being the words of the grantor, they must, according to the general rule of construction, be taken most strongly against him. The right of way or road allowance is described as an exception or reservation. A mere right of way cannot strictly be excepted. Nor can a parcel of the land, if it can pass by the words, a road allowance, pass strictly as a reservation. These terms do not aid us in determining positively whether an exception or reservation was intended, or in other words whether a right only was to pass, or the land on which the way is was to pass; but it is important to observe that the land is granted "excepting the *reservation* hereinafter mentioned," and that *reservation* as stated can apply strictly only to a *right* of way or right of road allowance, and not to the land for the road. The right of way, it appears, is the principal subject provided for, and that is otherwise described as a road allowance, a well known descriptive name for roads which do not pass to the grantee; but it cannot have that effect in this case for the reasons stated. And it is not necessary for the purposes of the grantor.

Strictly, too, an exception must be out of a general subject, as out of a manor an acre may be excepted, but an exception cannot be out of a certainty, as out of twenty acres, one: 1 *Co. Lit.* 47*a*.

I agree the motion should be made absolute, with costs.

O'CONNOR, J., concurred.

Order nisi absolute, with costs.

[QUEEN'S BENCH DIVISION.]

HUBER V. CROOKALL.

Libel—Innuendo—Admissibility of evidence of defamatory meaning—Nonsuit.

A draft drawn on the plaintiff being presented for acceptance at his place of business by a clerk in an agency of a bank, answer was returned that the drawee (plaintiff) was away from home, in the Western States, and the clerk so noted the answer on the back of the draft. The defendant, the manager of the bank agency, added in his own handwriting to what the clerk had written the words, "or San Francisco, or the Rocky Mountains," and the draft was thereupon returned to another bank, by which it had been sent for presentation, and by which after its return it was handed to the bankers of the drawers. *Innuendo*, "that the defendant meant to impute that the plaintiff had left for parts unknown, not intending to return to Ontario, and with intent to defraud" his creditors.

Held, that the words were capable of the libellous meaning alleged, and a nonsuit was therefore set aside and a new trial directed, in order to submit to the jury the question whether the words did in fact bear that meaning.

Held, also, on the facts set out below that there was evidence to go to the jury in support of the *innuendo*.

At the trial the bank manager to whom the draft was returned was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the Judge ruled that in the absence of evidence (which it was admitted could not be given), that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put.

Held, that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, but (following *Daines* v. *Hartley*, 3 Ex. 200) that nevertheless a proper foundation had not been laid for the question; that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the Judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered.

LIBEL.

The statement of claim set out that the plaintiff was a member of the firm of Shantz & Huber, doing business in Berlin, in the county of Waterloo, and having large business transactions throughout the United States of America; and that the defendant was the manager of the Merchants' Bank of Canada Agency Office in Berlin: that on the 4th of February, 1885, Clare Brothers & Co. of Preston, in the said county, drew a bill of exchange upon the plaintiff for $42.66, through the Preston Banking Company, at two months, payable to the order of the Preston Banking Company: that there was attached to the bill a memorandum in the following words: "No protest. In case of refusal, report answer given; hold—days for arrival of goods, if necessary:" that the Preston Banking Company sent the bill to their agents, the Federal Bank of Canada at Guelph, who sent the same to the Merchants' Bank of Canada at Berlin, for presentation to the plaintiff for acceptance: that at the time the Merchants Bank enclosed the bill for presentation for acceptance the plaintiff was away from home on business of his firm in the Western States of the United States of America, and that one of the clerks of the Merchants' Bank, on presenting the bill for acceptance, was told by the bookkeeper of the plaintiff's firm, what the said clerk of the bank wrote upon the back of the said bill, that the "drawee is away from home; he is in the Western States;" and the said clerk took the bill back to the said bank, when the defendant added to the words which the said bank clerk had written the following words, "Or San Francisco, or the Rocky Mountains."

The defendant then sent the bill with the said words written on the back of it to the Federal Bank at Guelph, and the Federal Bank sent it with the said words upon it to the Preston Banking Company.

The plaintiff alleged the words so written upon the bill were written and published falsely and maliciously, and the defendant meant thereby and imputed that the plain-

tiff had left the Province of Ontario and gone to some unknown place in the United States of America, not intending to return, and with intent to defraud his creditors; whereas the defendant well knew the plaintiff was so absent on the business of his firm, and would return to Berlin, his place of residence.

The defendant denied everything alleged in the statement of claim. He also pleaded the statement was privileged, for the statement was made in answer to the request made to give the answer returned in case of refusal of acceptance: that San Francisco and the Rocky Mountains were in the Western States, and the added words meant only the defendant did not know in what part of the Western States the plaintiff then was.

The defendant also demurred to the statement of claim.

Issue.

The demurrer came before O'Connor, J., while sitting as the Judge of the Single Court, who gave judgment thereon for the plaintiff.

The cause afterwards came before Cameron, C. J., at the Berlin Assizes.

The counsel for the plaintiff at the trial asked Mr. Mair, who was the manager of the Federal Bank at Guelph at the time the bill was sent to that bank by the Preston Banking Company, and at the time the Federal Bank sent the bill to the Merchants' Bank at Berlin, and at the time the latter Bank returned the bill to the Federal Bank at Guelph.: "What did you think the meaning of these words was?" That is, the words written on the back of the bill about the plaintiff being away from town, and which are complained of as a libel. That was objected to by the defendant's counsel.

The learned Chief Justice said:

"Unless there is some particular meaning to be attached to them by the usage of bankers, I think the question is inadmissible."

The question was then asked:

Q. Is there any particular usage or not? A. No. That

is, as it might be inferred, that there was no such usage of bankers.

The plaintiff was cross-examined by the defendant's counsel at considerable length:

1. As to what States constituted the Western States of America.

2. To shew that the plaintiff, although he was left a great deal of property by his father, frittered it away and failed in business in about five years after, and his estate did not pay his creditors more than 70 cents in the $.

3. That the defendant, as manager of the Merchants' Bank at that time, found out in good time the state of the plaintiff's affairs, so that the bank lost nothing.

4 To shew that the plaintiff sued the defendant several years ago for $20 or $30 in the Division Court and got judgment against him.

5. That soon after that the defendant notified the plaintiff to remove his account from the bank, and that he, the plaintiff, complained of the defendant to the Head Office.

6. That in 1883 the defendant would not discount for the plaintiff on customer's paper.

7. That since he failed in 1874 the plaintiff had owned no real estate, and that he owned none at the time of the trial: that he had lately given a chattel mortgage on his property, and he had no other property but a bill of sale upon some pearl buttons; and that he had nothing that could be taken in execution; and that he was then paying twelve per cent. on the money he had to raise, and that he had nothing but what he made by his business.

8. That one Rumple would not trust the plaintiff without Mr. Hillburn guaranteeing the loan.

9. And full enquiries were also made into his selling felt boots for Rumple, and selling stoves for Clare Brothers.

It appeared the plaintiff left word with his clerks and people in his business that he was going to Chicago, and from there as far as St. Pauls and Minneapolis. Mr. Bingham also stated in his evidence, both in chief and on

cross-examination, that the defendant did not want to deal with the plaintiff, or with any paper that had his name on.

The learned Chief Justice dismissed the action with costs.

At the Michaelmas Sittings *Clement* obtained an order *nisi* to set aside the nonsuit, and for a new trial, on the grounds that the words complained of were capable of a defamatory meaning, and the case should have been left to the jury; and for the rejection of evidence.

Clement supported the order *nisi*, and cited *Daines* v. *Hartley*, 3 Ex. 200, and *Hart* v. *Wall*, 2 Ch. D. 146.

Bowlby, contra, cited *Daines* v. *Hartley*, 3 Ex. 200; *The Capital and Counties Bank (Limited)* v. *Henty*, L. R. 7 App. Cas. 741; *Hunt* v. *Goodlake*, 29 L. T., N. S. 472; *Cox* v. *Cooper*, 12 W. R. 75; *Odger* on Slander and Libel, 110, 544.

January 11, 1886. WILSON, C. J.—The alleged libellous words are that the Merchants' Bank at Berlin, of which the defendant is the manager, on receiving a draft on the plaintiff for $42.66, to present to the plaintiff for acceptance; and after it had been sent for presentation, and after the clerk who presented it had written in pencil on the draft what he had been told by the plaintiff's clerk, "drawee is away from home—he is in the Western States," the defendant added the words, "*or San Francisco, or the Rocky Mountains*," and he returned it to the Federal Bank at Guelph, from which the draft had been sent. The innuendo in the statement of claim is, "that the defendant thereby imputed that the plaintiff had left the Province of Ontario, and gone to some unknown place in the United States of America, not intending to return, and with intent to defraud his creditors."

The learned Chief Justice of the Common Pleas dismissed the action at the trial, because he said, "I do not believe the words are libellous."

It is at times an exceedingly difficult question to determine whether a particular writing is or is not a libel.

In *Hart* v. *Wall*, 2 C. P. D. 146, Archibald and Quain, JJ., were of opinion the words there were not libellous. Coleridge, C.J., and Lindley, J., were of the opinion that they were. And in the later case of *The Capital and Counties Bank* v. *Henty*, L. R. 7 App. Cas., at p. 777, Lord Blackburn said he could not make out what the meaning was which the letters in *Hart* v. *Wall* were supposed to be capable of bearing. Then, in the case just mentioned of *The Capital and Counties Bank* v. *Henty*, it appears Grove and Denman, JJ., in the Common Pleas Division, held the circular there in question libellous. In appeal Brett and Cotton, L. JJ., decided it was not libellous, Thesiger, L. J., dissenting; and in the House of Lords four of the Law Lords affirmed the judgment of the Court of Appeal, holding the circular to be libellous, while Lord Penzance dissented. So also in *Barnett* v. *Allen*, 3 H. & N. 376.

The words in this case, "drawee is away from home, he is in the Western States," were truly the words given by the plaintiff's clerk to the bank clerk, and the clerk reported the answer he got just as he got it, and as he had been required to do. The addition made to that answer by the defendant, "or San Francisco or the Rocky Mountains," was written by the defendant of his own motion, and without having been told so by any one, and he returned the whole of that writing as the answer which had been given by the plaintiff's clerk.

Such an answer, represented as the answer which was given by the plaintiff's clerk of the whereabouts of his employer, would, I think, naturally excite more suspicion against the plaintiff than if given by one who was not in the business or employment of the plaintiff.

If to the present words had still further been added by the defendant "or Texas or Mexico," it would have tended to show a still greater uncertainty of the plaintiff's whereabouts, and a greater probability of his not desiring to have his locality ascertained.

If the words had been "or points unknown," the mean-

ing of the true answer would have been very greatly altered, and the question may be, can the words "or San Francisco, or the Rocky Mountains" be said to mean the same as *parts unknown*, or anything like that?

It is settled law that it is for the Judge to say whether the publication is capable of the meaning ascribed to it by the *innuendo*, and if he is satisfied of that, it is then for the jury to say whether the publication has that meaning. It is also a rule that words not libellous must be read and construed in their natural sense; but they may be shewn to have a different meaning by evidence of a libellous purpose, or of extrinsic facts calculated to lead reasonable men to understand them in a libellous sense.

A publication in the most innocent terms may, with reference to certain circumstances and to persons knowing those circumstances, be shewn to convey a meaning very different from that which would be understood from the same words used under different circumstances.

It is necessary the person or persons to whom the publication is made should understand the words complained of, if not libellous in themselves, are not to be understood in their natural meaning, but have a different, and that a libellous, meaning from their natural meaning.

If the defendant had publicly placarded the words in question on the walls of Berlin, or had published them in the newspapers, or to persons with whom he had no business relations, it might have been evidence of a malicious intention beyond what was expressed by the words themselves.

It is always a question for the Judge or for the Court, upon reading the *innuendo*, and after having heard the evidence upon it, to say whether the words are reasonably capable of bearing the meaning attributed to them: *Hunt* v. *Goodlake*, 42 L. J. C. P. 54; *Goldstein* v. *Foss*, 6 B. & C. 154, S. C. 4 Bing. 489, in Ex. Ch.; *Hearne* v. *Stowell*, 12 A. & E. 719; *Capel* v. *Jones*, 4 C. B. 259. And I refer, in support of the above propositions, to the following cases: *Hunt* v. *Goodlake*, 29 L. T. N. S. 472; *Cox* v. *Cooper*, 12

W. R. 75; *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

The cross-examination by the defendant's counsel of the plaintiff's witnesses was directed chiefly to shew the plaintiff had squandered a very liberal patrimony: that he had failed in business in 1874, and had assigned his estate and effects for the benefit of his creditors: and that his estate had only paid 70 cents in the $: that since his failure he had "not owned an inch of territory in Canada:" that he had mortgaged his chattel property: that his wife owned the household furniture: that he had nothing which could be taken in execution: that some years ago he sued the defendant in the Division Court for some small sum, and got a judgment against him: that he had complained twice to the Head Office against the defendant: that the defendant had required him to remove his account from the bank, of which the defendant was manager; and that that bank lost nothing by his failure, because the bank of which the defendant was manager found out in good time how the plaintiff's affairs were.

The following are some of the questions and answers on the cross-examination:

Q. So far as you [Mr. Checkley, one of the firm of the Preston Banking Company] knew, nobody ever gave the plaintiff a dollar unless Hilburn was on it? A. I believe they did.

Q. Tell us one that you know of, of any body giving the plaintiff any money without Hilburn being liable for it, because if you could I would like to know it? A There were manufacturers delivering goods to him.

Q. Tell the name of any man that would do such a thing? A. I don't know his business.

Q. Do you think any banker or any business man would be such a fool as to give him credit without Hilburn or some respectable person on it? A. I don't think a banker would.

The object of the cross-examination was apparently to show the plaintiff was a man who had no property, or

commercial standing or credit, and whatever credit he got was obtained only by some one becoming surety or indorser for him, and that he was not a man likely to pay, or to be able to pay any body, from which it might be inferred his whereabouts was of little consequence to any one, as it was somewhere in the Western States, or it may be in San Francisco, or even in the Rocky Mountains, although what he could be doing in the Mountains, one cannot understand, for his ordinary business would not be likely to take him there, nor to make it a profitable locality in which to bargain for the sale of his pearl buttons. Such an examination must have been pursued for the purpose of establishing that the defendant added the words in question because the plaintiff was such a person as the examination endeavoured to make him out to be; but as there was no truth in the words added by the defendant, nor the pretence that the defendant had been informed by any one of the facts he stated, the cross-examination can only be understood as establishing very clearly that the defendant added the objectionable words purposely, and of his own motive, and falsely and maliciously. There can, however, be no recovery in such an action, however maliciously the defendant may have acted, unless the publication be proved to be a libel.

The question then is, do the words so added by the defendant to the original words written by the clerk of the bank so alter the original words and their meaning as to constitute the whole of the writing read together as a libel?

I think the addition made by the defendant has altered, the meaning and effect of the original answer and report made by the bank clerk.

It now reads that the plaintiff's whereabouts at that time was so unknown that he was to be found in the Western States—certainly a wide enough territory—but if not there, he might be found in San Francisco or in the Rocky Mountains, a much wider area, the latter place, if inhabited, being the resort of miners or wandering parties, and not the abode of settled orderly communities.

And I think the addition so made by the defendant may mean what the *innuendo* avers, that the defendant "imputed that the plaintiff had left the Province of Ontario and gone to some unknown place in the United States of America not intending to return, and with intent to defraud his creditors;" that is, the words are capable of that meaning. If the defendant had written of the plaintiff that he had gone "*to Jericho*," there would, I think be no doubt these words would be held to be capable of bearing a libellous meaning, because the expression of "go, or gone to Jericho" has an understood popular meaning of having gone to the bad, or of having gone away altogether. But I cannot say the words that the plaintiff is and has gone, not only to the first two named places, or has gone to the third named place, "the Rocky mountains," may not have as wide and as bad a meaning as any other term or place when used with respect to a mercantile man, having a settled abode and business in this Province, when written of him respecting a bill of exchange or other business matter, liability, or security. If the writing is capable of the meaning in the inunendo, the next enquiry is, is there evidence of the libellous meaning averred?

In determining that question the evidence given at the trial and the surrounding facts and circumstances must be taken into consideration.

If the plaintiff be such a man as the defendant so vigorously endeavoured to prove him to be—bankrupt in name and in fortune, not to be trusted, trading on other people's credit, having nothing to lose—it is not, I think too much to say that the *innuendo* may be maintained, and that the defendant did mean by the words he added that the plaintiff had left the Province and gone to some unknown place in the United States of America, not intending to return, and with intent to defraud his creditors; and that a finding by the jury at the trial of the innuendo, may be supported in law as an inference properly warranted by the facts and by the evidence.

As the writing is not libellous in its terms and according to its natural meaning, and as it can be made so only by the extrinsic facts and circumstances given in evidence, it must be shewn that the person or persons to whom it was published understood the writing not in its natural, but in a defamatory sense. The persons to whom the publication was made were Mr. Mair, the manager of the Federal Bank in Guelph, and the members of the Preston Bank to whom the bill was finally to be returned.

Mr. Checkley, one of the members of that bank, said he got the bill back from the manager of the Federal Bank in Guelph in that bank.

"The way in which I received it there was, I said, what has become of Mr. Huber, and he handed me this item, and called my attention to what was written on the back of it, and I explained to him that it was some of Mr. Crookall's doing."

The examination was not followed up. Then Mr. Mair, of the Federal Bank, was asked, "What did you think was the meaning of these words?" which was objected to, the learned Chief Justice saying, "unless there is some particular meaning to be attached to them by the usage of bankers, I think the question is inadmissible." Then he was asked if there was any such usage, and his answer was the only one that could have been given, that there was no such usage among bankers.

The learned Chief Justice did not lay down the rule quite correctly when he said the plaintiff must show the particular meaning desired to be given to the writing by the plaintiff's counsel must be such a meaning as was attached to it according to the usage of bankers. It is obvious the usage of bankers cannot in any way be the rule by which the meaning of such words, even on a bill of exchange, can be held to be governed.

"The proper course for a counsel to take who purposes to get rid of the plain and obvious meaning of words is to ask the witness not, what did you understand by those words? but was there anything to prevent those words

from conveying the meaning which ordinarily they would convey? because if there was, evidence of that may be given, and then the question may be put, what did you understand by them?" *Daines* v. *Hartley*, 3 Ex. p. 295.

The question, "What did you think was the meaning of these words?" as put and objected to at the trial was not altogether an improper question. It was put before a foundation for putting it had been laid. The preliminary question should have been put, was there anything in the words which made you impute to them a meaning different from that which they would ordinarily and naturally bear?

In the case referred to the Chief Baron said, when the question was put at the trial, "what did you understand by that?" "I stated that I did not reject the question altogether, but that in my judgment he could not put the question in that shape, and he declined to put it in any other."

In this case the question was not altogether rejected, but it was held to be inadmissible, unless it was shewn there was some particular meaning to be attached to the words by the usage of bankers, which was misleading, for the learned Chief Justice should have said the question to be first put was whether there was any reason to prevent the witness from reading the words in their natural sense.

I confess there is a good deal of refinement, to my mind, in the mode of interrogation required by the case of *Daines* v. *Hartley*.

It appears to me the witness may be properly asked. "Did you read or understand these words in their natural sense?" And if the answer be, "No," he might then be asked, "In what sense did you understand them?" But the decision referred to seems to require the question last mentioned should not be asked until the question is put and answered, "Why did you not understand the words in their ordinary sense?"

The plaintiff has not yet had an opportunity to prove the innuendo as laid, because the counsel was confined at the trial to shew that the sense intended, as opposed to

the natural sense, was restricted to such a sense as was regulated by the usage of bankers, which had nothing whatever to do with the matter by interpretation, explanation, or otherwise.

There is one part of the case still to be referred to. It is that part of it which relates to what was meant by the expression "the Western States."

The bank clerk reported as he had been told, the plaintiff was "in the Western States," and the defendant added, "or in San Francisco, or the Rocky Mountains;" and it was contended by the defendant's counsel that the addition of the defendant made no difference in the meaning of the clerk's report, "in the Western States," because San Francisco and the Rocky Mountains are in the Western States.

The question is, what was meant by "the Western States?" Not the precise geographical meaning of them. The defendant himself, after the words "Western States," shewed that he understood the expression to be not their strict geographical position with respect to the whole United States, for he added *or* San Fransisco, *or* the Rocky Mountains, as if these two localities were not in the Western States, in his own opinion, and as he wished it to be understood by those to whom the writing was to be exhibited. In any case the Rocky Mountains are not more in the Western States, even geographically, than they are in the Dominion of Canada, for these mountains are said to extend from Mexico to the Arctic Ocean. It is not worth while to waste time on that part of the case.

The order *nisi* was moved on the ground that there were circumstances which shewed the words were capable of a defamatory meaning, and it should have been left to the jury to say whether they had that defamatory meaning upon the evidence given; and that evidence upon that point was improperly rejected.

I am not quite prepared to say that evidence was improperly rejected, but I think the objection made to its being given, viz., that it should be shown the words have a

special meaning according to the usage of banks contrary to their natural meaning, prevented the plaintiff from stating his question in such other form as would have made the primary question admissible; and if the evidence had been given by the witnesses which the proper question was designed to obtain, it is probable it would have been sufficient to have established a case for the jury, because the main part of the defendants cross examination was designed to prove the plaintiff was just such a person as would be likely to abscond from the country to defraud his creditors.

I think the case should go to trial again, and that there should be no costs of the trial, or of this present application to either party.

But I think it would be well if the parties could arrange the matter between themselves without a further trial. (*a*)

ARMOUR, J., took no part in the judgment, not having been present at the argument.

O'CONNOR, J., concurred.

Order nisi absolute for new trial, without costs.

(*a*) Mr. Clement, immediately after judgment was given, handed in a note of a case of *Melaney* v. *Preston*, 47 Mich. 103, where it was held that to write of another by postal card, in answer to the whereabouts of the plaintiff, "gone to Canada," may be libellous, and the jury may be so directed.—REP.

[CHANCERY DIVISION.]

RE CLARKE V. THE UNION FIRE INSURANCE COMPANY.

PETITION OF WILLIAM SHOOLBRED.

Dominion Winding-up Act—Application thereof—Notice—Liquidator—Appointment of—45 Vic. ch. 23, D.—47 Vic. ch. 39, (D.)

Held, that 47 Vic. ch. 39, sec. 2, is not limited in its application to companies being wound up at the date of 45 Vic. ch. 23, it applies also to companies in liquidation, *i. e.*, insolvent though not technically being wound up, and against which proceedings are being taken to realize their assets and pay their debts.

In proceedings for a winding-up order under the above statutes, notice need be given only to the company, and perhaps also to creditors, who have brought action against the company, which would be stayed by the winding-up order.

When proceeding under 45 Vic. ch. 23, sec. 24, (D.) as amended by 47 Vic. ch. 39, sec. 4, (D.) the Court has power to refer the appointment of a liquidator to the Master.

THIS was a petition by one William Shoolbred seeking to discharge and vacate or vary a certain order made on January 27th, 1885, for the winding up of the Union Fire Insurance Company.

On or about November 24th, 1881, Alexander A. Allan, Delia Amelia Lyman, and James Patterson, took proceedings under the "Ontario Joint Stock Companies Winding-up Act," and obtained an order under the said statute from the County Judge of York for winding up the Union Fire Insurance Company, for which purpose certain directions were given by the said order.

On November 29th, 1881, a writ was issued in the Chancery Division in an action by one A. S. Clarke, who sued on behalf of himself and all other creditors of the Union Fire Insurance Company, against the said company for administration of the company's deposit in the hands of the Provincial Treasurer under R. S. O. ch. 160, secs. 21-22, and one Badenach was appointed *interim* receiver; and on January 7th, 1882, judgment was pronounced in the suit, whereby, after reciting that the company had

failed to pay an undisputed claim arising, or loss insured against in Ontario for a space of sixty days after being due, whereby the deposit of the company with the Treasurer of Ontario had, under R. S. O. ch. 160, sec. 21, become liable to administration and distribution, the Court continued W. Badenach as receiver of the company for the purposes of sections 21, 22, and 23 of the said statute; and there was a reference to the Master-in-Ordinary to take an account of the debts and liabilities of the company, and fix priorities of creditors, further directions being reserved.

By an order made in the said action in the Chancery Division on November 29th, 1882, the said Alexander A. Allan, Delia Amelia Lyman, and James Patterson were added as parties defendants to the said action to represent themselves and the other shareholders who obtained and were prosecuting the said winding-up order, and by the said order the winding up order and all the proceedings thereunder were stayed. This order was procured by the consent of all parties, and provided for the payment of the costs of all parties out of the company's moneys.

By an order made on April 30th, 1884, upon the action of *Clarke* v. *Union Fire Ins. Co.*, coming up for hearing on further directions, on hearing read the judgment of January 7th, 1882, and the reports of William Badenach as receiver, and the report of the Master-in-Ordinary dated January 10th, 1884, and certain other proceedings, the Court ordered and adjudged that it should be referred to the Master, to continue the accounts and calculate subsequent interest on the claims of creditors and policy holders of the company; and amongst other directions the Master was directed to ascertain who were the stockholders of the company and the amounts remaining unpaid on their stock, and further provisions were made in regard to the realization of the assets of the company, and of the payment of the costs of all parties.

On the return of the warrant issued by the Master pursuant to this order of April 30th, 1884, the present petitioner appeared and filed certain objections to the

jurisdiction of the Master, which were subsequently argued, and the Master reserved judgment, and had not delivered the same at the time of the presenting of the present petition.

By an order made on January 27th, 1885, which was the order now sought to be discharged or varied, upon the petition of two of the creditors of the Union Fire Insurance Company on behalf of themselves and all other the creditors of the company, upon hearing read the said petition and an affidavit of service thereof upon one Hay, alleged to be Vice-President of the said company, the Court did declare that the company was an insurance company within the meaning of 45 Vic. ch. 23, (D.), and the amendments thereto, and it was further ordered and adjudged that the said Badenach should be appointed interim liquidator of the estate and effects of the company, and it was referred it to the Master in Ordinary to appoint a liquidator of the estate and effects of the company; and by the said order the Master was also directed to settle the list of contributories, take all necessary steps and make all necessary enquiries and reports for the winding up of the affairs of the company under the provisions of the said Acts; and the Court did also order that the accounts and enquiries theretofore made under the judgment and reference by the Master in the action of *Clarke* v. *Union Fire Ins. Co.*, including the proceedings to ascertain who were the shareholders of the company, and the evidence taken in connection with the said proceedings should stand and be incorporated with and used in the said winding up proceedings under the said order and reference in so far as the same could properly be made applicable by the said Master in the proceedings before him and in the matter of the winding up of the affairs of the said company; and in and by the said order certain provisions were made for the payment of the costs of the plaintiffs and defendants of all proceedings theretofore taken in the said suits or in the matter of the winding up under the said order, out of the assets of the company and in priority to the payments of the debts due by the company.

The petitioner now prayed that this order of January 27th, 1885, might be discharged and vacated, or that in any event it might be varied by striking out such portions thereof as adopted the proceedings in *Clarke* v. *The Union Fire Ins. Co.*, and granted costs to the defendants prior to the claim of the creditors. The grounds for asking this relief so far as the same are passed upon in the judgment, were thus set out in the petition:

"Your petitioner shews that no notice of the intended application for the said order pursuant to the statute in that behalf was served.

In and by the said order it is referred to the said Master to appoint a liquidator of the estate and effects of the company, but your petitioner shews that in and by the statute in that behalf the Court in making an order for the winding up of a company is directed to appoint a liquidator, and your petitioner shews, and the fact is, that there is no power in the said Court or any Judge thereof to delegate to the Master such powers. By the said statute it is also provided that no such liquidator shall be appointed unless a previous notice has been given to the creditors, contributories, shareholders, or members in the manner and form prescribed by the Court, and your petitioner shews and the facts are, that no service or notice whatever of the petition for the said application was made or given to the said creditors, contributories, shareholders, or members of the said company, nor was any direction given as to the manner and form of such service, nor was any notice prescribed by the said Court.

Your petitioner shews and the fact is, that no notice whatever of the said petition was served upon him or his said solicitor although the question had been raised in the office of the Master in the suit of *Clarke* v. *The Union Fire Ins. Co.*, and was standing for judgment, that all the proceedings in the said suit were *ultra vires*, void, and of no effect as against him.

Your petitioner further shews that there is no power under the said Statute for the winding up of companies to make any such provision for the adoption of proceedings taken in another action, and your petitioner shews that the said petition was presented and the said order was obtained by the solicitor engaged therein for the petitioner and the company assenting and agreeing together upon the adoption of the said course, the object being as your petitioner believes, to prevent the objections of your petitioner in the said action of *Clarke* v. *The Union Fire Ins. Co.*, being sustained, and to prevent your petitioner obtaining the costs of the proceedings in the said action properly incurred by him in raising the said defences.

Your petitioner also shews that although the said order purports to be made in the matter of the said action in the Chancery Division (of Clarke against the Company) that all the parties to the said action are not made parties to the said petition, Alexander A. Allan, Delia Amelia Lyman, and James Patterson being parties defendant to the said action.

Your petitioner alleges and the fact is, that the said Court had no jurisdiction or power to make the order and judgments in the said suit of *Clarke* v. *The Union Fire Ins. Co.*, hereinbefore referred to. Your petitioner further alleges and charges that the said Court had no jurisdiction or power to adopt under the said Winding-up Acts the proceedings had and taken in the said suit."

The matter of the petition was argued on October 19th, 1885, before Proudfoot, J.

W. Cassels, Q.C., for the petitioner.
G. F. Shepley, for the Union Fire Insurance Co.
Bain, Q.C., for the petitioners for the winding up order.
Foster, for A. S. Clarke.
In re General Financial Bank, 20 Ch. D. 276: and *Buckley's* Companies Acts, pp. 235, 238, 570; Insolvent Act of 1875, 38 Vic. ch. 16, sec. 147, sub-sec. 7 (D.); 41 Vic. ch. 21 (D.); 43 Vic. ch. 1 (D.); 45 Vic. ch. 23 (D.); 47 Vic. ch. 39 (D.) were cited.

November 11th, 1885. PROUDFOOT, J.—On the 27th of January, 1885, I made an order for winding up the Union Fire Insurance Company, at the instance of two creditors, in the presence of counsel for the company and for the plaintiff Clarke.

A petition is now presented by William Shoolbred who alleges himself to be a holder of 50 shares in the capital stock of that company, and also a creditor of the company having a claim against the company for over $1,250, praying that the winding up order may be discharged and vacated; and that in any event the order may be varied by striking out such portions of it as adopt the proceedings in *Clarke* v. *The Union Fire Ins. Co.*, and grant costs to the defendants prior to the claim of the creditors. The reasons assigned for the prayer of the petition are: 1st. That notice should have been given to Shoolbred before making the winding up order. 2nd. That there are no proceedings taken under the Act upon which the order could be made. 3rd. That there was no power to refer it to the Master to appoint a liquidator. 4th. That some of the parties are

not before the Court who were made parties to the action of *Clarke* v. *The Union Fire Ins. Co.*, by order of November 29th, 1882. 5th. That there was no power to adopt the proceedings in *Clarke* v. *The Union Fire Ins. Co.*, as that was not a winding up proceeding.

The 45 Vic. ch. 23, sec. 1, (D.), as amended by 47 Vic. ch. 39, sec. 1, applies to incorporated insurance companies, amongst others, which are insolvent or in process of being wound up. And section 2 of the last cited Act enacts, that when, at the date of the passing of the 45 Vic., ch. 23, company was in liquidation or in process of being wound up, any creditor might apply to the Court asking that the company be brought within and under the provisions of that Act.

The Insolvent Acts had been repealed by the 43 Vic. ch. 1, (D.) (April 1st, 1880), and from that time till the passing of the 45 Vic. ch. 23 (May 17th, 1882), there was no mode by which the insurance company could be wound up in the technical sense of that phrase. During that interval, (on the 29th of November, 1881), Clarke instituted an action on behalf of himself and all creditors of the company against the company, alleging in his statement of claim that the license which the company held from the Provincial Treasurer to transact business in Ontario was suspended by order in Council; that the company was insolvent; that there were a great many shareholders of the company and it would be impossible to proceed with the cause if compelled to make all the shareholders parties, &c., and asking to have the company wound up and the assets administered under the direction of the Court.

On the 29th of November, 1881, this Court appointed a receiver, and various proceedings were had before the receiver, and subsequently before the Master, but such difficulty was experienced in prosecuting the action that the Master suggested the application for a liquidator.

Then the application was made for the order now appealed from.

I see nothing in the 47 Vic. ch. 39, sec. 2, to limit its application to companies being wound up at the date of 45 Vic. ch. 23. It applies to a company in liquidation *or* in process of being wound up. Liquidation would apply to a company insolvent, though not technically being wound up, and against which proceedings are being taken to realize its assets and pay its debts.

There appears to be no reason for proceeding under the 2nd section of 47 Vic. ch. 39, for the order might have been made under the amended section, 45 Vic. ch 23, sec. 1, under which it is only required that the company be insolvent.

Under either section notice need be given to the company only, as was done in this case, and perhaps also to creditors who have brought action against the company, and whose action would be stayed by the winding up order: 45 Vic. ch. 23, secs. 13, 20. The notice here, I think, was sufficient.

Nor does it seem to me that the objection that there was no power to refer the appointment of a liquidator to the Master is valid. The 24th section of 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, sec. 4, reads, that "The Court, in making the winding up order, must appoint a liquidator." But that means nothing more than the Court shall appoint through means of its ordinary machinery. Under section 92 of the (Imperial) Companies Act, *Buckley*, on the Joint Stock Companies Acts, p. 235, the appointment is to be made by "the Court," and it has been held that though the appointment may be made at the hearing of the petition, it will not be so made except by consent; and the settled practice now is in all cases to direct a reference to Chambers. It was said that this was the effect of General Order 8 of November, 1862(*a*). But a reference to the order does not establish it. It says: "The Judge may appoint without previous advertisement, &c.," and

(*a*) The rule referred to is as follows:

"8. The Judge may appoint a person to the office of official liquidator without previous advertisement, or notice to any party, or fix a time and place for the appointment of an official liquidator, and may appoint or reject any person nominated at such time and place, and appoint any person not so nominated."

Mr. Buckley (p. 510) says the object of this rule is, to enable the Court, in cases where all parties have agreed to the appointment of a well known person, to make the appointment immediately and thus accelerate the proceedings;" and he repeats the statement that "the settled practice is to direct a reference to Chambers." And I understand that the Chancellor has made such an order of reference in the case of *The East Lambton Printing Co.* (22nd of November, 1882).

The technical objection as to want of parties was scarcely argued, and seems to me untenable for reasons already given, and because it does not lie in the plaintiff's mouth to make the objection.

The order having been properly made it was obviously for the advantage of all parties that the proceedings had in the action should not be rendered useless and the expense thrown away. The adoption of those proceedings would not preclude any one who had not been a party to them from requiring them to be taken over again.

But the section of my order adopting these proceedings directed that they were to stand and be used in the said winding up proceedings in so far as the same can be made applicable, and in so far as the parties contesting their liability as shareholders may consent.

And the petitioners right to costs was protected by the order if it should turn out that he was entitled to them. The right of the company to costs in the action of *Clarke* v. *The Union Fire Ins. Co.*, was determined by the order of the Court on further directions of April 30th, 1884, and this could not be altered by me.

I think the appeal should be dismissed, with costs. It is a satisfaction to me to know that the petitioner as he has avowed his intention to appeal in case my opinion were adverse to him, will now have an opportunity of having his rights adjudicated upon by the highest authority in the province.

A. H. F. L.

[CHANCERY DIVISION.]

FUCHES ET AL. v. THE HAMILTON TRIBUNE PRINTING AND PUBLISHING COMPANY.

COPP'S CASE.

Directors—Company—Power to compromise—Liability of subscribers of stock—Contributories

C. subscribed for 160 shares in the H. Company, the subscription list being headed: "We subscribe for and agree to take the number of shares of the capital stock of the H. company set opposite our signatures, and to pay on account thereof 50 per cent. to the secretary-treasurer of the company in quarterly payments of 12½ per cent. each of the amount subscribed for by us respectively, the first of such payments to be made on February 1st, 1882." C. was at the first shareholders' meeting elected a director, and remained so until the final winding-up of the company. One of the by-laws of the company provided for the calling up of the second 50 per cent. of the stock subscribed at any time after November 1st, 1882, on thirty days notice. In August, 1883, the president of the company arranged with C. that he should sign for 80 shares on the terms of a new stock book which had been opened, and that C.'s original stock was to be treated as cancelled. C. accordingly signed the new book. This arrangement with C. was never communicated to the shareholders of the company. In January, 1884, a winding-up order was made, and C. was subsequently declared a contributory to the amount of 160 shares. C. now appealed, claiming to be a contributory only to the amount of 80 shares, on the ground that the arrangement of August, 1883, was a valid compromise, entered into with him because he subscribed originally on the understanding, (1st) that the company was not to go into operation before all the stock was subscribed for; and (2nd) that only 50 per cent. of his subscription would have to be paid.

Held, that, whether directors have inherent power to compromise with shareholders or not, there was nothing to support the compromise here set up. As to (1st,) C.'s actions as director, were totally at variance with this contention; and as to (2nd,) the subscription was unconditional, and though expressly providing for payment of 50 per cent. it was not inconsistent with the balance being paid when required. Moreover the by-laws, at the adoption of which C. was present, recognized the right to call up the whole stock, and C. appeared to have made no dissent.

THIS was an appeal on behalf of one Anthony Copp from the certificate of the Master at Hamilton, whereby it was found that the appellant was the holder of 160 shares of the stock of the Hamilton Tribune Printing and Publishing Company, incorporated under the "Ontario

Joint Stock Companies Letters Patent Act." On January 5th, 1884, the Master in Chambers, on the petition of certain creditors of the company on behalf of themselves and the other creditors, made an order for the winding-up of the company under 45 Vic. ch. 23. (D.), appointed a provisional liquidator, and referred it to the Master at Hamilton to appoint a permanent liquidator, settle the list of contributories, take all necessary accounts, and make all necessary enquiries for the winding-up of the company.

Proceeding under this order, the Master found and certified that the present appellant was a contributory to the amount aforesaid.

The facts of the case, as shewn by the evidence, appear from the judgment of the learned Chancellor.

Mr. Copp now appealed from the said finding, stating in his notice of appeal the following grounds:

1. That the original subscription for 160 shares of said stock was superseded by subsequent subscription for 80 shares, made in 1883, and the latter subscription was the only one that the company ever acted upon, and the only one that the company could have enforced against the said Anthony Copp, and the said Anthony Copp submitted to be put in the list of shareholders for 80 shares of said stock, on which a balance of $250 remains unpaid.

2. The agreement referred to in the evidence made on August 6th, 1883, was within the authority of the directors of the company to make, and was made *bona fide* by the board of directors, and sanctioned by the shareholders, and was a fair compromise of an honest and substantial dispute as to the liability of Anthony Copp to take 160 shares, and by the said agreement the holding of the said Anthony Copp was reduced to 80 shares of said stock, as the books of the company and their subsequent dealings with Mr. Copp shew.

The appeal came up for argument on November 5th, 1885, before Boyd, C.

A. Bruce Q.C., for the appellant. The heading of the subscription book is peculiar, and it was understood that only half of the amount subscribed for was to be paid. Moreover, it was a condition of Mr. Copp being liable that all the capital should be subscribed for before the company should go into operation. The signature of the new book

for $2,000 was the result of a compromise. All the cases cited before the Master were under the English Joint Stock Companies Act. Under our Act the powers of directors are larger: R. S. O. c. 150, secs. 21, 28, 29, 39. We rely, however, on *Dixon* v. *Evans*, L. R. 5 H. L. 606. What is to be looked at is, was there an honest contention on the part of the shareholder? If the compromise was *bonâ fide* it binds: *Brice* on Ultra Vires, 2nd Ed., pp. 387-8, 609; *Wright's Case*, L. R. 12 Eq. 331, 3 Ch. 55; Lord *Belhaven's Case*, 3 DeG. J. & Sm. 41; *Wollaston's Case*, 4 DeG. & J. 437.

Carscallen, contra. The appellant cannot contend that the company was not to go into operation till all the stock was subscribed, because he helped to organize it. I refer to *Spackman* v. *Evans*, L. R. 3 H. L. 171; *Brice* on Ultra Vires, 2nd Ed., pp. 375, 383, 387-8, 609; *Bennett's Case*, 5 De. G. M. & G. 284; *Munt's Case*, 22 Beav. 55; *Barton's Case*, 4 Drew 535; *Lindley* on Partnership, 4th Ed., pp. 735, 743.

Bruce in reply cited *Page* v. *Austin*, 10 S. C. R. 132; *Wheeler & Wilson Manufacturing Co.* v. *Wilson*, 6 O. R. 421.

November 11th, 1885. BOYD, C.—Mr. Copp was a provisional director of this company, and subscribed for 160 shares of stock after its incorporation. The list was thus headed: "We, the undersigned, do hereby subscribe for and agree to take the number of shares of the capital stock of the Hamilton Tribune Printing and Publishing Company set opposite our respective signatures, and to pay on account thereof 50 per cent. to the secretary-treasurer of the company in four quarterly payments of 12½ per cent. each of the amount subscribed for by us respectively, the first of such payments to be made on the 1st day of February, 1882."

At the shareholders' first meeting, on April 25th, 1882, Copp was elected a director, which office he seems to have retained down to the winding up order in January, 1884.

At the directors' meeting of 16th May, 1882, Copp was present, and was then appointed one of the Executive Committee. Under his auspices the business of the company was prosecuted till the fire of August, 1882. After the fire it appears at the meeting of October 23rd, 1882, that the recommendation of the Executive Committee was, "that as it would be hazardous to go on with only 50 per cent. paid up, the shareholders be asked to pay a full subscription when called upon." It does not appear that Copp was then present. This was, however, in pursuance of the by-laws of the company, number three of which provided that "the capital stock of the company shall consist of 2,000 shares of $25 each, which may be issued in such amounts and at such times and on such terms as the Board of Directors may from time to time order," and number five of which is: "The first 50 per cent. of the subscribed stock being called for under the terms of subscription in four quarterly payments of 12½ per cent. each, the first thereof payable on the 1st of February, 1882, no further calls (if any) shall be made on the last 50 per cent. until after the 1st day of November, 1882, and then not without at least 30 days' notice, and not more than 12½ per cent. of each share at any one call to be authorized by the directors."

At the special meeting of the shareholders on 28th of October, 1882, it was resolved that the third and fourth calls of 12½ per cent. each be paid forthwith, and the last of 50 per cent. be paid within one year as required by the directors from time to time. It does not appear that Copp was then or afterwards present at any meeting of the board of shareholders.

An arrangement was made by the President of the company, with the authority of the Board, with Mr. Copp's brother on August 6th, 1883, (the Director Copp being then absent from the country, and the brother being empowered to act in the matter), whereby Mr. Copp was to sign for $2,000 of stock on the terms of a new stock book which had been opened, and the original stock was to be treated

as cancelled. The effect intended was to treat the first subscription for $4,000 as at an end, and to substitute for it the new subscription of $2,000. Mr. McQuesten (*a*) in his evidence says: "We were authorized by the board to make such arrangement as we could, and we reported the above arrangement to the board."

The new subscription list has this heading: "We do hereby subscribe and agree to take the number of shares set opposite our signatures, and to pay calls on account thereof to the secretary-treasurer of the company from time to time in such instalments as the directors may by by-law appoint, credit being given for calls already paid by us under original subscription list." Mr. Copp made his payments subsequently according to this settlement.

There is no record of this transaction in the books or minutes save that in the stock register, shewing Copp's liability at $4,000, there is a pencil note in the secretary's writing, "Cancel $2,000." When it was put there does not appear. Mr. Copp did not actually subscribe the new stock list till about September, 1883.

It is argued that this arrangement was the result of a compromise *bonâ fide* entered into by the representatives of the directors, and which is a valid arrangement though never communicated to or approved of by the shareholders. Mr. Bruce argued that it was a compromise because of two contentions which were preferred on behalf of Mr. Copp: First, that he went into the concern on the understanding that the company was not to go into operation before all the stock was subscribed; and second, that he went into it on the understanding that only 50 per cent. of his subscription would have to be paid. Whatever argumentative value these pleas may have had I find no substance in them whatever to support such a compromise as this, made by members of the board with one of their own number.

(*a*) Mr. McQuesten was the President of the company. He made the arrangement in question in concert with the managing director of the company.—Rep.

As to the first, Mr. Copp's actions as director are totally at variance with such a contention. Whatever his original understanding, he did not guide himself by it, but allowed and sanctioned the operation of the company before all the capital was subscribed.

As to the second: the subscription is unconditional, and though it expressly provides for the payment of 50 per cent. it is not inconsistent with the balance being paid when required. Whatever the original understanding was, it was departed from and the right to call up the whole stock recognized when the by-laws were passed, to which I have adverted. Now the draft of these by-laws was submitted and adopted by the provisional directors at their meeting of the 24th of April, 1882, and the next day these by-laws were adopted by the first shareholders meeting. At both of these meetings Mr. Copp was present and made no dissent so far as the books and the evidence shew.

In *Dixon* v. *Evans*, L. R. 5 H. L. 606, Lord Westbury speaking of the power to compromise with a shareholder there exercised by the directors said, at p. 618: "I should be almost inclined to think that they would have such a power without the necessity of seeking any distinct authority beyond their deed of settlement. But," he goes on to say, "it is unnecessary to press that, because there is a distinct authority in the deed of settlement, which is directly applicable."

The contention there was, that of a shareholder who repudiated liability because a precedent condition had not been fulfilled, and Lord Westbury treated the case as one not of complete but only of conditional contract. The matter compromised was his contention that he was never a shareholder as there had been no agreement on his part.

In *Bath's Case*, L. R. 8 Ch. D. at p. 340, this *dictum* is referred to by Jessel, M.R., and is commended as pointing to the conclusion that corporations must have a power of compromise as an incident to their existence. That proposition indeed all the judges agree in holding as well

founded. The observations of the Master of the Rolls appear to indicate his view that the directors might exercise that power in a proper case, as being the acting representatives of the company.

But whatever may be the scope of the directors' inherent powers in this direction, I am very clearly of opinion that in the circumstances of the present case they had no power to bind the company by their unauthorized and uncommunicated action. This case falls within the views expressed by Hall, V. C., in the *Ex parte Trading Co.*, 12 Ch. D.. 19, in which it was sought to support a cancellation of directors' shares on the ground of compromise. But he found that the real ground for the cancellation was that there had been something said as to their not being under liability if they would take shares.

It is perfectly manifest that the alleged compromise would have no effect on the rights of creditors of the company antecedent to that date. As said in *Marshall* v. *Glamorgan Iron and Coal Co.*, L. R. 7 Eq. at p. 138: "No cancellation can affect a past liability," and it was stated that this company was insolvent in August, 1883.

Again, the alleged compromise at $2,000 secured nothing for the benefit of the company. This Copp would have to pay in any event. Even on his own shewing I think he would be liable for the whole of his first subscription to the creditors of this company, and the whole transaction appears to be rather the cancellation of an actual asset than the compromise of a matter of doubtful obligation: *Adams's Case*, L. R. 13 Eq. 474; *Hall's Case*, L. R. 5 Ch. 707.

I come to the same conclusion as the Master, though perhaps not for the same reasons, and the result is that the appeal is dismissed, with costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

HILLIARD v. GEMMELL ET AL.

Landlord and tenant—Tenant holding over after expiration of term—Rent payable therefor.

Where a party who has held for a term at certain rent continues to occupy after the expiration of his term, it is presumed, if there is no evidence to the contrary, that he holds at the former rent.

In this case the evidence showed that the plaintiff allowed the defendants to remain in occupation for two months after the expiration of their term, and made no demand for an increased rental; but they had notice that if they desired to remain on longer they must pay an increased rental.

Held, that the plaintiff must be deemed to have agreed to allow the defendants to remain for the two months on the terms of paying the rent reserved by the lease; but thereafter only on paying the increased rent.

THIS action was for an amount alleged to be due for use and occupation brought by a landlord against tenants who overheld after expiry of the term.

The cause was tried before O'Connor, J., without a jury, at Peterborough, at the Fall Assizes of 1885, when a judgment was given for the plaintiff for $301.66, and costs.

In Michaelmas sittings *Edmison* moved on notice to reduce that sum, claiming that the amount awarded for use and occupation after the expiry of the term should have been calculated on the basis of the rent payable under the lease.

2. That the learned Judge should have made an allowance for time lost when the mill was shut down for repairs.

3. And for fuel which was not supplied by the plaintiff during the over-holding.

During the same sittings, *Edmison* and *Wallace Nesbitt*, supported the motion, and referred to *Woodfall* on Landlord and Tenant, 12th ed., pp. 509, 526; *Evertson* v. *Sawyer*, 2 Wend. 507, 512; *Jones* v. *Shears*, 4 A. & E. 832; *Mayor of Thetford* v. *Tyler*, 8 Q. B. 95, 100; *Leigh* v. *Dickeson*, 12 Q. B. D. 194; *Elgar* v. *Watson*, 1 Car. & M.

494; *Weise* v. *Board of Supervisors of Milwaukee County*, 51 Wis. 564; *Lowrey* v. *Barker*, 5 Ex. D. 170; *Blackburn* v. *Lawson*, 2 A R. 215; *Tancred* v. *Christy*, 12 M. & W. 316, 323.

Dumble, contra, referred to *Mayor of Thetford* v. *Tyler*, 8 Q. B. 95; *Woodfall* on Landlord and Tenant, 12th ed., 526-27.

December 19, 1885. ROSE, J.—In my opinion the second and third grounds of the motion fail.

The learned Judge made no allowance for the time lost while repairs were being made, as the repairs were for the defendant's benefit. Moreover, it appears that the defendants were bound to repair under the terms of the lease.

As to the fuel, the covenant upon which the claim is founded was as follows: "The lessor agrees that he will supply the lessees with such fire-wood from his sawmill while he is manufacturing for export as they may require to run their factory, to the extent of fifty cords in each year." The learned Judge found as a fact and in accordance with the evidence that the plaintiff was not during the over-holding manufacturing for export.

The first ground was the one most strenuously argued by Mr. Nesbitt. He frankly admitted that if the learned Judge had any option in determining the amount he could not hope to succeed on this motion as the reduction could only be asked to the extent of about $80, being for nine and a half months at the rate of $300 per annum, instead of at the rate of $400 as allowed by the learned Judge.

Mr. Nesbitt's contention was that at the expiry of the term the defendants held as tenants at sufferance, and their holding was solely referable to the lease, and therefore the rent reserved by the lease governed and was the measure for the time they remained in possession after the expiry of the term.

This depends on the facts. If the holding was as a fact solely referable to the lease then probably the rent reserved must govern.

So far as seems material, the facts were as follows:

The term of the lease was for four years from the 1st of April, 1880. On the 16th of April the defendant wrote to the plaintiff asking if he was "going to renew the lease for them, or what is the best you can do for us."

To that the plaintiff replied on the 19th offering to give them "a renewal of the lease;" and adds, "but will have to ask you an advance equal to $500 per annum. In considering the offer you must not take present rental into account. I gave you the lease much below its value. I did so for the purpose of aiding you in making a start. You represented to me that your means were very limited, and could not afford to pay a large rental, for the reason that you had not capital to do a large business. If you decide the rental to be too high please advise me at an early date."

To this the defendants replied by letter, which was not produced, the plaintiff having lost or mislaid it prior to the trial.

The plaintiff says the letter contained a simple offer of $400; the defendants, that the offer was conditional upon repairs being made. They do not specify the repairs.

The learned Judge found that "they at the time made no complaint about repairs." No agreement was arrived at.

After the expiry of the term the plaintiff applied for possession, and on the defendants' request consented to their occupying the premises to enable them to work up the stock of wool then on hand, they saying they could work it up inside of two months. The defendants purchased other stock, and kept the premises during the summer and until the 15th of January following, and only gave them up after receiving a notice stating that if they remained after the 15th the plaintiff would charge them $5 a day, and would take the fact of their remaining as evidence of an agreement to pay that sum. There was evidence that the summer months were the best season of the year, and that repairs to the mill could not well be done in the winter.

The leading case in which the law governing this question seems to have been settled is *Mayor of Thetford* v. *Tyler*, 8 Q. B. 95, and was relied upon by counsel for both plaintiff and defendants.

There a Mrs. Tyler was tenant under a lease from the corporation with a rental of £47 per annum. Prior to the expiry of her term her son agreed to take a lease of the premises, to commence upon its expiry, at £80 per annum. By agreement between all parties the son entered into possession in April, 1843, some six months prior to expiry of the term, and continued in possession, paying the rent reserved in the lease. Some disagreements arose between the corporation and the son, and a new lease was accepted by the son. He, however, remained in possession, and at the end of a quarter after the expiry of the term under the old lease tendered rent at the rate of £47. The corporation demanded rent at the rate of £80. At the trial the defendant contended that he was in the same position as his mother would have been had she overheld without a fresh agreement. Alderson, B., thought the defendant must be considered a stranger to the tenancy; but reserved leave to move; and directed the jury to find what was a fair rent.

On motion in term the order *nisi* was discharged. Lord Denman, C. J., said, at p. 100: "The fallacy in Mr. Hill's" (counsel for defendant) "argument lies in making the plaintiff's case depend on a contract to pay the higher amount of rent. But the case rests upon a principle resulting from the nature of an action for use and occupation, namely, that he who holds my premises without an express bargain agrees to pay what a jury may find the occupation to be worth. Where a party, having held for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there be no evidence to the contrary, that he leases at the former rent. But in the present case there is so clear an indication of an intent to alter the terms that the principle cannot apply."

Williams, J., said: "I am of the same opinion. Under the peculiar circumstances the ordinary inference of law does not arise."

Wightman, J., said: "When a party is allowed to hold after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law. If there is nothing to show a different understanding, he will be considered to hold on the former terms: but here we have evidence to the contrary."

In the present case it seems to me when the plaintiff gave the defendants permission to remain in occupation for two months to enable them to work off their stock and made no demand for an increased rental, he must be held to have agreed to allow them to remain on the terms of paying the rent reserved by the lease. But his letter of the 19th of April was a clear notice that if they desired to have a further term the rent must be at an increased rate; and the defendants could not have fairly supposed he was willing to allow them to remain beyond the two months on the terms of paying the former rent.

In my opinion the judgment must be reduced by the sum of $16.66, being the rent or a sum for use and occupation for the first two months after the expiry of the term allowed in excess of the rate of $300 per annum, otherwise to stand.

As the defendants had a strict right to make the motion they cannot be directed to pay costs; but as they have succeeded only for a small portion of the amount claimed they should not have costs.

The motion will, therefore, be allowed to the extent of reducing the judgment by $16.60, without costs.

CAMERON, C. J., and GALT, J., concurred.

Motion allowed.

[COMMON PLEAS DIVISION].

FRYE v. MILLIGAN.

Hire contract—False representation—Deceit—Breach of warranty—Damages.

The defendant delivered a piano to the plaintiff on a "Hire contract," the price being stated to be $500, payable by crediting $100 on an old piano taken in exchange, and the balance of $400 by monthly instalments, the plaintiff giving a note for the $400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, and there were instalments in arrear when action was brought. The plaintiff sued for fraudulent misrepresentations, and for general damages for breach of implied warranties; the alleged misrepresentations or warranties being that the piano was worth $500: that it was a first class instrument; and as good as any Steinway or Chickering piano. The jury found for the plaintiff with damages.

Held, that the plaintiff could not succeed as to the false representation, for the evidence shewed that after she discovered the piano was not as represented, she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting; nor could she recover in an action for deceit, for she failed to show that the defendant did not believe the statements made to be true, or that they were made recklessly; and also no damages were shewn; and *Semble*, the statements were such as are properly styled simple commendation.

Held, also, that as the property had not passed, an action for the breach of warranty would not lie.

THIS was an action tried before Armour, J., and a jury, at St. Thomas, at the Fall Assizes of 1885.

The claim was for fraudulent representations made to the plaintiff on a sale of a piano. The same representations were set up as warranties, and damages claimed for alleged breaches thereof.

The representations or warranties were:

1. That the piano was worth $500.
2. And was a first-class instrument.
3. And as good as any Steinway or Chickering piano.

The contract was what is known as a time contract, and provided that the defendant did "neither part with the said piano" nor did the plaintiff "acquire any title" to it until the note which was given for the price was fully paid; and that on default of payment of the note or any of the instalments the defendant was authorized to enter the

plaintiff's premises and take and move the piano and collect all reasonable charges for its use.

The price, $500, was payable: $100 by an old piano taken in part payment, and the balance in monthly instalments, with interest.

The plaintiff gave a note for $400, payable in like instalments. This note was discounted with a private banker, the defendant indorsing it.

The instalments were not met as they fell due, and payment of certain of them was enforced in the Division Court; and at the time of the action there were other instalments in arrear, as appeared from the statement of defence.

The jury found for the plaintiff, with damages.

In Michaelmas Sittings *W. H. Meredith*, Q. C., obtained an order *nisi* to set aside the verdict and judgment for the plaintiff, and to enter a non-suit or judgment for the defendant, upon the grounds: 1. That the alleged representations of the defendant Milligan did not constitute a warranty or warranties, and were not actionable even if true. 2. That the property in the piano never having passed to the plaintiff she could not recover, and having made default in payment of the instalments due upon it her rights to the piano were gone; or for a new trial on grounds of alleged misdirection in the charge to the jury.

During the same sittings, November 2, 1885, *Meredith*, Q. C., and *Crothers*, supported the motion. There was no evidence of fraudulent representation. There must be moral fraud: *Jolliffe* v. *Baker*, 11 Q. B. D. 255; *Petrie* v. *Guelph Lumber Co.*, 11 A. R. 336, 341. The statements were made *bonâ fide*. There was clearly no warranty. What was said was merely *simplex commendatio*. In *Regina* v. *Bryan*, 1 Dears. & B. C.C. 265, followed in *Regina* v. *Ardley*, L. R. 1 C. C. R. 301, it is pointed out that when the representation is merely a vaunting or exaggeration of the value of the article on which the dealing is taking place by representing it to be in quality equal to a particular manufacture, this was not indictable; and although these were

criminal cases they may be looked at to shew the principles are equally applicable to civil cases. See also *Morrison* v. *Earls*, 5 O. R. 434; *Vernon* v. *Keyes*, 12 East 637; *Kerr* on Fraud, 2nd ed., 42, 43, 46. Under the hire-receipt the property did not pass to the plaintiff until the price was paid, and when the property has not passed no action of warranty for general damages can be maintained. The plaintiff could have rescinded the contract and have recovered back what she paid, but she has affirmed the agreement, and cannot sue now; *Elphick* v. *Barnes*, 5 C. P. D. 321. This point was decided in *Bennett* v. *Chatham Manufacturing Co.*, a *nisi prius* decision of Mr. Justice Burton at St. Thomas in April, 1884. The only damages that could be recoverable would be special damages: *Church* v. *Abell*, 1 S. C. R. 442; *Northwood* v. *Rennie*, 28 C. P. 202.

Falconbridge, Q. C., contra. There was clearly fraudulent misrepresentation. There was also breach of warranty. The case went to the jury, and they found for the plaintiff. The defendant attempts to escape liability on the warranty by setting up that because, as he says, there was no sale, that is, because he has guarded himself by the terms of the contract against the property passing, then the plaintiff is to be without remedy. There has clearly been a wrong practiced on the plaintiff, and where there is a wrong, there is certainly a remedy: *Kerr* on Fraud, 2nd ed., 44-47; *Addison* on Torts, 5th ed., 674; *Wall* v. *Stubbs*, 1 Madd. 80, 82; *Richardson* v. *Dunn*, 5 C. B. N. S. 655; *Mallan* v. *Radloff*, 17 C. B. N. S. 588.

December 19, 1885. ROSE, J.—I do not think the plaintiff can succeed on the count for fraudulent misrepresentation.

She is not entitled to have the contract rescinded, for after she discovered, as she alleges, that the piano was not what was represented she treated the contract as existing, and did not disaffirm or offer to return the piano. On the 11th of March, 1884, more than a year after she obtained the piano, she wrote to the defendant stating that owing

to financial embarrassment she was unable to meet the payments, and requesting him to re-sell the instrument.

Nor is she entitled to recover damages in an action for deceit, for she has not shown that the defendant did not believe the statements made to be true, or that the same were made recklessly. (See *Benjamin* on Sales, 4th Am. ed., sec. 694, and *Joliffe* v. *Baker*, 11 Q. B. D. 255). The learned Judge in his charge does not suggest such want of belief, but leaves to the jury the question solely as to whether the representations were true or false; and states the measure of damages to be the same as for breach of warranty, *i. e.*, general damages, no special damage being alleged or shewn.

Moreover, no damage was shewn up to date of the action, for the plaintiff had—including what was allowed for the old piano—paid only $175, and the piano at its lowest price was stated to be worth $200.

In order to recover in an action for deceit the misstatements must have been material. Without coming to a positive conclusion, I am strongly inclined to believe that the statements were such as are properly styled simple commendations—the praise by a vendor of the chattel of which he is endeavoring to dispose.

The law on this point may be found in *Schultz* v. *Wood*, 6 S. C. R. 585; *Morrison* v. *Earls*, 5 O. R. 434, 466-7; *Kerr* on Fraud, 2nd ed., pp. 42, 43, 46; *Benjamin* on Sales, 4th Am. ed., sec. 641.

I am also of the opinion that the action fails on the warranty. In Mr. *Benjamin's* work above referred to, sec. 1349, it is stated that where the property has not passed to the buyer he may reject the goods if they do not correspond in quality with the warranty; sec. 1351—After receipt and acceptance he may bring his action for damages; sec. 1352, or may counter-claim in the vendor's action for the price.

I have looked carefully at all the authorities cited and referred to, especially *Church* v. *Abell*, 1 S.C. R. 442, and *Ellis* v. *Abell*, 11 A. R. 226, but find nowhere any authority for

the proposition that where the property has not passed the buyer may recover general damages, *i. e.*, the difference between the value of the article contracted for and that supplied.

In *Northwood* v. *Rennie*, 28 C. P. 202, 3 A. R. 37, it was held that special damages could be recovered for breach of warranty on a conditional sale. The point was not taken in *Ellis* v. *Abell*.

I have found no case directly in point, nor was any cited. Counsel referred to the decision of Burton, J. A., at the sittings of the High Court at St. Thomas in April, 1884, in the case of *Bennett* v. *Chatham Manufacturing Co.*

On reference to that learned Judge I find that it was conceded by counsel in that case that there could be no recovery for breach of an implied warranty where the property had not passed, so that he was not called upon expressly to decide the question.

Apart from authority, on principle, I think the defendant's objection well taken. It would seem anomalous that, as here, when the contract expressly provided that no property should pass; when the instalments were in arrear, although I do not base my opinion on that fact; and when, therefore, the vendor had the right to re-take possession, there should be a recovery of damages, being the difference in value between the article contracted for, but to which the plaintiff was not and might never become entitled, and the article supplied, to the possession of which she had ceased to be entitled. If the payments were in arrear the most the plaintiff could claim would be that upon payment of the contract price she would become entitled to be put in possession of such an article as the defendant warranted the article supplied to be.

If this action could succeed the defendant might, and possibly would be placed, in the position of having allowed the plaintiff to have the use of a piano for more than two years, paid her $300, and received from her less than $200, and be compelled to take back the instrument, no longer new, but second-hand.

It may be said the plaintiff's position is a hard one if she is bound to continue her payments up to $500 on an inferior instrument, worth only $200, and wait until payment in full to recover the damages for the breach of warranty. The answer is, she had her remedy. She might have returned the piano so soon as she discovered the breach of warranty, that is, within a reasonable time after receipt, or if the facts warranted her in so doing, she might have had her action for deceit. Failing these, she must pay for the article and bring her action for the breach, or possibly plead the breach in answer to an action for the price. What her position in this case may be with reference to raising such a defence in an action by the endorsee of the note I have not considered.

The effect of discounting the note on the rights of the vendor is discussed in *Mason* v. *Bickle*, 2 A. R. 291.

On the whole I am of the opinion that the order *nisi* must be made absolute to set aside the verdict and judgment for the plaintiff, and to enter a judgment as of nonsuit for the defendant, with costs of trial and of this motion; but without prejudice to the plaintiff's right to bring a new action when she has paid the purchase money, if she be so advised.

CAMERON, C. J., and GALT, J., concurred.

Order absolute.

[CHANCERY DIVISION.]

DEMOREST V. THE GRAND JUNCTION RAILWAY COMPANY ET AL.

Arbitration—Compensation for land taken by Railway Company—Issue—Pleadings—Fixing day for making award—42 Vic. ch. 9, sec. 9, sub-sec. 21, (D.)

D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the Court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that therefore the sum of $400 offered by the railway company before proceedings taken had become the amount of the compensation.

The learned Judge found on the evidence that no time had been fixed by the arbitrators for making the award.

Held, that as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favor of the plaintiff, the sum of $400 offered had not become the compensation to be paid, and a reference back was ordered.

THIS was an action brought by Burnham G. G. Demorest against the Grand Junction Railway Company, amalgamated with the Midland Railway Company of Canada, and the Midland Railway Company of Canada, to compel the defendants to pay for certain land which the Grand Junction Railway Company had taken for their right of way.

The plaintiff's statement of claim set out the taking of the land, and alleged that no arbitration had taken place, and no payment had been made for the same.

The defendants' statement of defence denied the truth of the allegations in the statement of claim, and alleged the service on the plaintiff of a notice to arbitrate and an offer of $400 as compensation: that arbitration proceedings were had, and three arbitrators appointed who fixed a day for making their award, but made no award before the said day so fixed, and did not enlarge the time for making their said award: that by reason of such day being passed, and no legal award having been made, the said sum of $400 so offered had become the amount which the plaintiff must

accept; and alleged a tender and willingness to pay the $400 and interest.

The plaintiff's reply denied that the arbitrators fixed a day for making their award, and admitted that an award, or what purported to be an award, had been made, but upon the plaintiff's motion it had been set aside, and thereupon and after the execution of the said award the said arbitrators were *functus officio;* and that the plaintiff had requested the defendants to conclude the matter by arbitration, but the defendants refused to do so; and that the sum tendered was wholly inadequate for the plaintiff's just claim.

The action was tried at the sittings held at Belleville on October 8th, 1885, before Ferguson, J.

The facts are fully set out in the judgment.

Cassels, Q.C., and *Skinner*, for the plaintiff. The setting aside of the award did not renew the authority of the arbitrators. When the reference is ineffectual, it is the same as if there had been no award: *Russell* on Awards, 6th ed., 144-724; *Hall* v. *Pickering*, 40 Maine 548; *Grimshaw* v, *The Grand Trunk R. W. Co.*, 19 U. C. R. 493; *In re Horton & Adamson and Canada Central R. W. Co.*, 45 U. C. R. 141. Sub-sec. 13 of sec. 20, R. S. O. c. 165, does not apply because the County Judge did not appoint an arbitrator, and no day was fixed for the making of the award. The proceedings were not taken under the Dominion Act. The statute should be strictly construed, that is, the Court should be careful to see that all the facts required occurred: *Malloch* v. *The Grand Trunk R. W.*, 6 Gr. 348; *Scanlon* v. *The London and Port Stanley R. W. Co.*, 23 Gr. 559; *Edwards* v. *The Ontario and Quebec R. W. Co.** The plaintiff simply asks for an order that the defendants be compelled to arbitrate.

Bell, Q. C., and *W. H. Biggar*, for the defendants. This action was brought to compel the giving of the notice to

*Not reported. Tried at Peterborough before FERGUSON, J., on April 9th, 1884.

arbitrate. What was called for by the writ has been done, and the notice is sufficient, and what the plaintiff now claims is for something that arose after action brought. The present arbitration is still pending: *In re Horton & Adamson and The Canada Central R. W. Co.*, 45 U. C. R. 141. The sum offered by the defendants is now the sum that the plaintiffs are bound to accept.

Cassels, Q. C., in reply.

After the argument counsel for all parties arrived at an agreement which the learned Judge took down in the following words:

"Agreement.

"The parties now agree that I shall determine whether or not the $400 has become the absolute sum. If I determine that it has, the order may be made for the payment of it. If I am of the opinion that it has not, then the arbitration shall go on under the original notice, and in either event I am to dispose of the costs of this suit. The meaning is that the reference go back to the same three arbitrators, and with the same evidence if they, the arbitrators, or a majority of them, see fit to proceed upon the same evidence."

December 16th, 1885. FERGUSON, J.—The action, as appears by the record, is against the Grand Junction Railway Company amalgamated in the Midland Railway Company and the Midland Railway Company of Canada. It was commenced on the 31st day of January, 1884, and is (to put it shortly) for the purpose of compelling the defendants to proceed to an arbitration in respect of certain lands taken by them for the purposes of the railway, and damages pursuant to the provisions of the Railway Acts in that behalf.

After the issue of the writ the defendants gave notice under the provisions of the statute, the parties proceeded to an arbitration, an award was signed by two of the arbitrators, but the third arbitrator refused to execute it, or at all events, it was not signed by him. This so called award

was subsequently set aside as invalid by an order of the Court made on December 19th, 1884, after which the plaintiff proceeded in the action, the statement of claim being delivered on January 20th, 1885.

There might have been some, now unnecessary, trouble, had it not been for an agreement between counsel at and near the close of the trial, which was that I should determine whether or not the sum that had been offered by the defendants ($400) to the plaintiff before any proceedings had been commenced, and as I understood under the provisions of the statutes, had, upon the facts and under the circumstances, become the amount of the compensation to be paid by the defendants to the plaintiff, that if I should be of the opinion that this sum had become the amount so to be paid, then that I should pronounce an order or judgment for the payment of it. But, if I should be of the opinion that this sum had not become the amount so to be paid, then that there should be an arbitration, or rather that the arbitration should proceed under the original notice of the same given by the defendants, the reference being to the same three arbitrators, and that they should proceed upon the same evidence that they had taken in the former abortive arbitration if they, the arbitrators, or a majority of them, should see fit to proceed upon that evidence, and that in either event I should dispose of the costs of this suit.

There was some discussion at the trial as to whether the Railway Acts of Ontario or those of the Dominion applied to the case. After looking at the statutes and the cases referred to by counsel, I am of the opinion that the Legislation of the Dominion of Canada is that which is applicable. See the remarks of the Chancellor in *Darling* v. *The Midland R. W. Co.*, 11 P. R. 33. The application before Chief Justice Cameron, 10 P. R. 73, appears to have been prior in date to the passing of 46 Vict. ch. 24, (D.)

The enactment on which the defendants must, in my opinion, rely to support their contention on this subject is the Act of the Dominion Parliament 42 Vict. ch. 9, sec. 9, sub-sec. 21, which is as follows:

"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 them."

Mr. Lazier, one of the arbitrators who was called by the plaintiff, says that the arbitrators were sworn and professed to act under the Ontario Statute, and that he did not know anything of the Dominion Act. He says they appointed a time to meet and consider what the award should be, but this was after the evidence had all been given. He says there was no time fixed before which the award should be made that he knew of, or was a party to.

Mr. Robert Gordon, another of the arbitrators who was called by the defendants, says that they did agree upon a day that they would meet together and make their award. On cross-examination, however, he says that there was just an appointment of a time when they would meet and discuss the evidence. Both witnesses were, I think, quite candid, and when Mr. Gordon is properly understood, I think he does not disagree from what Mr. Lazier says, and, I think it quite clear that no day was fixed before which the award should be made, and I think there is no evidence whatever to shew that the arbitrators did, at the first meeting after their appointment, fix a day on or before which the award should be made.

The defendants in their statement of defence plead that pursuant to the statutes in that behalf, the arbitrators did fix a day for making their award, but failed to make any legal award on or before the said day, and that they did not on or before the said day, or at any time enlarge the time for making their award.

The plaintiff by his reply denies the allegation that the arbitrators fixed a day for making their award. An issue is thus raised, the finding upon which must undoubtedly

be in favour of the plaintiff. The words used in sub-sec. 21, above mentioned, are: "A majority of the arbitrators at the first meeting after their appointment * * shall fix a day." The Interpretation Act 31 Vict. ch. 1, sec. 6, sub-sec. 3, (D) says that the word "shall" is to be construed as imperative, and the word "may," as permissive.

Sub-section 21, aforesaid, provides that if the same (the award) is not made on or before such day, (the day so fixed) or some other day to which the time for making it had been prolonged, * * then the sum offered by the company as aforesaid, shall be the compensation to be paid by them. But the sub-section does not say that if the arbitrators shall not, at their first meeting, &c., have fixed a day on or before which the award shall be made, the sum offered by the company as aforesaid, shall be the compensation to be paid by them, or that in such a case this shall be the effect of the omission to fix the day at the time designated. The omission might have some other disastrous effect differing from the effect mentioned in the sub-section. However this may be, I do not think I am absolutely driven to decide it, for the parties have, by their pleadings, placed themselves upon an issue on the subject which they considered the material one, and which I have found in favour of the plaintiff, and besides, the fact that the arbitrators had not at the first meeting appointed a day for making their award was known to the parties, and they nevertheless proceeded with the arbitration to the end thereof, with the statute book before them making this provision on the immediate subject.

Again, a party pleading is bound to state the facts on which he relies for his case or defence. The issue raised is found for the plaintiff, and no amendment was asked.

I am of the opinion that it has not been made to appear that the sum offered by the defendants (the $400) has become, or is the compensation to be paid by them, and I think that, in accordance with the agreement above set forth, the matter in difference should be referred back to the same arbitrators, and that they may proceed upon the

evidence that was taken before them upon the former arbitration, if they, or a majority of them, see fit so to do. And after some hesitancy I am of the opinion that as the plaintiff has succeeded in respect of the substantial contention, he should be paid his costs of the action by the defendants.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

IN RE HONSBERGER.

HONSBERGER V. KRATZ.

Interest chargeable against executors—Gradation according to conduct—Commission—Costs—Allowance on moneys received pendente lite.

The English Rules regulating the award of interest against executors and trustees may be approximated in this Province (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate, at the statutory rate of 6 per cent: (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) By charging him who makes gain out his trust by embarking the money in speculative or trading adventures with the profits or with compound interest, as the case may be.

The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during that period was; but the notes and mortgages held by the executors bore interest for the most part at 6 per cent. The Master charged the executors with interest at 6 per cent per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the Master, it was

Held, that the interest should be charged at 6 per cent., but that the awarding of compound interest was opposed to the spirit of the decision in *Inglis* v. *Beaty*, 2 A. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors.

Held, also, that the executors were entitled to their costs, because the action was not occasioned by their misconduct; but they were disallowed the costs of such part of the enquiry as was caused by the

misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate.

The taking of administration proceedings does not deprive executors of their functions or even suspend them, and a reasonable allowance should made for moneys received *pendente lite*.

THIS was an appeal from the report of the Master, at St. Catharines.

The action was brought for the administration of the estate of Christian Honsberger and on the reference amongst other things the Master found as follows:

"Shortly after proving the will of the testator and soon after his death, the three executors, who were men of fair intelligence, appointed one of their number, the defendant Jacob Kratz, to be the acting executor of the estate, and that although the said Jacob Kratz kept a book in which he professed to record the receipts and disbursements connected with the estate in the usual course of business, yet the said Jacob Kratz failed to make such accurate entries in said book of said receipts and disbursements as it was his duty to have done, by reason whereof the expense of taking the accounts under the administration order herein has been increased: that the plaintiff filed a surcharge and falsification of the accounts filed by the defendants, seeking to charge the defendants with various items of receipts over and above what was admitted by the accounts, and to falsify payments as charged in said accounts and that the estate was benefited therefrom to the extent of $1000: that the said Jacob Kratz received large sums of money from time to time on account of said estate more than sufficient to meet the immediate requirements of the estate and he kept no bank account, nor did he deposit the moneys of the estate in any safe place of deposit until after the commencement of this action, nor did he invest any of the moneys of the estate, but on the contrary the said Jacob Kratz from time to time and at all times during his executorship retained and used a portion of the moneys of the said estate for his own purposes without indemnity to the said estate therefor, and it has been proven before me that he, the said Jacob Kratz, advised with his co-

defendant, Abraham Martin, who was cognizant of at least one sum of $1,326 being so used by the said Jacob Kratz upon one occasion * * out of the moneys of the said estate; but that the said Abraham Martin did not demand or insist upon security being given for said last mentioned sum and that as a fact security was not given therefor nor was the said amount repaid to the said estate up to the time the administration order herein was issued: that while large sums of money belonging to said estate were being retained and used by the said Jacob Kratz as stated * * interest was accruing on past due notes of the testator and other claims against the testator bearing interest and that nothing was paid or offered in payment of the legacies mentioned in the will of the testator by the defendants: that in taking the accounts of the said defendants I have * * charged the said defendants with interest at six per cent. per annum, with annual rests upon moneys in their hands belonging to said estate * * and that such interest amounts to the sum of $1,997, and I have allowed to the said defendants their usual commission for their services as executors of said estate: that I have allowed to the said defendants their costs.

From this report the executors appealed on the following grounds:

1. That the said Master should not have taken the accounts against them with rests.

2. That the said Master should not have charged them with interest upon the balances in their hands during their administration of the estate except upon a sum of $1,326, which the defendant Kratz admitted having applied to his own use as upon a loan from the estate.

3. That the Master should have allowed them commission on the sum of $3,812 paid in pending the proceedings and upon the sum of $1,997 which was the amount charged to them by the Master for interest upon balances in their hands.

The plaintiff gave notice of cross appeal on the allowance to the executors by the Master of their costs and commission.

The appeals came on for argument on October 22nd, 1885, before Boyd, C.

W. H. P. Clement and *Collier*, for the executors. There is no evidence that Kratz used any of the money in trade. The failure to pay the legacies arose because because the time had not arrived when they should be paid, and no monies of the estate were available, therefore no interest should be charged against the executors: *Boys' Home, &c., of Hamilton* v. *Lewis*, 4 O. R. 18; *Davenport* v. *Stafford*, 14 Beav. 319; *Williams* on Executors, 8th ed. 1851; *Blogg* v. *Johnston*, L. R. 2 Ch. 225; *Jones* v. *Morrall*, 2 Sims. N. S. 241; *Inglis* v. *Beaty*, 2 A. R. 453; *Burdick* v. *Garrick*, L. R. 5 Ch. 243. Commission should be allowed on moneys paid to executors pending action where they received mortgage moneys, gave discharges and were ready at any time to pay into court: *Simpson* v. *Horn*, 28 Gr. 1.

McClive, for Susan Honsberger. There is no question as to the interest charged on $1,356 spent by Kratz for a farm, for if he gave a mortgage on it he would have had to pay interest on the mortgage. The Master has properly taken the accounts with rests and charged the other amounts of interest. I refer to *Wiard* v. *Gable*, 8 Gr. 458; *Smith* v. *Roe*, 11 Gr. 312; *Small* v. *Eccles*, 12 Gr. 41.

Hoyles and *Ingersoll*, for the plaintiff. The evidence shews there was a clear breach of trust in dealing with the funds: *Williams* on Executors, 8th ed., 1852; *Mousley* v. *Carr*, 4 Beav. 49. Interest at the higher rate of 5 per cent. is allowed in England even where there is no misconduct: *Re John Jones—Jones* v. *Searle*, 49 L. T. N. S. 91, decided by Bacon, V. C.; *Gilroy* v. *Stephen*, 30 W. R. 745, Fry, J.; *Price* v. *Price*, 42 L. T. N. S. 626. *Inglis* v. *Beaty, supra*, is a case where the defendant believed he was entitled to use the moneys, and did not think he was committing a breach of trust. See also *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, ib. 468; *Walrond* v. *Walrond*, 29 Beav. 586; *Swaffield* v. *Nelson*, W. N. (1876) 255; *Norris* v. *Wright*, 14 Beav. 291;

Lockhart v. *Reilly*, 1 DeG. & J. 476. The executors should not get costs, it was their misconduct that caused the proceedings. The accounts were inaccurate as delivered to the heirs, and even as brought into the Master's office: *Smith* v. *Roe*, 11 Gr. 314; *Kennedy* v. *Pingle*, 27 Gr. 305. No commission should be allowed: *Sivewright* v. *Leys*, 28 Gr. 498 & 1 O. R. 378. The money paid in *pendente lite* was paid in by consent and arrangement of all the parties.

Clement, in reply. The books kept were fairly well kept for fifteen years. There were no intentional mistakes in the entries but mere blunders and no profit was made by Kratz out of the money with which the farm was purchased. As to the question of costs. The suit was necessitated by the death of one of the daughters. The usual præcipe decree was taken out and no charges of misconduct were made against the executors. They were asked for an account and at once furnished it.

October 22, 1885. BOYD, C.—The more modern rules developed in the English Courts regulating the award of interest against executors and trustees appear to proceed upon these main lines: (1) When the money is kept in the executors hands without sufficient excuse, the offence is deemed an act of negligence, and the usual Court rate of interest will be charged at four per cent. (2) When the executors are not only negligent but commit an act of misfeasance by expending the funds for their own benefit or in any other way use them, the higher rate of five per cent. will be charged. (3) If the act of misfeasance is of such a character as to lead to the conclusion that more than this rate of interest has been made out of the money as for instance if it is employed in ordinary trade or in speculation the beneficiaries will be allowed the option of either having an account of the profits or having the interest taken with rests: *Burdick* v. *Garrick*, L. R. 5 Ch. 241; *Liquidators of Imperial &c. Association* v. *Coleman*, L. R. 6 H. L. 209. The latest English rules of decisions were

in effect adopted by our Court of Appeal in *Inglis* v. *Beaty*, 2 A. R. 453, and the result has been to modify some of the earlier decisions on questions of interest in the reports. It is very distinctly laid down that the punitive element in awarding interest is now to be discarded and the compensatory principle is declared to be that which governs: *Gilroy* v. *Stephen*, 30 W. R. 745; *Re Jones*, 49 L. T. N. S. 91; *Price* v. *Price*, 42 L. T. N. S. 626.

The gradation recognized in English practice may, however be approximated here in some such way as this: by charging an executor who negligently retains funds which he should have paid over or made productive for the estate at the statutory rate of six per cent.; by charging him who has broken his trust by using the moneys for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and by charging him who makes gain out of his trust by embarking the money in speculation or trading adventures, with the profits or with compound interest, as the case may be.

The evidence in this case shews that the executors not only kept considerable and constantly increasing balances in their hands from year to year, but also allowed the acting executor to use that money as he pleased. It was not employed in trade nor is it proved that any profit was made out of it. There is, however, no special evidence to shew what were the current rates of interest during the this period, it appears that the notes and mortgages held by the executors bore interest for the most part at six per cent. If any evidence had been given that money was worth more than this, I should have charged the executors at the higher rate but at present I see no safe ground on which to place the interest at more than six per cent. yearly. Some of the earlier authorities might have warranted the Master in awarding compound interest, but I think that such a charge is opposed to the spirit of the decision in *Inglis* v. *Beaty*, *supra*, and could only be upheld as being in the nature of a penalty imposed on the executors.

Interest should begin to run at six per cent. on the sums in the executors hands from the close of 1871, when there was a balance of $686 on hand, which appears not to have been even partially applied in paying debts for many months.

As to costs, the Master was to some extent right in taxing costs, but the executors should not get their full bill as allowed. They should get costs, because the action was not occasioned by their misconduct or failure to account, but their wrongdoing in the mis-user of the funds is but partially remedied by the imposition of interest, therefore they should not get the costs of such part of the enquiry as grew out of their misapplication of the funds. Neither should they get such costs as have been occasioned by their failure to make reasonably accurate entries of their dealings with the estate. The Master certifies that the proceedings were lengthened and the expense increased on his account. This is not punishing them for not being skilled book-keepers, but it is only just to withhold from them costs incurred by their failure to set down with dates moneys received and paid, which the acting executor undertook to do, and which he could easily have done had he acted with ordinary care.

To whatever extent the expense in the Master's office has been increased by misconduct and by inaccurate and omitted entries—if ½, or ⅓, or ⅛th, or as it may be—a corresponding reduction should be made from the costs as taxed to the executors. The Master may certify as to this proportion if the parties desire it, or it may go to the taxing officer.

I see no grounds for interfering with the allowance of compensation to the executors: *Sivewright* v. *Leys*, 1 O R. 378. Their services were of value to the estate and no loss will arise attributable to them, as they are prepared to pay what is against them into Court. Some small sum for commission should be allowed in respect of the moneys received by them *pendente lite*, say about $50 in all. The taking of proceedings to administer does not deprive them

of their functions as executors, or even suspend them. Money paid to them thereafter is of the same character as money paid to them before action and on both a sum for compensation should be allowed, unless special reasons exist for disallowing it on what was received after action. None such appear in this case: *Berry* v. *Gibbons*, L. R. 8 Ch. 747; *M'Dermot* v. *O'Conor*, Ir. R. 10 Eq. 352.

The parties may have the account modified on the footing of this judgment before the Registrar, but if any one wishes a reference back to the Master it may be ordered without costs.

As success is divided on the appeal and cross appeal I think it better not to award any costs than to apportion them.

G. A. B.

[CHANCERY DIVISION.]

RE MONTEITH.

MERCHANTS BANK ET AL. v. MONTEITH.

Administration—Banks—Warehouse receipts—Warehouseman taking possession of goods—Creditors without execution—Estoppel—Rights of personal representative—Corroborative evidence—43 Vic. ch. 22, sec. 7. (D.)

In proceedings taken in the Master's Office to administer the estate of M. which was insolvent, the M. and D. banks brought in their claims as creditors. Other creditors opposed these claims on the grounds that the banks had been paid large sums in reduction of their debts by assets of the deceased, which they had taken after his death and before administration. The banks set up their right to the assets so taken under warehouse receipts therefor, signed by H. and held by them. It appeared that M., who was a provision merchant, in his lifetime had obtained advances from the banks on the faith of the receipts being valid securities, he representing to them that he had rented the cellar of his warehouse to H. as warehouseman, and that as such H. had sole charge of the cellar. Before the receipts matured, M. disappeared and was subsequently found dead. Before his death became known, H. and his solicitor took possession of the cellar and the property covered by the receipts, and posted up in the cellar a notice stating that H. held the property therein as warehouseman of the banks, to whom he had granted receipts. Two days after taking possession, H. refused to be any longer responsible for the property, which was subsequently taken by the banks under their receipts, and as it was rapidly deteriorating was sold by them. At the time of the sale there was no personal representative to M.'s estate, nor was there any execution creditor. It appeared by the evidence of H. that he had signed the receipts at M.'s request and as a matter of form, but that he had not leased the cellar, nor had he any control over it or the property contained in it.

Held, that the receipts were good between the parties and by the result of the subsequent dealings they were rehabilitated so as to be valid against creditors by the act of intervention on H.'s part during the life of M., but in any event, there being no creditor who had any *locus standi* when the banks sold under the receipts, they had the right to apply the proceeds to reduce their claim against M.'s estate.

Per BOYD, C.—There are two classes of persons authorized to issue warehouse receipts by section 7 of 43 Vic. ch. 22, (D.,) (substituted for 34 Vic. ch. 5, sec. 45, (D.)) viz., bailees of goods and keepers of a warehouse, &c., and the same sort of proof is not required in the case of the latter as in the former. The test of their validity does not necessarily depend upon proving that the warehouseman was actually, visibly and continuously in possession of them from first to last.

Per PROUDFOOT, J.—That section authorizes persons who are not warehousemen alone, but who may have other business also to give receipts, but these are comprised in the definition of "warehouse receipt," previously given in the statute, which requires the goods to be in the "actual, visible, and continued possession of the bailees."

Remarks as to the application to civil causes of the practice in criminal cases regarding the corroboration of accomplices.

THIS was an appeal to the Divisional Court from the judgment of Ferguson, J., given on an appeal from a report of the Master in Ordinary.

The action was for the administration of the estate of one William Monteith, deceased, and in proceeding in the Master's office the creditors who had no security proposed to attack the validity of certain warehouse receipts, which were the security of the secured creditors. This the Master refused to allow them to do on the ground that he had no jurisdiction to try such an issue; but on appeal his decision was reversed, and the matter was referred back to be disposed of in his office: *Merchants Bank* v. *Monteith*, 10 P. R. 458.

On that reference evidence was taken. The administrator and the unsecured creditors tendered the evidence of one Herson, who had issued to the deceased the warehouse receipts. The Master ruled that his evidence could not be received. This decision was reversed on appeal, and the matter again sent back to the Master's office: *Merchants Bank* v. *Monteith*, 10 P. R. 467, 475.

On the last reference the Master disposed of the question referred back, by finding against the contention of the unsecured creditors, and re-affirmed his former findings, but gave no costs on the ground that if the cases he referred to in his judgment (*a*) had been cited on the

(*a*) In his judgment dated April 18, 1885, the Master-in-Ordinary referred to *Regina* v. *Farley*, 8 C. & P. 106; *Regina* v. *Stubbs*, 1 Jur. N. S., 1115; *Bridges* v. *King*, 1 Hag. Ecc. Cas. 288; *Bean* v. *Bean*, 12 Mass. 19; *Kittering* v. *Parker*, 8 Ind. 44, 1 *Wharton's* Law of Evidence, par. 414; *Cotton* v. *Luttrell*, 1 Atk. 451; *Howard* v. *Braithwaite*, 1 V. & B. 202; *Bootle* v. *Blundell*, 19 Ves. 494, and then proceeded: "These references seem to warrant the conclusion that the salutary and prudential practice of judicial cautions to juries to regard with distrust the testimony of a witness, who is an accomplice in a crime, though not a rule of law, applies equally to the testimony of a witness who is an accomplice in a fraud, in fact to all civil and criminal cases where witnesses are allowed *suam allegare turpitudinem*.

If during Monteith's lifetime civil and criminal actions had been instituted respecting these warehouse receipts, Herson would be a competent witness against him. But can it be contended that a Judge trying each

appeal there would, in his opinion, have been no reference back.

From this finding the unsecured creditors and administrator again appealed, and the appeals were argued in Chambers on May 11th, 1885, before Ferguson, J.

J. A. Paterson, for the unsecured creditors.
McGregor, for the administrator.
Geo. M. Rae, for the Merchants Bank, } Two of the se-
W. N. Miller, for the Dominion Bank, } cured creditors.

action would caution a jury as to his evidence in the criminal and not in the civil action ?

Further evidence has been given on this reference presumably as a corroboration of Herson's testimony, but I do not find that it comes within the definition of corroborative evidence. It can, I think only be read as shewing a probability of Herson's evidence being correct rather than corroborative of the facts stated by him, which if true would invalidate the warehouse receipts. There is however a great difference between evidence of the probability and evidence corroborative of a fact. Evidence proving the probability of a transaction but not going into the transaction or act itself is not corroborative evidence : *Simmons* v. *Simmons*, 11 Jur. 830, *Regina* v. *Birckett*, 8 C. & P. 732 ; *In re Whittaker—Whittaker* v. *Whittaker*, 21 Ch. D. 657.

The parol evidence given by Herson on the former reference impeached his truthfulness: upon his oath he asserts that to be false which he had in the written documents signed by him, attested to be true.

The further evidence on this reference weakens his credibility, while it establishes that Monteith was in every way reliable and trustworthy. It also places beyond question that Monteith on every occasion represented to the banks that Herson had leased the cellar of his warehouse, which representations the warehouse receipts signed by Herson himself confirmed, and which fact was so found by Rose, J., in *Monteith* v. *Merchants Bank* 10 P. R. 469."

The Master then referred to *In re Browne*, 2 Gr. 590 ; *Cameron* v. *Barnhart*, 14 Gr. 661 ; *Royal Canadian Bank* v. *Cummer*, 15 Gr. 627 and proceeded : " Any one of the grounds commented upon would justify my not giving effect to Herson's evidence. * * I must disregard Herson's evidence as utterly unsafe to warrant a finding against the validity of the warehouse receipts : *Cotter* v. *Cotter*, 21 Gr. 159 ; *Grant* v. *Brown*, 13 Gr. 256. I dispose only of the question referred to in the Chancellor's judgment and reaffirm my former findings. I give no costs. If the cases above referred to had been cited on the appeal I think there would have no reference back."

July 4th, 1885. FERGUSON, J.—This is an appeal from a report or judgment of the Master in Ordinary. The matter or suit is one for the administration of the estate of the late William Monteith. The appellants say in effect:

1. That Monteith died insolvent, and that after his death, and before any administration had been granted in respect of his estate, the Merchants Bank forcibly entered his warehouse and removed a quantity of goods of the estate and converted the same to their own use, the value of which was $6,544.62.

2. That the Merchants Bank pretend to have been entitled to these goods under and by virtue of certain alleged warehouse receipts, which the appellants say were invalid.

3. That at any rate, the Merchants Bank by so acting constituted themselves executors *de son tort* and are liable for these goods to the estate.

4. That the Merchants Bank not only so constituted themselves executors *de son tort*, but really acted as such by giving a portion of such goods to other creditors, the Dominion Bank, one Walsh, and D. Gunn & Co. And they submit that the Merchants Bank should account to the estate for the said sum of $6,544.62, not by way of a credit upon their account against the estate, but as a sum to which they were in no way entitled, and that it should be found that they owe this sum to the estate.

The chief contention was as to the validity of the warehouse receipts under which the Merchants Bank acted.

These receipts were signed by one Herson, and were delivered to the bank by the late Mr. Monteith in due course of business for or as a security for large advances of money made to him also in the usual course of business, and it was conceded that the receipts were to all appearance genuine in every respect, and accurately drawn. There had been a former appeal from the Master's judgment upon one point and on that point alone there was a reference back to him, and in giving his last judgment he says that he disposes only of the question so referred back to him, and he re-affirms his former findings.

There was much contention as to whether or not Herson was in possession of the goods within the meaning of section 45, as passed in 43 Vic. ch. 22, (D.), where it is said that: "Warehouse receipts, when used herein, shall be held to mean any receipt given by any person, firm, or company for any goods, wares, or merchandise in his or their actual, visible, and continued possession, as bailee or bailees, in good faith, and not as of his or their own property," &c. It was contended by the appellants that Herson was not shown to have been in such possession of the goods, which were in the cellar of the building occupied by Monteith as his place of business.

In the Master's judgment, in which are the former findings mentioned in his last judgment, he quotes the finding of my brother Rose, before whom the action *Monteith* v. *The Merchants Bank*, was tried. That action involved the same question apparently in respect to the same warehouse receipts, and the learned Judge said: "I find as a fact that the goods claimed were covered by the warehouse receipts produced by the bank, and were taken by the bank under and by virtue of such receipts. I find that the bank advanced the money secured by such receipts. I find that Herson, who signed the receipts, was lessee of the cellar where the goods were stored and warehoused. I find that Monteith represented to the bank that Herson was a warehouseman, and had warehoused goods for him for years, and on such representations had obtained the advances." And he held that Herson could not be allowed to give evidence that the warehouse receipts were false and fraudulent, &c. That action was by the personal representative of the late Mr. Monteith, and the learned Judge held that he was not in any better position than Monteith himself would have been had he been living and the plaintiff, and that he could not claim the goods against the representations on which the moneys were obtained.

Here, one class of the appellants, the unsecured creditors of the late Mr. Monteith are, as regards an estoppel in a different position. In *Bigelow* on Estoppel, 2nd ed. 249, it

is stated that an administrator is, of course, in privity with the intestate in regard to the personalty, and the author shows I think clearly and upon American authority that there is no privity between even a judgment creditor and his debtor, and says: "If judgment creditors are not privies of the debtor how can simple contract creditors be such privies?"

It is I think clear that the estoppel referred to by my brother Rose, does not apply to the unsecured creditors of Monteith who are separately represented on this appeal, and who were, as I understand, separately represented before the Master in Ordinary.

The warehouse receipts were signed by Herson. He signed them, no doubt, knowing the money was to be obtained from the banks upon them as security. This was a representation by him that he had received the goods and had possession of them. Monteith when he indorsed the receipts to the bank represented also that Herson had the possession of the goods. The receipts were regularly drawn, and on their face appeared to be perfectly valid. The money was advanced upon them in good faith.

The evidence shews that Herson was at Monteith's place of business (if not in the cellar in question) every day, or every day or two.

The Master, in the same judgment, finds that after the death of Monteith Herson was in possession of these goods; that he claimed to be in possession of them as a warehouseman; that he told the bank officers that they might take the goods, and that thereupon and by virtue of these warehouse receipts the banks took and disposed of the goods. He also finds that after the death of Monteith, and before any one on behalf of the banks appeared, Herson went with his solicitor and posted up a notice in the cellar in these words:

"From this pile west and north is the property of the Dominion Bank and Merchants Bank, of which I am warehouseman, and have given warehouse receipts.

(Signed) J. HERSON."

In his last judgment the Master says that the parol evidence given on the former reference impeached his Herson's truthfulness: that upon his oath he asserted that to be false which he had in the documents signed by him attested to be true, and that the further evidence on the reference weakened his credibility, while it established that the late Mr. Monteith was in every way reliable and trustworthy, and placed beyond all question that Monteith had on every occasion represented to the banks that Herson had leased the cellar of his warehouse, and that the warehouse receipts signed by Herson were confirmatory of this.

The burden was I think upon the appellants of showing that Herson had not leased the cellar, or that he was not in possession of the goods. To show this, they relied upon the evidence of Herson, and apparently more or less upon that of Chapman, who had been book-keeper for the late Mr. Monteith. As to Herson the Master (apart from the question discussed in his former judgment, and the judgment of the Chancellor in appeal from the same) discredited him, and he informs me that he did not place reliance upon the evidence of Chapman.

The giving of a false receipt as a warehouse receipt, or the making of a false statement in a warehouse receipt is, under the provisions of the 64th and 65th sections of the Act, 34 Vic. ch. 5 (D.) a misdemeanor, and the Master has, under all these circumstances, found in favor of the truthfulness of these receipts, and the honesty of the transaction by which the receipts were given. I am not prepared to say that he was wrong, or that the appellants satisfied the onus that was upon them, to which I have already referred.

If, then, it is assumed that Herson was the lessee of the cellar and in possession of the goods in the manner stated in the statute, or that he was so in possession of the goods, it would appear that the warehouse receipts are good, and the transactions between Monteith and the banks one of the ordinary character, and, for the reasons that I have endeavored shortly to state, I think it should be so

assumed, and I think there is no sufficient foundation for the contention that the banks made themselves executors *de son tort*. I am of the opinion that the judgment of the Master should be affirmed, and the appeal from his report dismissed. I see no good reason for withholding costs, and the appeal will be dismissed, with costs.

From this judgment the unsecured creditors and the administrator appealed to the Divisional Court, and the appeals were argued on September 8th, 1885, before, Boyd, C., and Proudfoot, J.

J. A. Paterson, for the appeal. On the former appeal it appeared that the Master declined to give effect to Herson's evidence, and the Chancellor referred the case back to him. The Master has re-affirmed his judgment (reads the Master's judgment partly set out in footnote.) The attitude of the Master in giving his last judgment is not what we are entitled to in this case after the reference back by the Chancellor. He will not be overruled. The ruling above was not satisfactory to him, [BOYD, C.—But my brother Ferguson has found the Master's finding correct] Yes, but he did not see the witnesses, and his reading of the depositions did not give him the same advantage. That learned Judge says we did not prove that Herson had no lease. I do not care whether he had or not, as the evidence shews that he was not in actual and continued possession: *Milloy* v. *Kerr*, 8 S. C. R. 474. The onus should be on the banks to shew that they were carrying on their business in the usual way. The banks should shew they followed the statute. 43 Vic. c. 22, s. 45 (D.) shews what a warehouse receipt is, and 34 Vic. c. 5, s. 40 (D.) shews how banks are to do their business. Herson's own evidence shews that he was not in possession of the goods, and he is corroborated by several other witnesses. The Master has found against the evidence. If Monteith, in his lifetime, had refused the goods to the banks they could not have recovered them. My clients have a right to attack the receipts: *Royal*

Canadian Bank v. *Miller*, 29 U. C. R. 266; *Taylor* v. *Brodie*, 21 Gr. 607; *Kitching* v. *Hicks*, 6 O. R. 739; *Chamberlen* v. *Clark*, 9 A. R. 273. The case against my contention is *Parkes* v. *St. George*, 10 A. R. 496, but there the security was good as between the parties, and here it is bad. (BOYD, C.—Your position is just this, that on the death of Monteith these goods were assets of his estate subject to any valid liens.) Yes, and my clients can make the banks account as executors *de son tort*: *Sharland* v. *Mildon*, 5 Ha. 469; *Edwards* v. *Harben*, 2 T. R. 587; *Mountford* v. *Gibson*, 4 East. 444.

McGregor for the administrator. The administrator is in a better position than the deceased, and a defence which could be set up against the latter could not be set up against the former. The goods passed by the Surrogate law to the administrator. The banks should prove their warehouse receipts: *Howes* v. *Ball*, 7 B. & C. 481. *Taylor* v. *Brodie*, 21 Gr. 607, is an authority to show that any creditor who is overpaid will be ordered to refund. (Proudfoot, J. *Chamberlen* v. *Clark*, 9 A. R. 273, proceeded on the same ground). An administrator is in the position of an assignee of an insolvent estate. When the evidence is all one way the Master cannot say I refuse to believe one witness and decide against that evidence, as he did in this case. I refer to *Kilbourne* v. *Fay*, 29 Ohio St. 264; *Royal Canadian Bank* v. *Ross*, 40 U. C. R. 466, and the cases there cited: *Elmslie* v. *McCaulay*, 3 Bro. C. C. 624; *Doran* v. *Simpson*, 4 Ves. 627; *Utterson* v. *Moir*, 2 Ves. 95.

Rae, for the Merchants Bank. The onus lies upon those who claim the banks are debtors to the estate in the same way as any plaintiff proving a debt against a defendant. The change of possession is a question of fact, and the weight of evidence is in favour of the banks: *Scribner* v. *McLaren*, 2 O. R. 265. Herson was a curer and packer of pork, and as such was one of the parties entitled under the statute to give warehouse receipts. As soon as Monteith disappeared Herson posted his notice shewing he was in possession,

and told the banks to take their goods, which they did, and there being no fraud their action will be upheld. Herson's oral evidence cannot be believed in opposition to his written evidence in the warehouse receipts and the representations made by Monteith: *Robins* v. *Clark*, 45 U. C. R. 362; *Holton* v. *Sanson*, 11 C. P. 606; *Nolan* v. *Donnelly*, 4 O. R. 447; *Brice* on *Ultra Vires*, 2nd ed. 814. As to *Kilbourne* v. *Fay*, 29 Ohio St. 264, see *Jones* on Chattel Mortgages, sec. 240.

W. N. Miller, for the Dominion Bank. The unsecured creditors say the banks had no right to take the goods, then they should prove it. Their witness is a discredited man. The evidence shews that Herson was at Monteith's every day. The warehouse receipts are *primâ facie* evidence that Herson was in possession, and there is not sufficient evidence to displace that state of facts up to the date of Monteith's death: *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *The Merchants Bank* v. *Smith*, 8 S. C. R. 582, judgment of Mr. Justice Strong. Even if the warehouse receipts were bad, we are entitled to the goods by virtue of our equitable lien which we got when we took possession. Monteith would be estopped from setting up the invalidity of the warehouse receipts, and his administrator is in no better position, No administrator had been appointed when the goods were sold, and the unsecured creditors had no rights as they had no judgments: *Parkes* v. *St. George*, 10 A. R. 496.

Paterson, in reply.

McGregor, in reply.

December 3, 1885. BOYD, C.—In proceedings taken in this Court to administer the estate of the deceased Monteith, the Merchants Bank and the Dominion Bank brought in their claims as creditors, and sought to prove in order to obtain a share of the assets, as it is conceded on all hands that the estate is insolvent. Other creditors opposed their claims on the ground that they had been paid large sums in reduction of their debt by assets of the deceased which they had taken after the death and before administration. The

banks set up their right so to do under warehouse receipts which it was said covered the goods and merchandise taken. This the other creditors contested, alleging that on the proper taking of accounts it would appear that the banks had thus received more than the dividend which would come to the other creditors, and that for the surplus they should account to the personal representative, and to the unsecured creditors.

The banks have obtained an order by which they are the plaintiffs in the administration proceeding. The questions thus raised as to the assets require to be cleared in order to the due administration and distribution of the estate, and the banks themselves invite adjudication by conducting the proceedings and claiming to prove and rank as creditors.

The case of the appellants briefly is this, the goods in question were in the possession of Monteith at his death, and thus were assets vested in the administrator. The answer of the banks is, the goods were validly pledged by the deceased during his life, and after his death they had the right to enforce their security as and when they did. In reply, the creditors say that the warehouse receipts held by the bank were invalid, and were not cured by any action of the parties prior to the death, and after death, the estate being insolvent, the rights of the administrator and of the other creditors intervened and could not be affected by the *ex parte* action of the banks.

The warehouse receipts impeached were given by one Herson, and the special invalidity complained of, as argued before us, consisted in this, that he was not a competent warehouseman (within the meaning of the Act, 43 Vic. ch. 22, sec. 7, (D.), because the goods, &c., were not in his "actual, visible, and continued possession" during the currency of the receipts. This, it is contended, was proved affirmatively by the evidence given on behalf of the appellants. The provisions of the present statute are to be scrutinized, *i. e.*, the new section 45 substituted by the Act of 1880, ch. 22, (D.) for that section as it was in the Act of 1871, ch. 5, (D.) The definition now given of a warehouse receipt reads thus:

"The words warehouse receipt, when used herein, shall be held to mean any receipt given by any person, firm, or company for any goods, wares, or merchandise in his or their actual visible, and continued possession, as bailee or bailees, in good faith, and not as of his or their own property; and shall comprise receipts from any person who is the keeper of any harbour, cove, pond, wharf, yard, warehouse, shed, storehouse, tannery, mill, or other place in Canada for goods, wares, or merchandise, being in the place, or one or more of the places so kept by him, whether such person is engaged in other business or not."

This is to be read so as to discriminate between two classes of persons who are authorized to issue such receipts.

1. Any *bonâ fide* bailee of goods which are in his actual visible and continued possession may give receipts therefor; and

2. Any person who is the keeper of a warehouse or other place for goods can in respect of goods being in that warehouse or place give such receipts. See *Bank of Hamilton* v. *Noye*, 9 O. R. 631.

I think that these two classes were confounded during the argument of this appeal. The same sort of proof is not required in the case of a warehouseman granting such documents as in the case of a mere bailee of the goods. Herson, in the transactions now before us, acted as a warehouse keeper and not as a mere bailee of the property. He issues the receipts in the former character and the test of their validity does not necessarily depend upon proving that he was actually, visibly, and continuously in the possession of them from first to last. The receipts were upon their face valid and, therefore, not governed by the decision in *Royal Canadian Bank* v. *Miller*, 29 U. C. R. 266, relied on by the appellants. They were in this form:

WAREHOUSE RECEIPT.

Received in store in warehouse at 25 Church street from Wm. Monteith 1,000 sides long clear bacon, 70,000 lbs., to be delivered to the order of the said Wm. Monteith to be endorsed hereon.

This is to be regarded as a receipt under the provisions of stat. 34 Vic. cap. 5.

The said bacon is separate from and will be kept separate and distinguishable from other grain (*sic.*)

Dated, Toronto, 5th April, 1883.

(Signed) J. HERSON.

These Monteith endorsed to the banks. No suspicion is cast upon the dealings of the banks, and their position as *bonâ fide* creditors who advanced upon the faith of these instruments is not impeached.

One chief point to be determined is: Were the receipts valid at their inception? It was argued that they were void. Whatever might be the weight of this argument if made by execution creditors, in my opinion they were not void but valid securities in the circumstances of this case.

Herson, who signs the receipts is, as against the banks, estopped from denying that he was warehouseman and that as such he had the goods specified in the receipts in his custody. Similarly Monteith, who obtained the advances from the banks on the faith of these receipts being good securities and who represented to the banks that he had rented the cellar of his warehouse (25 Church street) to Herson as warehouseman, and that as such, Herson had sole charge of the cellar and would give the receipts for such advances, would be estopped from denying the truth of such statements, upon reliance on which the banks changed their position: *Bigelow*, on Estoppel, 2nd ed. 429; *Knights* v, *Wiffin*, L. R. 5 Q. B. 650; *Sim* v. *The Anglo American Telegraph Co.*, 5 Q. B. D. 188. Such would be the position of the parties during the currency of the receipts, and in the absence of any execution creditor intervening. Before the receipts matured Monteith disappeared on Saturday the 25th August, 1883; his dead body was found on Wednesday, 29th August; beyond this, the precise time of his death is not shewn. After the disappearance of Monteith, Herson accompanied by his solicitor Mr. Macgregor went to the cellar in question where the goods covered by the warehouse receipts were stored, (their identity appears to be indisputable) and

formally took actual possession of them on that day, which according to the weight of evidence, was Monday, 27th August. At that time and with Herson's sanction, the solicitor wrote out a notice which was affixed to one of the pillars in these words: "From this pile west and north is the property of the Dominion Bank and Merchant's, of which I am warehouseman, and have granted warehouse receipts. (Signed) J. HERSON."

Herson claimed the right to do this, and as between himself and Monteith unquestionably had that right to possess himself of the goods as bailee for the banks. I am not to assume that Monteith was then dead, rather am I to regard him as living, in the absence of any evidence, that he was then not living. Such was the state of affairs, Herson being in possession for the banks, till the afternoon of of Wednesday, when the sheriff seized all the property in the cellar under a writ of replevin at the suit of Walsh. Herson then refused to be any longer responsible for the property now in question, and threw down the key of the cellar, which he had obtained on Monday, and told the banks that they might take the goods and do as they pleased with them. Next day Monteith's death was known and I suppose the sheriff withdrew as the replevin suit had abated. The cellar and storehouse were then locked and left under charge of Monteith's book-keeper as caretaker. From him the banks afterwards obtained permission as the receipts were maturing, to take the bacon, &c., and sell it, as it was found to be spoiling and becoming rapidly unsaleable. There was at this time no personal representative to Monteith's estate, so that the banks were of necessity acting *ex parte*, but there was then no execution creditor to complain.

The result of these dealings appears to me to be this: The receipts at first were good and valid as between the parties, they were now rehabilitated so as to be valid against creditors by the act of intervention on Herson's part during the life of Monteith, and there was no creditor who had any *locus standi* to complain when the banks

sold under the receipts and applied the proceeds to reduce their claim against Monteith's estate.

Fraud is out of the question so far as the banks are concerned; there was no fraudulent or undue preference obtained by them at the expense of other creditors. Legally, as between Monteith and his estate, represented by his administrator, on the one hand, and the banks on the other, they had the right to hold in pledge and realize upon this property. Therefore, in my opinion, the report should not be disturbed as made in favor of the banks.

I may say that if the appeal rested upon the credibility of Herson and those who corroborate him, I should have come to a different conclusion from the Master. There is no reason to doubt the truth of what he says: that he was not lessee of the cellar, and had no control over it so far as the public was concerned. He signed the receipts as a matter of form or of accommodation between himself and Monteith, and being either ignorant or regardless of the offence which he was committing. If an execution had reached the sheriff against Monteith before the taking possession of the property by Herson, I do not see how it would have been possible for the banks to have preserved their security. But as the facts are, the banks perfect their security and realize upon it before any creditor attacks or is competent to attack the transaction, and there being no fraud, the possessors retain what they have legally gained.

Nothing more need be said upon the merits of this appeal, but it is necessary to advert to the unusual course pursued by the Master in seeking by written and reported opinions to justify and re-establish former judgments of his reversed on appeal. That they are reported, and may thus mislead other officers and bring the practice into a state of confusion, is my reason for dealing with what might otherwise have been left unnoticed.

The Master having held at the outset that he had no jurisdiction to deal with the contest between the banks and the other creditors, this ruling was on appeal reversed, and the matter was referred back to be disposed of in his office:

10 P. R. 461. When he does subsequently deal with it, he suggests that the reference back was not sufficiently considered: 10 P. R. 474. But he overlooks the invariable rule of this Court in the administration of assets, which is referred to, and acted on in *Wilson* v. *Paul*, 8 Sim. 63, and *Mitchelson* v. *Piper*, *Ib.* 64. That is, when one creditor of an insolvent estate has, after the testator's death, received or obtained payment of part of his claim, which works a preference in his favor, the Court will not pay him any dividend out of the remaining assets until the other creditors have received the same proportion upon their claims. Having jurisdiction, therefore, to deal with the claim of the banks to rank upon the estate and share ratably with the other creditors, the Master was necessarily involved thereby in the consideration of the whole transaction now in question, which rests upon the one state of facts.

Again upon the question of evidence: The Master reasserts the correctness of his original judgment upon the evidence, and the methods by which it was reached. His views are presented in such a shape that it is necessary again to refute them and prevent an innovation by which the stringent procedure of the criminal law shall be introduced into the Master's office.

In criminal law the cautionary practice is well known that in serious cases it is not safe to allow conviction to rest upon the unsupported testimony of an accomplice, and it is now the almost invariable practice to advise the jury to acquit the prisoner in such cases unless that testimony be corroborated in some material fact: *Regina* v. *Siddons*, 16 C. P. 389. This rule, however, has not been extended in civil cases to the testimony of self discrediting witnesses, or of those who seek to impeach instruments which they have signed or circulated as trustworthy. Upon a former occasion the Master dealt with the evidence of Herson as that of an accomplice in a criminal act, and held that effect should not be given to it unless materially confirmed by other evidence: 10 P. R. 471, 472. Upon appeal I remitted the report for further consideration and evidence (if it

was desired by either party), intimating that it was unsafe to import into civil causes rules which obtain in favor of life and liberty: 10 P. R. 475. I cited for the Master's guidance *Bootle* v. *Blundell*, 19 Ves. 494, (in which *Howard* v. *Braithwaite*, 1 V. & B. 202, is referred to), as marking the farthest limit to which suspicion should go in civil tribunals, in testing evidence such as Herson's.

Though the rules of evidence may be the same in civil as in criminal [illegible]

ERRATUM.

In MONTEITH V. MERCHANT'S BANK, at p. 530,

This sentence appears: "The Master ruled that his (Herson's) evidence could not be received." This is not correct. The wording of the Master's judgment was: "Although I held he was not estopped from giving evidence," 10 P. R. 471, "I must decline to give effect to Herson's evidence," 10 P. R. 472.

[illegible] a case decided a quarter of a century ago by the Court of Common Pleas in Ireland: *McClory* v. *Wright*, 10 Ir. C. L. R. 514, the head-note of which is as follows: "In an action for a penalty, brought under the Corrupt Practices Prevention Act, 1854, sec. 2, for offering a bribe to a voter, the only evidence against the defendant was the uncorroborated testimony of the plaintiff, who was the party sought to be bribed. The plaintiff admitted having entered into such a negotiation with the defendant as would have subjected himself to an action for a penalty, under sec. 3 of the same Act. It having been objected that the defendant could not be convicted upon

the above evidence in the absence of corroboration, inasmuch as the plaintiff was to be regarded in the light of an accomplice:—*Held*, That, assuming an analogy to exist between criminal cases and penal actions, there was no inflexible rule of law which rendered illegal a conviction obtained upon the uncorroborated testimony of an accomplice. *Held*, also, that no such analogy existed between criminal cases and actions for penalties, and that the case was rightly submitted to the jury upon the sole evidence of the plaintiff."

The judgment of Mr. Justice Christian, in particular, points out the obvious generic differences, moral and material, which weaken the analogy between the two forms of proceeding, and then adverts to two particular distinctions which render it impossible to import from the criminal to the civil side the rule regarding the corroboration of accomplices: the one is that the success of the action will confer no personal immunity on or hold out any hope of it to the plaintiffs: and the second is that the parties are themselves competent witnesses in civil proceedings. Upon the first part he adverts to the principle upon which in criminal cases it is usual to require that accomplices shall be corroborated. It is because they are usually interested and always infamous witnesses: guilty themselves, they come to purchase impunity by tendering their evidence against their confederates. Now, how can you apply a practice which is founded on these reasons, to a proceeding in which the evidence of the witnesses not only affords him no protection against future proceedings, either criminal or civil, but may be made use of against him in one of these forms of proceeding?

Applying that reasoning to the present case, what possible inducement had Herson to deviate from the truth when his own evidence shewed he had exposed himself to the penalties of a misdemeanor? His interest was rather to support the warehouse receipts, and so exculpate himself.

Of course the circumstance that here Monteith is dead

and so cannot be called in opposition to Herson is accidental, and does not derogate from the general effect of the distinction emphasized in *M'Clory* v. *Wright*. That case was followed in *Magee* v. *Mark*, 11 Ir. C. L. R. 449, and its principle was recognized by Kelly, C. B., in *Vaughton* v. *London & North Western R. W. Co.*, L. R. 9 Ex. at p. 96.

The criminal aspect which the case has assumed in the Master's eyes appears to have influenced his whole judgment on the facts. I think he has erred for this reason in his estimate of the evidence which corroborates Herson.

His definition of corroborative evidence, and the distinction he makes between evidence establishing the probability of Herson's evidence being correct, and evidence corroborative of the facts stated by him, is derived from the judgment of Dr. Lushington in *Simmons* v. *Simmons*, 5 Notes of Ca. Ecc. & Mar. 325 and 11 Jur. 830, which was, a suit for the restitution of conjugal rights by the husband against the wife, and the question to be determined was whether adultery had been proved. By the rules of that Court as then constituted the evidence of one witness (though implicitly believed) was not enough to prove adultery unless there was corroborative evidence. The Judge therefore held that the corroboration in order to be legally sufficient must be of matters *ejusdem generis* with that of the chief witness, and tending to produce the same result. But he recognizes that the test of what is corroborative may be very different when there is no rule as to the number of witnesses requisite, and then says, as to such cases, that evidence as to probability may have great weight (p. 344).

In fact, the test as to corroboration which the Master has thus adopted goes beyond even what is required in criminal cases. For example, in the case of an information for bribery (*Regina* v. *Boyes*, 1 B. & S. 320), the law is thus laid down by Wightman, J., (in which the other Judges concur): "It is not necessary that there should be corroborative evidence as to the very fact; it is enough that there shall be such as shall confirm the jury in the belief

that the accomplice is speaking the truth." See also *Rex* v. *Birkett*, Russ. & Ry., C. C. 252, and *Rex* v. *Jarvis*, 2 M. & Rob. 40; *Ivy* on Accomplices, pp. 26, 61, 91, 99. So in the last case on the subject in 1883 *Regina* v. *Gallagher*, 15 Cox, C. C. 291, (a trial for high treason before Coleridge, C J., the M. R., and Grove, J.), it was held that it was not necessary that an approver should be corroborated in every particular, (for if so it would not be necessary to call him as a witness), but there must be a certain amount of confirmation sufficient to satisfy a jury.

What was the matter to be proved here? It was whether or not Herson had a warehouse at 25 Church Street from and after the date of the warehouse receipt, and during its currency. Herson says he had not—had no lease of it from Monteith—and no key of it—and no control of it.

Chapman corroborates this by saying that he as book-keeper of Monteith was at 25 Church street every day. The cellar therein (the site of the supposed warehouse) was entered by a trap-door which was usually open, and could only be reached through Monteith's place of business. There was no lock on the cellar. There was nothing to indicate that Herson was in possession of the goods there, and he swears that Monteith had sole possession of the goods in the cellar.

Cavanagh's evidence is also in the same direction as shewing that Monteith exhibited the goods in the cellar to him as his (Monteith's) goods, and obtained his endorsement on negotiable paper on the faith of this ownership. The evidence of James also is of the same character. All these witnesses give evidence *ejusdem generis* with that of Herson as to his not being a warehouseman in charge of Monteith's cellar, and the combined effect of their evidence is to convince me that (if these facts alone were to be regarded) the great preponderance of testimony is against the existence of any such warehouse.

I observe that the Master has disallowed to the banks the costs of this evidence taken on the reference back, on

the ground that had the cases he refers to been cited there would have been no reference back. These costs should not be withheld for that reason, as will appear from what I have already said.

The evidence last taken will prove material in case this contest is carried further, and the appellate Judges should differ from my view on the question of estoppel, and of the creditors' *status.* I think the costs of the reference back and the evidence then taken as well as of this appeal should be taxed to the banks.

PROUDFOOT, J.—43 Vic. ch. 22, s. 7, (D.) amending 34 Vic. ch. 5, sec. 45 (D.), in the first place defines the meaning of "goods, wares, and merchandize," it then defines "warehouse receipt" as a receipt given by any person, * * for any goods, wares, or merchandize in his actual, visible, and continued possession, as bailee in good faith, and not as of his own property, (such a bailee I understand to be a warehouseman) and then the section goes on to provide that the "warehouse receipt" *shall comprise* receipts by any keeper of a warehouse &c., for goods &c., in the place or one of the places kept by him whether he is engaged in other business or not, thus authorizing persons who are not warehousemen alone, but who may have other business also, to give receipts, but these are *comprised* in the preceding definition which requires the goods to be in the actual, visible, and continued possession of the bailee: this is further confirmed by the description of their being *in the place or one or more of the places kept by him.* If so they must be in his possession.

I agree with the Chancellor in other respects.

Appeal dismissed, with costs.

G. A. B.

[COMMON PLEAS DIVISION.]

LYTTLE v. BRODDY.

Assessment and taxes—Tax deed—Time within which it can be questioned—R. S. O. ch. 130, sec. 156.

Held, following *Hutchinson* v. *Collier*, 27 C. P. 254, that the two years given by sec. 156 of R. S. O. ch. 180, within which a tax deed can be questioned, is to be computed from the giving of the deed and not from the time of the sale.

The Court, though not satisfied with the decision as arrived at in that case, considered they were bound by it.

THIS was an action brought by the plaintiff, as owner and in possession of lots 2 and 3 on Ghent's survey, on the south side of Main street, west of the river, in the village of Glenallan, to set aside a sale thereof for taxes, and the tax deed made thereunder.

The sale took place on the 3rd October, 1882, and was for the taxes of 1879. The tax deed was given on the 7th November, 1883. This action was commenced on the 28th February. 1885.

The objections to the tax sale were, that the lots were not assessed separately with a value for each lot, but these two lots, with lot 1 and part of lot 27, were assessed together, and were so returned to the County Treasurer, and kept in his books with a gross sum for the taxes on the whole assessed premises. The County Treasurer advertized the three lots, 1, 2 and 3, but he did not advertize or sell or in any way deal with the part of lot 27. The County Treasurer in advertizing the said lots 1, 2, and 3, assumed to divide and impose the taxes, which had been returned as in arrear upon the said four parcels of land, equally upon and between the said lots 1, 2, and 3, and for the taxes so divided and imposed and the expenses of the sale, he sold the lots 1, 2, and 3. The said four lots were not of uniform size or value, and on one of the lots there was a dwelling house and three substantial enclosures and improvements.

The defendant claimed as assignee of the tax purchaser under a deed, dated 2ndJ uly, 1884.

The tax sale was admitted to be defective; and the whole question was, whether the defects had been cured under sec. 156 of R. S. O. ch. 180, by the lapse of the two years since the sale.

The learned Judge at the trial, in accordance with the decision of *Hutchinson* v. *Collier*, 27 C. P. 254, held that the two years must be counted from the giving of the deed and not from the time of the sale; and, therefore, the defects in the assessment had not been cured; and he entered judgment for the plaintiff.

In Michaelmas sittings *A. H. Macdonald* (of Guelph) moved on notice to set aside the judgment entered for the plaintiff and to enter judgment for the defendant, on the ground that the two years counted from the time of sale and not from the giving of the deed.

During the same sittings, November 25, 1885, *A. H. Macdonald* supported the motion. The defects in the assessment are cured by sec. 156 of R. S. O., ch. 180. That section enacts that the deed shall be valid and binding if not questioned within two years from the time of the sale. In *Hutchinson* v. *Collier*, 27 C. P. 254, it was held that the two years were from the giving of the deed. That case was decided under sec. 155 of 32 Vic. ch. 36, (O.,) and the wording of that section is different from that of sec. 156 of the Revised Statutes. In the recent case of *Claxton* v. *Shibley*, 9 O. R. 451, *Hutchinson* v. *Collier* was followed, but the difference in the statutes was not noticed. The case of *Hutchinson* v. *Collier* is not well decided, and should not be followed. The words of the section, even as originally enacted, are quite clear that the two years are to run from the sale and not the giving of the deed.

Miller (of Berlin), contra, was not called on.

November 25, 1885. CAMERON, C. J.—I cannot distinguish this case from *Hutchinson* v. *Collier*, 27 C. P. 254,

and while I am not satisfied with the decision as arrived at in that case, we are bound by it. The motion must therefore be dismissed, with costs.

ROSE, J.—I am also of opinion that the motion must be dismissed. Mr. Macdonald attempts to distinguish the present case from *Hutchinson* v. *Collier* on the ground of an alleged difference between the wording of sec. 155 of 32 Vic. ch. 36, (O.), and sec. 156 of R. S. O. ch. 180. I think he has failed to do so, and we must follow that case. Were the matter open to us I think I would be prepared to yield to his argument, that the time of the sale and not the giving of the deed, is the date from which the two years are to be computed.

GALT, J., concurred.

Motion dismissed.

[See *Claxton* v. *Shibley*, in the Divisional Court, *ante* at p. 288, per Boyd, C., Rep.]

[COMMON PLEAS DIVISION.]

REGINA V. MCDONALD ET AL.

Criminal law—Separate indictments for similar offences—On trial of one of the indictments evidence received relative to charge on the other one—Admissibility.

Two indictments were preferred against the defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. The defendants were put on their trial on the charge of destroying M.'s trees; and evidence relating to the offence charged in the other indictment, was admitted as showing that the offences had been committed by the same person.

Held, that the evidence was properly received.

AT the last Cobourg Assizes the defendants were indicted on two separate charges of felony, before O'Connor, J.

The offences charged were of the same class, viz., destroying fruit trees. The persons whose property had been injured were Oscar Macdonald and William Cox.

Upon the trial of the defendants in respect of the indictment against them respecting Oscar Macdonald, the Crown offered and the learned Judge admitted, subject to the objection of counsel for the defendants, the evidence of William Cox, Joseph A. Philp, Joel Turrney, and Moses Samis.

A case was stated by the learned Judge for the opinion of the Court.

The learned Judge in his statement of the case said:

"The question I reserve for the opinion of the Justices of the Common Pleas Division is, whether the evidence so admitted was properly admissible against the defendants upon the trial upon this indictment."

The evidence of the parties named was attached to the case.

During Michaelmas sittings, November 24, 1885, the case was argued.

G. T. Blackstock, for the defendants? The defendant

being charged on a separate indictment with girdling Cox's trees, the evidence referable to the Cox indictment should not have admitted. The defendants upon the indictment upon which they were being tried, namely, in McDonald's case, were in fact also put on trial on the Cox indictment, although not on their trial on that indictment The Crown must confine itself to the evidence which the prisoners presume will be offered against them on the charge preferred against them. There was also nothing to connect the evidence with the charge upon which they were being tried. It did not appear that the trees were girdled in a peculiar manner; and as to the boot tracks, this is very dangerous kind of evidence to admit. Boots of the description worn by the defendants are machine made; and there are thousands of the same kind and description: *Taylor* on Evidence, 8th ed., p. 304, 312-3; *Russell* on Crimes, 5th ed., vol. iii., p. 373; *Greenleaf* on Evidence, 14th ed., sec. 52. The case of *Rex* v. *Smith*, 2 C. & P. 633, clearly shews that the evidence was not admissible. See also *Waterloo Mutual Ins. Co.* v. *Robinson*, 5 O. R. 295; *Rex* v. *Westwood*, 4 C. & P. 547.

E. F. B. Johnston, for the Crown. The evidence was clearly admissible. There was evidence of threats to injure the trees of both McDonald and Cox. Then there was evidence of the trees being girdled on the same night and in the same manner, and the footmarks around the trees corresponded with the size of the defendants' boots. These were all circumstances to shew a connection between the two acts. The law is clearly laid down in *Russell* on Crimes, 5th ed., vol. iii., p. 375, and a manuscript case there referred to of *Rex* v. *Salisbury*, also referred to in 5 C. & P. 155. See also *Rex* v. *Rooney*, 7 C. & P. 517; *Rex* v. *Fursey*, 6 C. & P. 81.

December 19, 1885. GALT, J.—The offences charged were proved to have been committed on the same night, and the injury to the trees done in the same manner in both cases.

Mr. Blackstock's objection was, that as there was a second indictment pending against the defendants for the damage done to Cox's property, no evidence relating to that offence could be received.

He relied on the case of *Rex* v. *Smith*, 2 C. & P. 633, which certainly supports his argument. That was an indictment for forgery; and the learned Judge held that "as the second uttering is made the subject of a distinct prosecution, we are not at liberty to go into evidence of it even to shew a guilty knowledge in a previous uttering."

In *Russell* on Crimes, 5th ed., vol. iii., p. 375, it is laid down as the result of the cases cited. "It was formerly considered that if there were separate indictments for offences which constituted parts of the same transaction, evidence of an offence which was the subject matter of one indictment was not admissible upon the trial of another," citing the above case. "But it has since been held in several cases that there being another indictment pending makes no difference. And it has been laid down by a very learned Judge that the correct rule in such cases is, that it is in the discretion of the Judge to admit or reject evidence of other felonies which form the subject of other indictments, and that such discretion will be guided by the evidence appearing to be necessary or unnecessary in support of the indictment on which the prisoner is being tried."

In the case of *Rex* v. *Whiley*, 2 Leach C. C. 983, Lord Ellenborough, in the course of his judgment, says, at p. 985: "There is a case where a man committed three burglaries in one night, and stole a shirt at one place and left it at another; and they were all so connected that the Court heard the history of the three different burglaries."

We have none of the evidence given on the trial of the defendants other than that objected to; and as the objection to its admissibility was taken before it was given, I do not feel at liberty to review it; but the other evidence had been given, and it was, in my opinion, clearly a case in which it was within the discretion of the learned Judge to admit or reject it as tending to show that both offences had been committed by the same person.

CAMERON, C. J.—I am of the same opinion; and will only add to what my learned brother Galt has said, that it seems to me all such evidence is clearly admissible as tending to connect the prisoner with the offence charged. Assume that the prisoner had been seen at a place working with a drawing knife that had certain gaps in it of irregular shape, and which made a peculiar mark in wood shaved with it, and that the girdled trees had marks on them exactly resembling the gaps in the drawing knife, I do not think it could be contended that these facts could not be given in evidence, because *per se* they did not establish that the prisoner's hands held the knife when it made the marks, or that the knife of the accused had made them. They would be circumstances forming, or that might form, links more or less remote in the chain connecting the accused with the offence.

Then to further illustrate. Assume that the accused was seen girdling a tree belonging to himself, and that he did it in a particular manner: that he made a track in the ground of a peculiar character; and then it appeared that trees of the prosecutor had been girdled in the same way, and a track with the same peculiar mark had been found near the girdled tree, could evidence of these things be excluded from the consideration of the jury? I should say most decidedly they could not. Then if they could not, on what principle could they be excluded if the trees instead of being the property of the accused had been trees, in respect of the girdling of which a substantive felony was charged? The circumstances were not given in evidence to establish the other felony, but as circumstances leading to proof of the affirmation that the accused was guilty of the offence for which he was on trial.

The admissibility of evidence is a question for the Court, its weight is entirely for the jury. I attach very little importance to foot marks. It is a very weak link in the chain of circumstances, and unless of a peculiar or unusual character very little weight should be attached thereto; but, notwithstanding I entertain this view, I would not think of preventing such evidence being given.

In the present case the evidence was rightly admitted of the witnesses named in the case reserved, and the conviction must be affirmed.

ROSE, J., concurred.

Conviction affirmed.

[COMMON PLEAS DIVISION.]

REGINA V. BENT.

Criminal law—Forgery—Uttering—Guilty knowledge—Evidence—Admissibility.

The prisoner was indicted along with W.; the first count charging W. with forging a circular note of the National Bank of Scotland; and the second with uttering it knowing it to be forged. The prisoner was charged as an accessory before the fact. Evidence was admitted showing that two persons named F. and H. had been tried and convicted in Montreal of uttering similar forged circular notes printed from the same plate as those uttered by W.: that the prisoner was in Montreal with F., they having arrived and registered their names together at the same hotel, and occupied adjoining rooms: that after F. and H. had been convicted on one charge, they admitted their guilt on several others; and that a number of these circular notes were found on F. and H., which were produced at the trial of the prisoner. Before the evidence was tendered, it was proved that the prisoner was in company with W., who was proved to have uttered similar notes. Evidence was also admitted shewing that a large number of the notes were found concealed at a place near where the prisoner had been seen, and were concealed, as was alleged by him, after W. had been arrested.

Held, that the evidence was properly received in proof of the guilty knowledge of the prisoner.

THIS was an indictment tried at Toronto, before Armour, J., who, on the application of the defendant's counsel, reserved a case on one branch of the evidence for the consideration of this Court.

There was no special point reserved.

After the conclusion of the charge of the learned Judge, the following objections of the learned counsel were made: Mr. Bigelow: "I took certain objections during the course of the trial. I ask your lordship to reserve a case in regard to them. The crown counsel failed to convict." Armour,

J.: "I think I guarded in my charge against anything arising from that." Mr. Bigelow: "We cannot control the influence of evidence of that kind on a jury."

The learned Judge then said: "Of course I will allow you to take the opinion of the Court if I can in any way."

The prisoner was found guilty, and convicted.

The facts, so far as material, are set out in the judgment of this Court.

During the Michalmas sittings, November 24, 1885, the case was argued.

Bigelow, for the prisoner, referred to *Rex* v. *Davis*, Rus. & Ry. C. C. 113; *Russell* on Crimes, 5th ed., vol. i., pp. 164, 169, 171; *Wills* on Circumstantial Evidence, 173, and cases there cited.

McMahon, Q. C., for the Crown, referred to *Rex* v. *Burdette*, 4 B. & Al. 91, 122; *Rex* v. *Davis*, Rus. & Ry. 113; *Regina* v. *Exall*, 4 F. & F. 922, 927; *Regina* v. *Fair*, 4 F. & F. 336; *Regina* v. *Francis*, L. R. 2 C. C. R. 128; *Regina* v. *Barbour*, 1 C. & K. 442; *Russell* on Crimes, 5th ed., vol. i., 157.

December 19, 1885. GALT, J.—The whole case has been submitted to this Court without any special objections.

The prisoner was indicted along with one Thomas White. The latter was charged in the first count with forging a circular note of the National Bank of Scotland; and in the second with uttering it knowing it to be forged, and the prisoner Bent as an accessory before the fact.

It was proved on the trial that two persons named Fox and Hall had been tried and convicted in Montreal of uttering similar forged circulars; and it was proved that these forged circulars were printed from the same plate as those uttered by the prisoner White. It was proved that Bent was in Montreal with Fox; they arrived together; registered their names together, and occupied adjoining apartments in the same hotel. At the trial in Montreal, after Fox and Hall had been found guilty on one charge, they admitted

their guilt on several others. It was also proved that twenty-two of these circular notes were found on Hall, and twenty-one on Fox. These last were produced on Bent's trial.

This was the evidence objected to by Mr. Bigelow, who, on the evidence of the hotel clerk, as to the registration of the names of Fox and Bent, being given, said: "I take the objection that there is no evidence to connect Bent with Fox sufficient to warrant any evidence about Fox."

This objection was several times repeated at different stages of the case; and is that now before us.

The prisoner was charged as an accessory before the act to the uttering of forged paper; and the principal question for the jury to consider was, whether, supposing the prisoner was a party to the uttering, he knew the circular notes were forged. Before the evidence was tendered it had been proved that that the prisoner was in company with White who, beyond question, was guilty of uttering similar notes; and it had also been proved that a large number of these forged circulars had been found concealed about the wash room at the Cobourg station of the Grand Trunk Railway; and, as was alleged, had been so concealed by the prisoner after White had been arrested.

In my opinion the evidence of the prisoner's acquaintance and intercourse with Fox was properly received. It was tendered not for the purpose of convicting the prisoner with the uttering committed by Fox, but for the purpose of showing that if the prisoner was aware of the possession by Fox of these circular notes he knew they were forged; and it had previously been proved that, in addition to the parcel of forged circulars found concealed in the wash room addressed to White, there was another parcel of the same addressed to "Charles Foley" under which alias the prisoner Bent was indicted. We find then a large number of these forged circulars in the possession of White; also in the possession of Hall and Fox; and finally in the possession of the prisoner (if the jury believed that the two parcels had been secreted by him); and it is shown beyond

question that they were forgeries printed from the same plate. It therefore appears to me the evidence was properly received in order to satisfy the jury as to the guilty knowledge of the prisoner.

CAMERON, C.J.—I am also of opinion that the connection of the prisoner Bent with Hall and Fox was matter that properly could be given in evidence to show a guilty knowledge on his part of the felonious acts of the prisoner White, in support of the crime charged against him, that he had aided and abetted the latter in the commission of the felony with which he was charged: that the finding of the spurious letters of credit in the closet connected with the ladies' waiting room at the Cobourg station, though sometime after the prisoner Bent was seen in that waiting room, was also admissible. If Bent had been seen to go into the closet, and immediately after his coming out the papers had been found, there would, I assume, have been no doubt that the fact could have been given in evidence. That he was not seen in the closet and the papers were not found for some weeks after he was seen in the waiting room, does not make the fact inadmissible. It merely tends to weaken the force of the fact as a piece of evidence against the prisoner.

I am therefore of opinion there was no miscarriage at the trial; and the conviction must be affirmed.

I have not overlooked, in connection with the evidence as to Hall and Fox and what occurred at Montreal, it is not competent to give evidence of a prisoner's bad character, or the bad character of his associates, as that does not in any manner tend to establish the particular offence for which the prisoner is being tried. But if the conduct or character of his associates has a bearing upon the particular charge forming a link, near or remote, in the chain that connects the accused with the offence, it may be admissible in evidence; and nothing was received in evidence in this case that had not such a bearing.

ROSE, J., concurred.

Conviction affirmed.

[COMMON PLEAS DIVISION.]

CLARKSON V. SNIDER.

Stock—Pledge by broker—Recovery of purchase money—Jury case—Nonsuit—Motion to set aside—Practice.

A firm of brokers purchased twenty shares of bank stock for the defendant, the latter agreeing to repay to the former the price paid therefor on demand with interest, the brokers to hold the stock as collateral security and receive a ten per cent. margin and one quarter per cent. commission. The brokers took the stock in their own names, and then transferred it to a loan company together with other stock of the same character, the transfer by them, though absolute in form, being in fact a pledge to secure the repayment of a much larger amount than the sum payable by the defendant. The pledge had no reference to the transaction with defendant, but was for the brokers' own purposes. The defendant was not informed of the transfer, and calls for further margins were made from time to time as the stock fell. On the 27th June, 1884, the brokers suspended payment, at which date the stock had fallen considerably; and on the 26th December they made an assignment for the benefit of creditors to the plaintiff. Neither at the time of the suspension or assignment, was any unpledged or unhypothecated stock held for or by the brokers, nor was any transferred to the plaintiff, there being only a right in him to redeem any stock undisposed of by the pledgees. On the 4th August, 1885, after the stock had, by legislative enactment, been reduced to one half its original par value, or from $100 to $50 per share, the plaintiff offered to transfer twenty shares of the reduced stock, which the defendant refused to accept. The plaintiff then brought this action against defendant to recover the alleged balance due on the stock.

Held, there could be no recovery, for that the delivery of the stock and payment of the price were concurrent acts, and the brokers were not in a position after the time of insolvency to deliver the same, while at the time of the plaintiff's offer there was no stock of the nominal value per share of that which the brokers purchased for the defendant.

Where in a jury case the learned Judge at the trial enters a nonsuit, a notice of motion, and not an order *nisi*, is the proper mode of moving against the nonsuit.

THIS was an action brought by the plaintiff as assignee of the estate and effects of Messrs. Forbes & Lownsborough, brokers, to recover from the defendant a balance due on the purchase of twenty shares of Federal Bank stock made by the brokers for the defendant. The first purchase was of ten shares on the 28th February, 1884, at the rate of $138.25 per share; and on the 1st of May of ten further shares, at the rate of $126 per share, with a quarter per cent. commission for brokerage.

The plaintiff in his statement of claim alleged that the

purchase was made on the terms that the price paid by the brokers was to be repaid on demand, with interest at six per cent.; and the stock was to be held by the brokers as collateral security for the repayment of the money advanced by them.

The cause was tried before Galt, J., and a jury, at Toronto, at the Fall Assizes of 1885.

The evidence given for the plaintiff by Mr. Forbes, one of the brokers, disclosed that at the dates specified the brokers bought for and by the direction of the defendant the said stock, and received from him an agreed margin of ten per cent. on the par value of the stock: that within a day or two after the purchase of the stock, which was taken in the names of the brokers, the stock was transferred on the books of the Federal Bank to the London and Canadian Loan Association, together with other stock of the same character, to secure to the Association the repayment of much larger amounts than the sums payable by defendant. The defendant was not informed of this transfer, and the brokers made calls upon him from time to time as the market value of the stock fell for the payment of additional sums, so that he had paid up to the 25th June, 1884, in respect of margins and interest the sum of $550, and the brokers had received in respect of dividends paid by the bank on stock, $110, making $660. On the 27th June, 1884, the stock had fallen to 82, or 18 below par, and the brokers suspended payment. At this time they had no unhypothecated stock to give to the defendant or anybody else. Between the 27th June and the 26th December, 1884, the brokers had been making ineffectual efforts to effect a settlement with their creditors; and on the latter day executed an assignment of all their estate and effects, rights, and credits to the plaintiff in trust for the general benefit of their creditors. At the time of the assignment they held no unpledged or unhypothecated stock, and no stock was transferred to the plaintiff. There was only the right vested in him to redeem any stock that might have remained undisposed of by the pledgees.

On this state of facts appearing the learned Judge dismissed the action without hearing evidence for the defence, although the defendant had alleged in his pleadings, and by his counsel said he was prepared to prove, that he was under the belief that the brokers were holding the stock for him, and he was ignorant that it had been repledged, and he paid margins under such belief till the 25th June, when he gave instructions that it should be sold, which the brokers had failed to observe. In so dismissing the action the learned Judge was of opinion there was no evidence that the plaintiff, or those under whom he claimed, were in a position to transfer the shares to the defendant; and that the defendant was not bound to accept an offer to deliver stock, made on the 4th August, 1885, after the stock had by legislative enactment been reduced to one-half the original nominal value, that is to say, from $100 to $50 per share; and he refused to receive evidence that the transfer to the Loan Association, though absolute in form, was in fact a mere hypothecation.

During Michaelmas sittings, *F. Arnoldi* gave a notice of motion to set the judgment aside, and to enter judgment for the plaintiff, or for a new trial, on the ground that the learned Judge erred in his decision, and rejected evidence tendered by the plaintiff to shew that the transfer of the shares, though absolute in form in the transfer book at the bank, was a mere hypothecation; and because he rejected evidence to shew that the plaintiff was possessed of sufficient Federal Bank stock to answer the purchase of the defendant; and for the rejection of other evidence; and because the learned Judge refused to allow the plaintiff to proceed with his case, and interrupted the trial of the case, and examined the plaintiff's first witness in such a way as to interfere with the fair trial of the case; and because the said judgment was premature, and not sustained by the facts, and contrary to law; and the Judge improperly nonsuited the plaintiff.

During the same sittings, November 28, 1885, *Arnoldi*

proceeded to support his motion when *Fullerton* and *Cook*, for the defendant, raised the preliminary objection that the plaintiff should have moved by order *nisi* and not by notice of motion, and referred to *Etty* v. *Wilson*, 3 Ex. D. 359; *Hamilton* v. *Johnston*, 5 Q. B. D. 263; *Yetts* v. *Foster*, 3 C. P. D. 437; *Davis* v. *Felix*, 4 Ex. D. 32; *Macdonald* v. *Murray*, 5 O. R. 559, 365. The matter stood over to enable the matter to be more fully looked into.

On November 30, 1885, the argument was proceeded with. *Arnoldi* answered the preliminary objection and supported the motion. The only point decided by the English cases referred to by the other side is, that the case was a proper one for the Divisional Court and not for the Court of Appeal, and as an order *nisi* is required to bring such a case before the Divisional Court, an order *nisi* should have been obtained. Under O. J. Act rule 307, when there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. Then rule 308 provides for an order *nisi*. This, however, was not a trial by jury, for although a jury were sworn in the case there was no intervention of the jury as the Judge decided the case without the jury. The case comes within rule 317, which provides that where, at the trial of an action, the Judge has directed that any judgment be entered any party may, without any leave reserved, apply to set aside such judgment, &c. If, however, it is not a case within rule 317, then it is a *casus omissus*. Under rule 405 no rule or order to show cause shall be granted in any action or matter, except in cases in which an application for such rule or order is expressly authorized by the rules. The application here must, therefore, be by notice of motion. In the Queen's Bench Division, in *Christy* v. *Burnett*, a similar case, the Court decided that a notice of motion, and not an order *nisi*, was the proper mode of moving. In any event he asked leave to serve an order *nisi nunc pro tunc*. [The Court intimated that if it was found necessary the notice of motion would be converted into an order *nisi*.]

Fullerton and *Cook* contra. The English cases are clearly applicable. In England, where the motion must be by order *nisi*, it must be to the Divisional Court, and the cases shew that cases of nonsuit also come within the rule and must be by order *nisi*.

The arguments on the merits sufficiently appear from the judgment. The following cases were referred to: *Lecroy* v *Eastman*, 10 Mod. 499; *Colebrooke* on Collateral Securities, p. 490-1, sec. 369; *Dos Passos* on Stockbrokers, pp. 116, 129, 130-1, 136, 141-7; *Duncan* v. *Hill*, L. R. 8 Ex. 242; *Carnegie* v. *Federal Bank*, 5 O. R. 418, 425; *Langton* v. *Waite*, L. R. 6 Eq. 166, 167; *Ex p. Denison*, 3 Ves. 552; *Jones* on Pledges, sec. 509; *Markham* v. *Jaudon*, 41 N. Y. 235.

December 19, 1885. CAMERON, C. J.—Mr. Fullerton and Mr. Cook in shewing cause raised the preliminary objection, that the ruling of the learned Judge should be questioned by order *nisi*, and not by notice of motion, as the case was tried before a jury.

Though we announced on the argument, if this objection to the manner of questioning the judgment was entitled to prevail, we would allow the notice of motion to be converted into an order *nisi*, it may be as well to consider and decide the question, as it is one that must frequently arise in practice, and it is of importance that no uncertainty should exist as to the proper means of reviewing a judgment of nonsuit delivered at the trial without any findings by the jury.

By rule 307 of the Ontario Judicature Act it is provided: "Where there has been a trial by a jury any application for a new trial shall be to a Divisional Court. And by rule 308, the application shall be by motion calling on the opposite party to shew cause why a new trial should not be directed.

To make these rules applicable there must be a trial in fact by a jury, and the party moving must seek a new trial.

In the present case the plaintiff has asked as part of his motion that a new trial should be granted; but in the present condition of practice this was not essential. If the judgment dismissing the action be set aside, a trial could be had as a matter of course, as the entry in the Registrar's book would be that the nonsuit or judgment dismissing the action had been set aside and the case would stand as a case ready for trial; that is, it would assume the position it was in when the erroneous judgment was given.

The case of *Etty* v. *Wilson*, 3 Ex. D. 359, decided by the Court of Appeal, cited for the defendant on the argument, determined that under order 40, rule 4 of the English Judicature Act the motion to set aside a nonsuit should be made to the Divisional Court, and not to the Court of Appeal, following *Yetts* v. *Foster*, 3 C. P. D. 437, wherein it was held that where the Judge on undisputed facts had directed the jury to find for the plaintiff, the motion to set aside such finding should be made to the Divisional Court, and not by way of appeal to the Court of Appeal. The learned Judges in the former case being of opinion that there was no difference between the finding of the jury in the manner directed by the Judge and a nonsuit directed by him. But to me it appears there is a very clear and wide distinction. In the one case the jury acts. It adopts the direction of the Judge and renders a verdict. The jury might in the face of a positive direction by the Judge have found against such direction, and their finding, if correct in law and fact, would not be interfered with by the Court, while on the other hand a judgment of nonsuit or judgment dismissing the action without any finding by the jury, is the Judge's sole act to which the jury is in no sense a party. The finding by the Judge should in reason be dealt with in the same way as when he gives judgment in a non-jury case.

I much prefer the old common law practice of questioning what has been done by Judge or jury at the trial by rule or order *nisi*; but the object of the Ontario Judicature Act has been to assimilate the practice of the common law

Courts to that of the Court of Chancery, to which Court no such thing as an order *nisi* was known, all matters not otherwise expressly provided for being brought before the Court by notice of motion. When a Judge's decision is to be reviewed in the Common Law Divisions, a jury not having intervened, it must now be reviewed on notice of motion; and it would seem more consonant to uniformity of practice not to attack a judgment of nonsuit by order *nisi*.

I am therefore of opinion that the preliminary objection is not entitled to prevail.

This in no manner affects the question as to which Court an appeal should be made. In this country it is optional with the dissatisfied party to select the tribunal to review the judgment complained of, while in England it is otherwise, and the dissatisfied party must select the proper *forum* to review the decision of the Judge at his peril.

As to the rejection of evidence, the validity of that ground depends upon the principal question involved—the right contended for by the plaintiff of the brokers to hypothecate the stock in their own name without any reference to the defendant's right, and without limit as to the amount for which the hypothecation is made.

The evidence of Mr. Forbes very clearly establishes that the stock bought for the defendant was hypothecated for a much larger amount with other stocks than the claim of the brokers' against the defendant, and no intimation whatever was given to the pledgees, the London and Canadian Loan Association, that the defendant had any interest in the stock whatever.

It may therefore be assumed for the purposes of this motion, that the assignment of the stock in the bank books though absolute in form, was in fact only an hypothecation of the stock to the Association to secure the advances made upon it. But these advances had no reference to the advances made by the brokers to the defendant. They were advances made to the brokers without reference to the rights of the defendant. Regarded in that light it

seems to me there can on principle be no difference between an hypothecation and an absolute transfer.

There would appear to be no reasonable doubt upon the authorities that the broker may take a transfer of stock to himself, and hold it as security for the advances he has made to his client. But it is equally clear that he cannot sell or absolutely part with control over the stock purchased for his client without being guilty of a conversion; and in such case the client has the right to compel the broker to account for the proceeds of sale, or the market value thereof at the time of the disposal constituting the conversion, or he may require the present delivery of stock or payment at its market value; the option being with the client to select the time at which the value is to be determined.

It is quite true stock, so to speak, is not ear-marked, one share being as good as another; and it is not necessary that the identical shares bought for a client shall be kept separate from other shares, to be delivered when required by the client. To so hold would be holding against common sense, and imposing, for no good, trouble upon the broker. But while this is so, it does not interfere with the rule of law regulating the duty of an agent towards the principal, which requires him to have his principal's property so as to be ready for delivery to him when demanded, on payment of any lien he may have thereon against his principal.

The rule with reference to the obligation of stock brokers would seem to be clearly and satisfactorily laid down in the text-book, "*Dos Passos* on Stock Brokers," cited by Mr. Arnoldi, from which I make the following extracts, p. 143:

"The doctrine may be asserted as well settled, that a broker holding stocks for his clients on margin for speculation, is not bound to keep on hand the identical shares purchased, but he answers all of the duties of his employment by having ready for delivery to his client shares of the same description and amount. Shares of stock have

no ear-mark, and one share being of equal value with every other share of the same stock, the brokers are not bound to deliver or to have on hand for delivery any particular shares or the identical shares purchased for a client."

For this declaration of the law the judgment of Chancellor Kent, in *Nourse* v. *Prime*, 4 Johns. Chy. 489, is referred to. But the same writer treats it as essential that the broker must at all times have on hand stock sufficient in quantity to deliver the same to his client upon the payment by the latter of the amount due thereon. The most that he can claim is, that so long as he has on hand shares similar in kind, &c., to those he has purchased for his client, he has performed his contract; but when he denudes himself of the quantity sufficient to answer his clients' demands, he is guilty of a conversion; and the latter may assume that the sale by which the broker dispossessed himself of the stock was made for his benefit, and may recover the price of the shares on the day on which the sale was made.

The author, at p. 147, cites the language of the New York Court of Appeal in the case of *Taussig* v. *Hart*, 58 N. Y. 425, at p. 429, in sustentation of the text. This language is as follows: "The subsequent acquisition by the plaintiffs, after the stock had fallen to a very low figure, of a sufficient number shares to replace those which they had held for account of the defendant, did not relieve them from liability. Such reacquired stock was never accepted by the defendant, and he was in fact ignorant of the transactions. To allow a broker to sell his customer's stock without authority, and speculate upon replacing it at a lower price, would be encouraging speculation by agents, at the risk of their principals, and is totally inadmissible under familiar rules. Should the stock rise largely in price after the broker had thus divested himself of all control over the shares which he had purchased on the order of his principal, the broker might be unable to replace the shares, and the principal would have no remedy except a personal claim against the broker. This clearly is not what is contemplated under an

agreement to buy and carry stocks. The customer does not rely upon an engagement of the broker to procure and furnish the shares when required, but upon his actually purchasing and holding the number of shares ordered, subject only to the payment of the purchase price."

The case of *Donald* v. *Suckling*, L. R. 1 Q. B. 585, followed and approved in *Halliday* v. *Holgate*, L. R. 3 Ex. 299, is opposed to the law laid down in the above citation from *Dos Passos*, in so far as that citation makes the disposal of stock an act for which an action for conversion could be at once maintained by the original pledgor against the pledgee. In *Donald* v. *Suckling*, it was held that a pledge of debentures by a pledgee for a larger amount than he had loaned or advanced to the pledgor was not a conversion, and did not destroy the contract existing between the original pledgor and the pledgee.

Chief Justice Cockburn, at p. 618, expressly refrains from giving an opinion that a pledgee has a right to transfer his right in the thing pledged to a third party.

His language as to this being: "I think it unnecessary to the decision in the present case to determine whether a party, with whom an article has been pledged as security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to the third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. * * The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action—for

nominal damages if he has sustained no substantial damages; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged."

This language would seem on principle to be opposed to the defendant's contention, if the contract between them and the brokers must be taken to be as stated in effect in the statement of claim, an undertaking to pay them on request whatever they advanced for him to make the purchase of the stock, and a pledge of the stock as collateral security for the performance of that undertaking. But so regarding it the brokers would never have performed their part of the undertaking, as there was no stock purchased in the name of the defendant at all, and nothing obtained that could by any means be identified by the defendant, and be followed by him as his; and while in the usages of brokers recognized by the law they may take the stock purchased for their clients and hold it till they are paid their advances, in transactions like the present, the payment of the stipulated margin is what they look to for their protection, and while that margin is kept up they must be in a position at any moment to deliver the stock to their principal, and if they deal with the stock so as to prevent this, they have not the right to sue the client on the contract, as to do so they must be ready and willing to deliver to him the stock as such delivery and payment are concurrent acts.

It would probably be otherwise if the stock were purchased and stood in the name of the client, or in repledging it the client's interest was announced and the repledging was only to the extent of that interest, and there was something more due to the broker.

I do not think the law so unreasonable as to make the client liable under the original agreement and leave him to this action for damages for non-delivery of the stock. The one that seeks to make another liable in an action, must before suing put himself in a position to perform

whatever is essential to be done by him in fulfilment of his part of the contract as a condition precedent; and if it appears from the evidence that he is not in that position he cannot recover.

In the present case the delivery of the stock and the payment of the price being concurrent acts, and it appearing the brokers were not in a position after the time of their insolvency to hand over the stock, and at the time of the plaintiff's alleged offer there was in fact no stock of the nominal value per share of that which the plaintiff's assignors were instructed by the defendant to buy, my learned brother properly dismissed the plaintiff's action; and the present motion must be dismissed, with costs.

I have not thought it necessary to refer specially to all the cases cited on the argument, the most of which were considered and reviewed in *Mara* v. *Cox*, 6 O. R. 359, 385, a case which, as far as it has any application to the circumstances of the present case, supports the conclusion I have come to.

If the conclusion I have arrived at be correct there was no such miscarriage at the trial as complained of on the motion.

ROSE, J.—I am not able to come to so clear a conclusion on the question of practice as the learned Chief Justice has arrived at. I feel much doubt in view of the decision in *Etty* v. *Wilson*, 3 Ex. D. 359, referred to. However, as it is more important to have a settled practice than to determine whether or not we are following that decision, I think it best to concur. If it is proper to question upon notice the judgment of the Judge at the trial entered upon the finding of a jury, it does not seem objectionable to attack in a similar manner the judgment entered without any findings.

As to the question of liability. In *Sutherland* v. *Cox*, 6 O. R. 505, at p. 526, I ventured to record my views as to a broker having no right to substitute his personal responsibility for the security of the stock. After considering

the very full argument addressed to us on this motion, I see no reason to change my views, but am the rather confirmed therein.

I would also refer to pp. 386-7 of the judgment of the learned Chief Justice of the Queen's Bench Division, in *Mara* v. *Cox*, 6 O. R. 359.

I quite agree that the motion must be dismissed, with costs, for the reasons given by the learned Chief Justice in his very full exposition of the law.

GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

MCCANN v. PRENEVEAU.

Malicious prosecution—Termination of criminal proceedings—Production of original indictment—Sufficiency—Slander—Evidence of—Privileged communication—Amendment.

Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the Quarter Sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill."

Held, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced.

Held, also, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected as was done here.

There were no evidence to sustain the slander laid; but an amendment was allowed, to comply, as was alleged, with the evidence. The only objection made at the trial by the defendant was that he should be allowed to examine witnesses on the new count, which was done. An objection to the amendment in term was therefore not allowed.

The evidence in support of the amended count consisted not of statements made voluntarily by the defendant, but of answers to questions put to him, after he had laid a charge against the plaintiff, as to the nature of it.

Held, that this was not sufficient to sustain an action of slander; and that words so spoken were privileged.

THIS was an action for malicious prosecution; which arose out of a charge before a magistrate, and a subsequent indictment at the Quarter Sessions; and for slander. To

the count for malicious prosecution the defence was: that the proceedings complained of were not terminated; and to the count for slander: not guilty.

The case was tried before O'Connor, J., and a jury, at Cobourg, at the Fall Assizes of 1885.

The only evidence of the termination of the legal proceedings was the production of the original indictment with "no bill" endorsed thereon. The evidence, so far as material, on the slander count, is set out in the judgment.

The jury found a verdict in favor of the plaintiff, with $200 damages, on the count for malicious prosecution, and $25 on that for slander.

In Michaelmas sittings *Osler*, Q. C., obtained an order *nisi* to set aside the verdict entered for the plaintiff, and to enter a nonsuit, or judgment for the defendant, or for a new trial: 1. On the ground that there was no sufficient proof of the termination of the criminal proceedings; 2. As to the slander claim, that there was no evidence to sustain the slander as charged; and that the slander was uttered on an occasion of privilege; 3. That the amendment made at the trial should not have been allowed.

During the same sittings, November 28, 1885, *Osler*, Q. C., supported the motion. There was no sufficient proof of the termination of the criminal proceedings. The production of the original indictment is not sufficient. Judgment of acquittal, or the finding by the grand jury of "no bill," should have been entered of record, and an exemplification of the judgment drawn up and produced. There is also the additional objection that this was an indictment laid at the Quarter Sessions. *Roscoe's* N. P. Ev., 15th ed., 102, and cases there cited; *Regina* v. *Ivy*, 24 C. P. 78. There was also improper rejection of evidence as to the motives which induced the defendant to take the proceedings before the magistrate. The defendant was clearly entitled to shew that he acted in good faith, and so rebut the charge of malice. Then as to the slander. There was no evidence to support the slander as laid. After the case had been

closed an amendment should not have been allowed setting up a new charge of slander. It in reality amounted to a new action; but, even assuming the amendment was properly made, there was no evidence to support the amended statement of claim. Moreover, the occasion was privileged, and there was no evidence of express malice.

G. T. Blackstock, contra. The indictment was properly received. The learned Judge acted on the authority of *Regina* v. *Ivy*, 24 C. P. 78, that where the indictment with the endorsement of the finding of the grand jury of "no bill" is before the Courts it will be looked at, and constitutes sufficient evidence of the termination of the proceedings. There is also a distinction between a finding of "no bill" by the grand jury, and an acquittal after trial, for in the latter the case has been entered into and the finding is the considered judgment of the Court, and a formal judgment must be entered on it; but no judgment is ever entered where no bill is found by the grand jury. There is nothing to prevent oral evidence being given of the finding of no bill. All that the plaintiff has to do is to show that the criminal proceedings terminated favorably to himself. [GALT, J.—The case of *Rex* v. *Smith*, 8 B. & C. 341, seems exactly in point, and apparently determines that an exemplification of the record of acquittal should have been produced.] If, however, the Court should come to the conclusion that an exemplification of the judgment should have been put in, leave is asked to put it in now. As to the exclusion of evidence. At the time the evidence was tendered a proper foundation was not laid for it; and also it did not amount to evidence of reasonable and probable cause. Then as to the slander. The amendment was properly made, and there was sufficient evidence to sustain it.

December 19, 1885. GALT, J.—As respects the first objection. The evidence produced was what was stated to be the original indictment endorsed "No bill." This was objected to.

The case of *Rex.* v. *Smith*, 8 B. & C. 341, seems exactly

in point. There had been a case at the Quarter Sessions in which the Grand Jury had found a true bill, and the prisoner was indicted for a conspiracy to prevent a witness from attending and being examined on the trial thereof. At the trial of the conspiracy case, in order to prove that a true bill had been found, the prosecutor called the Deputy Clerk of the Peace (which was done in the present case), who produced an indictment indorsed "a true bill," but there was no general heading or caption to it. The defendants were convicted; but on motion made to set aside the verdict Lord Tenterden, C. J., said, at p. 343: "It appears to me that the evidence given was not sufficient to sustain the allegation that an indictment against H. S. was found at the Quarter Sessions, which is a Court of Oyer and Terminer and a Court of Record. In order to prove the finding of an indictment, it has always been the practice to have the record regularly drawn up, and to produce an examined copy." The rule for a new trial was made absolute.

This case was followed in our own Court, in *Aston* v. *Wright*, 13 C. P. 14.

Mr. Blackstock contended that as in the present case the finding was "no bill" the case was distinguishable.

I cannot agree to this conclusion. The allegation which the plaintiff was bound to prove was "that at the Court of Quarter Session the Grand Jury returned 'no bill' against the plaintiff, and the charge against him was accordingly dismissed." To do this it was essential that a copy of the indictment duly proved should have been produced, as the indictment was as much a record of the Court of Quarter Sessions in the one case as in the other.

The objection is therefore entitled to prevail.

As respects the slander counts and the amendment allowed at the trial. At the close of the case the counsel for defendant contended there was no evidence to support the charges. This was undoubtedly true. The counsel for plaintiff applied for leave to amend by setting forth what the witnesses had stated in their evidence; and this was after some hesitation granted, the only observation then

made by the counsel for defendant was, "I submit that you should allow me to examine the witnesses again, or that you should not allow the amendment." The witnesses were then recalled and examined by the defendant.

Under the circumstances I am of opinion the objection to the amendment is not entitled to prevail.

The more important questions as to whether the words were slanderous or the occasion privileged, remain to be considered.

The words (9th paragraph) are: "The plaintiff further says that the defendant between the 11th and 16th days of May last, falsely and maliciously spoke and published of and concerning the plaintiff the words following, that is to say, "I have had him, meaning the plaintiff, taken for obtaining money under false pretence and it will send him to Penitentiary. He obtained money from me under false pretences."

The evidence given to sustain this charge was that of a witness, Glen.

Before setting out this evidence it must be borne in mind the defendant had caused the plaintiff to be arrested, and the conversation I am about to set out took place after the plaintiff had been committed or bound over to take his trial.

The evidence on which this amendment was allowed is given at pp. 42 and 43, and certainly does not sustain the charge.

On the re-examination of the witness, after the amendment had been made, he stated:

F. C. Glen—Re-called.

Mr. Blackstock.—Mr. Glen is here now if you desire to cross-examine him.

Mr. Weller, to witness.—What was the conversation you had with Preneveau? A. In talking the matter over. Q. What matter? A. Between him and McCann. Q. At that time was the case between them before the magistrate? A. Yes; it was between the two trials. Q. It was between the time the man was first before the magistrate and the time it was adjourned to? A. Yes. Q. Where was it? A. In my place. Q. Anybody present? A. There were some parties present. Q. Who spoke first? A. I did; I asked him what he had him pulled for.

Q. What did you mean by pulled? A. What he was trying him for, and he told me that McCann had got money under false pretences. Q. What else? A. That is about all; that McCann was a pretty hard seed. Q. McCann was a pretty hard seed, and he was trying him for getting money under false pretences? A. Yes.

Mr. Blackstock.—Tell us all that he said about McCann. A. That is about all I ever heard him say. Q. Just tell us again. A. Well, he said McCann was a pretty hard one; that is about all. Q. Go on. A. I have not any more to go on with. Q. Tell us what you told my learned friend. A. I told you that Preneveau told me that McCann had got money under false pretences, some $25. Q. Did he say what he was going to do with McCann? A. Yes, he was going to try him for it, and it would probably send him to Penitentiary, because Mr. Preneveau could not send him there himself; those were as near the words as I can tell.

Mr Weller.—That was in answer to your question as to what he had him pulled for? A. For getting money under false pretences. Q. That was in answer to your question as to what he had him before the magistrate for? A. Yes.

Mr. Blackstock.—Did he just tell you that was what he had him before the magistrate for, or that that was the charge against him? A. That that was the charge he had against him.

This evidence does not sustain the charge that the defendant falsely and maliciously made any statement against the plaintiff. The statement, such as it was, was made in answer to a question put by the witness as to the cause of the dispute between the parties,—it was not volunteered; and to hold such a conversation given under such circumstances as affording a ground of action for slander, would be to say, that if a person who believes he has reason to accuse another of a crime, should in answer to a question put by a mutual acquaintance state his reasons for making the charge, he is liable to an action if the accused is acquitted.

Mr. *Starkie*, in his work on Slander, p. 56, points out the inconvenience of such a course: "The common and daily intercourse of mankind for the purposes of business and the ordinary exigencies of society require that communications be made though they may be prejudicial to particular individuals: it would therefore be vain and impolitic to endeavour to prohibit them."

The same objection applies to the other "slander" set

out in the statement of claim with greater force; and moreover I do not think that the words as alleged would afford any ground of action.

There is another objection taken by Mr. Osler as respects the charge of malicious prosecution viz., the rejection of evidence as to the motives which induced the defendant to take proceedings before the magistrate. This appears on p. 63 of the evidence. As we have decided the case on another ground, it is unnecessary to do more than say that, in our opinion, the evidence should have been admitted, as no doubt it was most important that the defendant should have been allowed to show the jury, if he could, that in making the charge he had acted in good faith so as to refute the charge of malice.

The rule will be absolute to enter judgment for defendant dismissing the action with costs, but without prejudice to the plaintiff bringing another action for malicious prosecution, if he be so advised; or, at the election of the plaintiff, there may be a new trial on the count for malicious prosecution. Costs of the last trial to be costs in the cause to the defendant in any event.

ROSE, J.—Mr. Blackstock was unable to cite any authority to support his contention, that an action of slander lay at the suit of a defendant on a criminal charge after acquittal for words spoken out of Court by a prosecutor in answering a question as to why he had laid an information against the defendant, even though such answer involved the statement of the prosecutor's belief in the truth of the charge, and an affirmance of the guilt of the defendant.

As such words would be evidence of malice to go to the jury in an action for malicious prosecution the defendant could in such an action obtain relief for any injury sustained.

My learned brothers think that words so spoken are privileged. In this case the evidence fairly read hardly goes farther than to describe the charge.

Without authority I see no good reason for holding that

an action lies for the words here spoken; and so concur in the judgment just read.

I agree there should be a new trial on the claim for malicious prosecution.

CAMERON, C. J., concurred with GALT, J.

Order accordingly.

[COMMON PLEAS DIVISION.]

McDONELL v. THE BUILDING AND LOAN ASSOCIATION, TORONTO.

Mortgage—Demise clause—Non-execution of mortgage by mortgagee—Tenancy from year to year—Right of distress—Death of mortgagor—Distraining for one thing, justifying for another.

The plaintiff's father executed a mortgage, declared to be in pursuance of the short form of Mortgage Act, of certain land, dated 17th November, 1881, to the defendants, but which was not executed by them, for the term of seven years, the principal and interest being re-payable by instalments on the 1st November in each year. The mortgage contained a demise clause for the term of the mortgage, at a rental equal to the instalments of principal and interest and due at the same time, and also a distress clause. The mortgagor was to remain in possession until default. He remained in possession and paid the instalments due on the 1st November, 1882 and 1883. He died intestate in December, 1884, when the plaintiff, a son, by arrangement with the other heirs at law and the widow, occupied the land. At the father's death there was due for principal $100, and for interest $147. The interest was subsequently paid by the plaintiff. In October, 1885, after the interest had been so paid, the defendants executed a distress warrant to their bailiff, directing him to levy $112.55, "the amount of interest due on the 1st November, 1884," under which the bailiff distrained the plaintiff's goods.

Held, that, by reason of the provisions of the mortgage, the mortgagor remaining in possession, and the payments made by him, the relationship of landlord and tenant on the basis of a tenancy from year to year was created between the parties, with the right to distrain, which was not put an end to by the death of the mortgagor.

Held, also, that notwithstanding the distress was stated to be for interest, the defendants, being entitled to distrain for principal, could justify therefor.

THIS was an action brought by the plaintiff against the defendants to recover damages for illegally distraining his

goods and chattels for arrears of interest under a mortgage made by one Ronald R. McDonell, owner of the fee, to the defendants, when no interest was in arrear; and claiming a perpetual injunction to restrain the selling of the goods distrained.

The defendants justified the distress under a provision in the mortgage authorizing the defendants to distrain for arrears of interest; and also on the ground that the mortgagor, Ronald R. McDonell, had become tenant to the defendants under a demise thereof to him by the defendants by the mortgage at certain rentals therein mentioned; and at the time of the distress there was rent in arrear under the demise.

The cause was tried before Armour, J., without a jury, at Cornwall, at the Fall Assizes of 1885.

At the trial it appeared that Ronald R. McDonell, the mortgagor, by indenture of mortgage, dated the 17th November, 1881, granted the east half of lot number 29 in the 7th concession (4th range) of the township of Cornwall, to the defendants in fee, subject to a proviso for redemption by the mortgagor on payment of the sum of $2,300, with interest at seven per cent, as follows: $100 of the principal money to be paid on the first day of November in each year during the next succeeding six years, and the balance, $1,700, on the 1st November, 1888, with interest payable yearly on the said 1st November.

This mortgage was declared to be made in pursuance of the Act respecting short forms of mortgages, and contained, among other provisions, the following: "Provided the said mortgagees (the defendants) may distrain for arrears of interest. * * And the said mortgagees grant to the said mortgagor possession and right of possession of the said lands and lease the same to him until the first day of November, 1888, undisturbed by the said mortgagees or any one claiming through or under them; the said mortgagor, his executors, administrators and assigns, keeping the covenants herein contained by him or them to be kept; and yielding, and paying therefor in every year during the

said term on each and every of and the same days as in the proviso for redemption appointed for payment of interest and principal, such rent or sums as equal in amount the interest and principal payable on such days respectively according to said proviso without any deduction; and it is agreed such payments, when made as aforesaid, shall respectively be taken, and be in all respects, in satisfaction and payment of the sums then payable. Provided always, and it is agreed in case any one or more of the covenants or agreements herein of the mortgagor be untrue, or unobserved or broken at any time the mortgagees, their successors and assigns, may enter into the said lands, or any part thereof, in the name of the whole without any prior demand or notice, and take and retain possession thereof, and determine the said lease."

The mortgage also contained provisos that upon default in payment of interest the whole principal should become payable; and that until default of payment the mortgagor should have quiet possession of the land, the production of mortgage to be *primâ facie* evidence of default; and that all interest in arrear should bear interest at seven per cent. from the time of accruing due until payment.

The mortgagor, Ronald R. McDonell, died intestate in the month of December, 1884; and an arrangement was made between the plaintiff, who was a son of deceased, and the deceased's widow and the other heirs-at-law, that the plaintiff should occupy the land, and out of the produce thereof support and maintain the widow and other members of the family remaining at home.

At the time of the mortgagor's death there was due on the mortgage for principal $100, and for interest $147.

On the 19th December, 1884, Messrs. McLennan & Liddell, on behalf of the plaintiff, wrote to the defendants, "that the mortgagor died on the Sunday preceding, and his son (the plaintiff) called and handed them the $100 then enclosed to be applied on the interest due on his father's mortgage, and expected to be able to send the balance of interest shortly."

On the 23rd February, 1885, Messrs. McLennan & Liddell wrote to the defendants again, enclosing $49 received from plaintiff on account of mortgage, without saying whether it was for principal or interest; and added "the insurance premium which you paid for him he asks to be allowed to stand in the meantime, and he would remit again."

No communication was shewn between the plaintiff and defendants other than the letters of Messrs. McLennan & Liddell, above referred to.

On the 7th day of October, 1885, the defendants executed a distress warrant, addressed to Donald McDonell, their bailiff, directing him to distrain the goods and chattels upon the mortgaged premises for $112.55, being the amount of interest due on the same on the 1st day of November, 1884, under which the said bailiff entered upon the premises and distrained on the 9th October, 1885 certain chattels. Previous to the making of the distress warrant the defendants had served a notice upon the plaintiff and other heirs of the mortgagor, claiming the whole principal money of $2,100, with interest from the 1st November, 1884; and that unless the same, with costs and expenses, was paid forthwith, the defendants would enter into possession of the mortgaged premises, and receive and take the rents, issues, and profits, and sell and dispose of the said lands and premises by public auction or private sale.

The learned Judge indorsed the following finding upon the pleadings:

"I find at the time of the distress made there was no interest in arrear. I find that the distress was unlawful. I find for the plaintiff, and $25 damages; and I direct that the injunction be made perpetual; and that judgment be entered for the said damages, with full costs of suit, on and after the fifth day of next Michaelmas Sittings."

During Michaelmas Sittings *Allan Cassels* moved on notice to set aside the said findings, and to enter judgment

for defendants, on the ground that the said findings and judgment were contrary to law, and evidence, and the weight of evidence.

During the same sittings *Allan Cassels* supported the motion, and referred to *Leith's* Real Property Statutes, pp. 89, 90, 392; *Morton* v. *Woods*, L. R. 3 Q. B. 658, 663, 666; L. R. 4 Q. B. 293, 304; *Ecclesiastical Commissioners* v. *Merrall*, L. R. 4 Ex. 162, 165-6; *Cooch* v. *Goodman*, 2 Q. B. 580, 598; *Crook* v. *Corporation of Seaford*, L. R. 6 Ch, 551; *Doe d. Pennington* v. *Taniere*, 12 Q. B. 998; *Davidson's* Precedents on Conveyancing, 3rd ed., vol. v., part 2, pp. 12, 14; *Agnew* on the Statute of Frauds, 10, 13, 24: *Browne* on the Statute of Frauds, 4th ed., secs. 38-9; *Doe d. Rigg* v. *Bell*, 2 Sm. L. C., 8th ed., 100; *Re Threlfall*, 16 Ch. D. 274; *Gibboney* v. *Gibboney*, 36 U. C. R. 236; *Clayton* v. *Blakey*, 2 Sm. L. C., 8th ed., 106; *Bell* v. *Irish* 45 U. C. R. 167; *Trent* v. *Hunt*, 9 Ex. 14; *Braithwaite* v. *Cooksey*, 1 H. Bl. 465; *Woodfall* on L. & T. 12th ed., 206, 212, 396; *Doe d. Shore* v. *Porter*, 3 T. R. 13; *Doe d. Hill* v. *Wood*, 14 M. & W. 682; *Williams* on Executors, 8th ed., 261-9, 679-684; *Williams* v. *Heales*, L. R. 9 C. P. 177; *Gwinnet* v. *Phillips*, 3 T. R. 643; *Gilbert* on Distress and Replevin, 29; *Crowther* v. *Ramsbottom*, 7 T. R. 654 657; *Gambrell* v. *Earl of Falmouth*, 4 A. & E. 73; *Phillips* v. *Whitsed*, 2 E. & E. 804; R. & J. Dig., 1091; *Keech* v. *Hall*, 1 Sm. L. C., 8th ed., 574; *Royal Canadian Bank* v. *Kelly*, 19 C. P. 196, 20 C. P. 279; 14 C. L. J. N. S. 8; *Trust and Loan Co.* v. *Lawrason*, 45 U. C. R. 176, 6 A. R. 286; *Ex p. Punnett, Re Kitchin*, 16 Ch. D. 226, 234; *Griffith* v. *Brown*, 21 C. P. 12; *Re Hoskins*, 1 A. R. 379; *Rudolph* v. *Bernard*, 4 U. C. R. 238.

Moss, Q.C., contra, in addition to the cases cited, referred to *Pitman* v. *Woodbury*, 3 Ex. 4; *Swatman* v. *Ambler*, 8 Ex. 72.

Cassels, in reply, referred to *Bradby* on Distress, 2nd ed., 77; *Morgan* v. *Pike*, 14 C. B. 473, 483-4.

December, 19, 1885. CAMERON, C. J.—The finding of the learned judge that no interest was in arrear at the

time of the distress was, I think, correct, as the letter of the 19th December, 1884, written by Messrs. McLennan & Liddell to the defendants, enclosing to them $100, expressly appropriated that payment to the interest in arrear; and in the same letter it was intimated the balance of interest would shortly be sent. So when the $49 were sent in February, though the letter enclosing it made no specific application of it, I think it, read in connection with the previous letter, would amount to a direction to apply the remittance on account of interest; and the learned Judge could not well have come to a different conclusion.

It is the contention raised by Mr. Cassels in his very carefully considered and elaborate argument, that although the distress was nominally for interest, there being an instalment of principal in arrear, and the mortgage containing a demise for the term of seven years at a rental equal to the amount of principal and interest falling due on the first of November in each year, the defendants were justified in distraining for such principal, and could, notwithstanding the bailiff was directed to distrain for interest, justify for the true cause, that gives rise to some nice questions that may not be solved without some difficulty.

The first question is, what is the effect of the demise clause in the mortgage, the mortgagees (the defendants) not having signed the mortgage? If the mortgagees had signed and sealed it there would clearly have been a term of seven years created in favor of the mortgagor subject of course to forfeiture on non-payment of rent or breach of any covenant or provision, entitling the mortgagees to resume possession within the seven years. Then, putting aside for the moment the fact of the mortgagor's death, the distress would have been legal. This seems to be established by the authorities cited by Mr. Cassels. Then what is the effect of the omission by the defendants to execute the mortgage? According to *Morton* v. *Woods*, L. R. 3 Q. B. 663, affirmed in appeal, L. R. 4 Q. B. 296, it was to constitute the mortgagor a tenant at will to the mortgagees,

with a right of distress in the latter for the amount payable as rent.

In the present case was the tenancy created no higher than a tenancy at will? If not, it may be that tenancy must be held to have been put an end to by the death of the mortgagor, although death, it is said, does not always put an end to such a tenancy.

The contention of the defendants, in effect, is that upon the execution of the mortgage with the demise clause in it, a tenancy at will at least was created which gave a right of distress for the interest and principal falling due on the 1st November, 1882; but that instalment having been duly paid the tenancy at will became enlarged into a tenancy from year to year, with all the incidents attaching to such a tenancy. This would undoubtedly have been so if the defendants with or without title had assumed by a separate instrument to have demised the premises to the mortgagor for seven years, though such demise would have been void as a lease for seven years, not having been under seal as required by the statute. Then can it make any difference that the demise is contained in the mortgage deed by which the mortgagor conveyed the fee subject to the right of redemption to the defendants? I do not think it can; and it therefore would seem that by reason of this provision in the mortgage, the retaining of possession by the mortgagor, and the payment of the interest and principal by him in 1882 and 1883, the relationship of landlord and tenant was established between them.

In *Kearsley* v. *Philips*, 11 Q. B. D. 621, Brett, M. R., at p. 624, cited with approval the following passage from the note to the case of *Keech* v. *Hall*, 1 Sm. L. C., 8th ed., 574, at p. 583: "A mortgage deed sometimes contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent, or a power enabling the mortgagee to distrain for interest, by which no tenancy is created. The object of such provisions is generally to further secure the payment of the interest, an object more completely effected by adopting the former than the latter mode of framing the deed;

because, whilst the former makes the mortgagor tenant at will only to the mortgagee, so that his interest may be put an end to by demand of possession, and at the same time creates a rent properly so called with all its incident remedies, the latter mode operates merely by way of personal license from the mortgagor, and affects his interest only."

This language is applicable, of course, to the position occupied by the mortgagor immediately on the execution of the mortgage, and does not deal with the question of the enlargement of the tenancy by the subsequent payment of rent.

Gibboney v. *Gibboney*, 36 U. C. R. 236, shews that a tenant entering under a verbal demise for five years becomes, even without payment of rent, a tenant from year to year.

In delivering the judgment of the Court the present Chief Justice of the Queen's Bench Division very fully and exhaustively reviewed the authorities, with the above result; and *a fortiori* after payment of rent would the tenancy at will be enlarged into the more beneficial holding for the tenant of a yearly tenancy.

I do not think on principle that the fact that the payment was referable to two different things, that is to say performance of the covenant to pay so much principal and interest yearly, and also to the payment of rent, can make any difference in the legal effect of the payment. The *reddendum* is clear and distinct to be a sum of rent equivlent in amount to the interest and instalment of principal falling due annually, and the sum when paid as rent was to be in discharge of the accrued principal and interest to a like amount. Nothing can be plainer than that the intention of the parties was to create the relationship of landlord and tenant between them, for the more effectually securing to the mortgagees the payment of principal and interest, by giving to them the right of distress resulting from the relationship of landlord and tenant.

As to the propriety of allowing such an arrangement to

prevail against strangers or creditors, I expressed my opinion in the case of the *Trust and Loan Co.* v. *Lawrason*, 45 U. C. R. 176, at p. 185; and I still adhere to the views then expressed.

That is a case, as reported in 6 A. R. 286, that may be most usefully referred to in considering the demise clause in the mortgage in question here.

But the case of *Kearsley* v. *Philips* has been decided in England since then, and fully indicates the law. The language of the Master of the Rolls, at p. 624, is: "When the relation of landlord and tenant and a rent, 'with all its incident remedies' are created by a mortgage deed, it makes no difference to the rights of the mortgagee that afterwards the premises are let by the mortgagor to an under-tenant. As to the seizure of the plaintiffs' goods it has been contended that he is an absolute stranger; but if the relation of landlord and tenant has been created between the mortgagee and mortgagor, it is not, and cannot be, denied the distress is lawful."

If I am right that by the terms of the mortgage, the occupation by the mortgagor of the premises after the mortgage, and the payment of part of the principal and interest, created a yearly tenancy, it follows that the death of the mortgagor did not determine the tenancy, and so when the distress was made there was a right in the personal representative of the mortgagor to hold till the tenancy was put an end to by the expiry of the seven years mentioned in the mortgage, unless the term should be sooner determined by a half year's notice to quit. For while there was not an absolute term of seven years created by the language used in making the demise, there was a tenancy that would last that long unless sooner determined by one of the parties giving six months' notice to put an end to it.

It is laid down in *Woodfall* on Landlord and Tenant, 12th ed., p. 266, that in the case of a tenancy from year to year as long as both parties please, if the tenant die, his personal representative has the same interest in the land

which his testator or intestate had; for whatever chattel he had must vest in his executor or administrator as his legal representative.

For this he cites a number of authorities to one of which it will suffice to refer, viz: *Doe dem. Shore* v. *Porter*, 3 T. R. 13, which fully sustains the text.

There still remains the question, was the distress invalid and the defendants trespassers by reason of it having been made nominally for interest when no interest was in arrear but an instalment of principal was due? The authorities seem clear that a distress for one cause may be made and avowry or justification for a different cause.

In *Gwinnet* v. *Phillips*, 3 T. R. 643, at p. 645, Lord Kenyon, Chief Justice, said "a party may distrain for rent and avow for fealty."

In *Trent* v. *Hunt*, 9 Ex. 14, it was said, it is not the right that a man says he has, but the right he has, is to govern.

This language Hagarty, C. J., in *Bell* v. *Irish*, 45 U. C. R. 164, at p. 174, quotes with approval; and adds, "I cannot see how the fact of defendant distraining on the plaintiff's goods prevents his justifying the taking on other grounds, viz: that the property or chattels were his, and he had the right to take them."

I confess it appears harsh to allow the taking of goods for a non-existing cause, and then justify the taking of them for a cause which, if made known at the time, might have prevented much inconvenience and expense to the person from whose possession they were taken. The right, however, would seem to be settled by authority and not now open to question.

The plaintiff's claim therefore fails, and his action must be dismissed, with costs, and the injunction restraining the sale of the distrained goods be dissolved.

I regret the necessity of arriving at this result as the distress under the circumstances was a harsh proceeding, the mortgaged premises being ample security for the debt due the defendants who had determined to exercise their

power of sale before they made the distress. But they had the legal right to enforce their claim in the way they did, and it is our duty to administer the law without regard to the question whether in its enforcement harshness was resorted to or not. Apart from the fact of distraining there was nothing to complain of in the manner in which it was done.

I should perhaps say that I have not failed to consider the cases of *Pitman* v. *Woodbury*, 3 Ex. 4, and *Swatman* v. *Ambler*, 8 Ex. 72, cited by Mr. Moss to show the relationship of landlord and tenant did not exist between the defendants and their mortgagor. They fall very far short of this, and only go the length of deciding that where the lessor has not executed a lease for years the lessee is not liable in an action on his covenants in the lease, as the covenants were made in respect of a term which did not exist, and though the lessees, so to call them, might be liable for use and occupation, they were not liable to be sued on their covenants.

GALT and ROSE, JJ., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

UDY V. STEWART.

Seduction—Death of plaintiff—Survival of action—17 Car. II. ch. 8—R. S. O. ch. 50, s. 236—O. J. Act, Rule 383—Witness, competency of.

In an action of seduction the plaintiff obtained a verdict, and judgment was directed to be entered in his favour. In the following sittings of the Divisional Court an order *nisi* was obtained to set aside the verdict and judgment, and to enter judgment for the defendant, on the ground of the improper admission of the evidence of the seduced girl by reason of her incompetency to give evidence. The order was set down, and on its coming on for judgment, it appeared that after the order had been served the plaintiff had died.

Semble, that under O. J. Act, Rule 383, the action abated by reason of the plaintiff's death; but

Held, that the girl's evidence was improperly received, as it clearly appeared that she was not capable of understanding or appreciating the nature of an oath or the obligation she assumed in swearing to tell the truth, and was therefore incompetent to give evidence; and without her evidence the verdict could not be supported.

Under the circumstances an order was granted staying further proceedings in the action.

THIS was an action of seduction tried before O'Connor, and a jury, at Lindsay, at the Fall Assizes of 1885, when the jury found for the plaintiff, and judgment was entered in his favor.

The only part of the evidence necessary to be given is that which depends on the competency of the alleged seduced girl to give evidence.

The case had been previously tried before Rose, J., and a jury, when the jury failed to agree.

At the last trial the competency of the witness to give evidence was objected to.

The following was the evidence given in relation to her competency. Her mother swore that she could not speak very plain. "When a baby she fell. Dr. Bigham said it was that. The members of the family can converse with her, and make her understand. We know everything she says. I did not let her go out to work earlier, because she was weak in mind, and not so smart as other girls. She cannot talk the same as the rest of them.

When she came to talk, she talked just as well as she does now. I understand quite a lot she says. Most things she talks in her own way. That language I understand. I understand most all she says. Pretty nigh all. She cannot speak the words properly out the same as we can. She has never been at school. I taught her as far as I knew. I taught her if she told a lie she would go to hell, and if she told the truth she would go to heaven. That is in her own language. I told her always to be a good girl and mind herself, and take care of herself. I cannot exactly say when I first began to instruct her, but ever since she knew anything. She can hear if she does not catch cold. If she catches cold she is a little dull of hearing. She never goes to Sunday School. I taught her her prayers. I taught her her A B C's. She never got any further. I taught her the Lord's prayer many a time when she would go to bed. I would say it for her, and she would say it as well as she could. I cannot remember how long it is since I heard her say it. You are going a little too far, I have said the truth, and nothing but the truth."

The witness herself was then called and examined by plaintiff's counsel, Mr. Blackstock, who asked, "where will you go if you tell a lie?" Witness made several inarticulate sounds, but uttered no words which could be distinguished. The question was repeated with the same result. Counsel for the defendant then asked: "How old are you? No answer. Q. Where do you live? No answer. Q. Do you hear what I say? The witness made an inarticulate sound. Q. Where did you live before you were at Fenelon Falls. Where did your father live? Answer: Lived on a farm. Q. Do you know your father's name? A. Yes. Q. How many sisters have you; do you know their names? No answer."

Counsel:—"I submit such a witness as that cannot be examined."

Judge:—"She may be treated as a dummy."

Counsel:—"She is mentally weak."

Judge:—"I do not think it is exactly that."

Judge to witness:—"You say your father lives on a farm? Answer, yes."

The shorthand reporter here notes: "It is to be understood that the witness where she is represented as saying the word yes, did not fully articulate the word, but made a sound evidently intended to express assent, and accompanied by a nod of the head."

Judge continuing:—"Have you any brothers? A. Yes. Q. How many? A. Willie. Q. How many brothers have you, do you understand me? A. Yes. Q. Well, answer how many have you? No answer. Q. Do you know what a sister is? A. Yes. Q. How many sisters have you; have you more than one? A. Yes. Q. How many? No answer. Q. How old are you; do you know? A. Down in the field. Q. Do you know your mother? A. Yes. Q. Where is your mother now, is she here? A. Yes. Q. Did she come with you here? A. Yes. Q. Can you see her now? A. Yes."

Mr. McCarthy:—"The law seems to be plain enough on the point. The administering an oath to this witness is an empty ceremony."

The Judge:—"The difficulty I feel is this, we are told by her mother, that she has a language of her own. I do not know that language, and cannot question her."

Mr. McCarthy:—"We will just let her sister come, and I will put questions through her."

Sophia Udy was then called to interpret. Mr. McCarthy: "Q. How many sisters have you? Sophia Udy:—I think she does not know how many. Q. How many brothers have you? No answer. Q. What is your brother's name? A. Mr. Stewart. Sophia Udy:—She is so excited, I do not think she knows now. Q. Where is Bill, your brother Bill? A. Bill is not here with me. Q. Where is your brother Bill? A. At home. Sophia Udy:—Brother is not at home, he is here. Q. Where is your mother? A. Here."

Mr. Blackstock:—"Q. Where will you go if you tell a

lie? A. To hell. Q. Where will you go when you tell the truth? A. To heaven."

Sophia Udy was then sworn as a witness, and said:—"I am a sister of the last witness. My sister has not been able to speak well since she was a baby. I am younger than she is. I can understand near every word she says, only a few words she does not say very plain, and I cannot understand her. At home she is in the habit of doing ordinary housework. She will do anything you tell her. I am in the habit of talking to her at home. I converse with her every day. I ask her how old she is. I cannot think what I ask her. I only just tell her what to do, that is all, no more is said. She knows the names of some of the neighbors, and some she does not. She knew Perryman, Stewart, and Archer. If I told her to go to Mrs. Archer's or Perryman's, she would know. She knows those people when she sees them. I never knew her to confuse one of my sisters with the others. All the other members of the family understand her. If I told her to lie down, she would know what I meant certainly. If I told her to go to bed, she would know what I meant. I cannot carry on an extended conversation with her. It has got to be a simple matter. If anybody hurt her, and she was asked, she could tell. She never says anything to one sister about the others. If she were asked who sat at breakfast with her, she would be able to tell that. If one of my sisters was up stairs, and she and I were down stairs, and I asked her where she was, she would know, if she knew she was up stairs. Some words I can make her understand, and some I cannot. I converse with her on ordinary household subjects. I think she knows a little about religion. She understands that she would suffer if she told a lie. I never found her telling stories that were untrue. I never knew her to come and tell some story that I knew to be nonsensical. I do not know whether she understands about counting or numbers. She did not understand the expression, how many. I have taught her to count on her fingers. If I would tell her to bring three

apples the same as anybody else, and she would know what it meant, and would bring them, if she knew where they were. She would bring twenty, and count them herself. I think she could count to twenty and no more. When out alone, on coming home, she could tell you any persons that she saw, if she knew them. She has come and told that Mr. Perryman was outside. She opens the door, if she hears the rap, and if anyone asked for mother, she would know and tell mother."

On cross-examination, she said her sister had not been able to speak any better than at present. "It is more by a grunt and noise that she speaks than by words; just a kind of little noise. I never attempt to carry on a conversation, only when I want her to do something I tell her, and see that she does it. I would tell her to go and wash or scrub, anything like that. She sometimes volunteers a statement. If she saw any one she would want to tell me. I do not think she would understand the nature of the word evidence. I do not know whether she would understand the meaning of the word true." The form of oath was repeated, and the witness said: "I do not think I could make her understand that. I cannot tell why. I can make her understand simple things such as go and come. Beyond that she has no understanding. She is just about the same as she has always been, only when she gets a cold, and then she is hard of hearing. She would say her prayers in her own language—the Lord's prayer. I have heard her say it, but could hardly make it out. She would repeat it after another. She has not memory enough to say it without repeating it for her. She knows if she told a lie, she would go to hell, because we taught her that before this trouble. We taught her not because she was in the habit of telling lies, but we thought we would teach her that much anyway. I did not teach her much religion; the rest of my sisters besides my mother taught her. Told her where she would go if she told a lie, and where she would go if she told the truth, and she must always be a good girl, and never do anything out of the way. That is all I

know of. If you were to ask questions, and I were to repeat them to her, she would be able to understand some, and some she would not. She would understand just very simple questions."

On re-examination, she said:—"If I told my sister what she told in the box must be the truth, and that she would go to hell if she did not tell the truth, and to Heaven if she did, she would understand that. I would have a little trouble to make her understand that. She can tell of things that happen to her without having them repeated to her. She occasionally goes very simple messages. Mrs. Archer could make her understand lots of things. She was able to understand the ordinary household work, and the directions given about it. She knows the distinction between what is good and what is bad. I do not know whether she knows it would be wrong to take the property of another. She knows the trouble she has got into is wrong."

By the Judge:—"I understand what an oath is. I do not think she does. She does not understand the nature of an oath. If she were asked whether she is coming here to tell the truth, she would understand, but you would have to speak very loud to her. She would be able to understand if she said what was not true, she would be punished hereafter."

Mr. McCarthy:—"I think now it is shown that the witness is incompetent."

The learned Judge:—"If I happen to be wrong in excluding the evidence, the case will have to come down for trial again. It is a matter about which I feel a great deal of difficulty. My own inclination is, to let her be sworn, and then stop the case afterwards, if necessary."

Mr. McCarthy:—"Before your Lordship does that, I would like to examine John Ellis on the point."

John Ellis was then sworn, and said:—"I am one of the grand jurymen. I know the plaintiff's family, but not the plaintiff. I do not know the girl Elizabeth. I have seen her once. They lived in the village, and I went to get

the mother to scrub the shop for me. I went to the back door, and no person came to the door, and this person was in the woodshed. I spoke to her and got no reply, and then I went away. She walked kind of shying away from me, and I did not pay any attention to her."

Elizabeth Stewart, wife of defendant, sworn :—"This girl lived at my place, I believe, from sometime in January, 1883, till August of the same year. There was no other woman there at the time. She was there principally for washing, scrubbing the floor, and washing dishes when I was with her. To make her understand what I wanted, I would speak to her, and make a sign at the same time. If I wanted her to scrub the floor, I would get a pail and the water, and point to the floor and tell her. If I wanted her to wash dishes, I generally picked them up and fixed them, and put water on them for her. She could only understand some things said to her."

It further appeared by the evidence of this witness, that the girl used to go to her father's on Sunday ; sometimes used to milk the cows when witness or her husband was with her; and on one occasion, on being told to scrub, got angry, but on being told she must do it, did scrub.

The witness, Elizabeth Udy, was then called in, and the learned Judge, through her sister Sophia as interpreter, said to her :—"Q. Do you know what you came here for ? She said yes. Q. What did you come here for, do you know ? A. No. Q. You have got to kiss this Bible, and after that, what will happen to you if you do not tell the truth ? A. Hell. Q. Why will you go to Hell if you tell a lie ? A. Up in heaven. Q. Do you know that you have to die sometime ? A. Yes. Q. If you are bad when you die, where will you go ? A. Up there. Q. If you are bad when you die, where will you go ? A. Go away up there. Q. Where do bad people go? Q. I do not know—die. Q. Do you know what a lie is ? A. Yes. Q. What is it ? No answer. Q. Do you know what it is to tell a lie ? A. Yes. Q. What is it ? No answer. Q. Do you know when you left home to come here? A. Up at Mrs. Stewart's."

The learned Judge:—"I hardly think now, Mr. Blackstock, we can go on with this examination."

Mr. Blackstock:—"I would ask your Lordship to take her evidence as you suggested, and see how she gets along after being sworn."

The learned Judge to witness, through the interpreter:—"Q. Where did you go after you went out of the witness box a short time ago. What room were you in a little while ago? A. No. Q. Can you point out the room to me where you went a little while ago. Where did you come from when you came in here now? A. I came when I came in. Q. Go back into the room where you were a little while ago." The witness went into the room where she had previously been.

The learned Judge:—"I see now what the trouble is, and that will be the trouble throughout. She understood where the room was. I think I will let her be sworn, and see how we get on."

The witness was then called and sworn.

Mr. McCarthy:—"I object to any examination by means of this girl, her sister. She does not speak a foreign language, and therefore, the sister cannot act as interpreter. I think your Lordship will find no authority for it."

The learned Judge:—"Then I will be authority for it."

Mr. McCarthy:—"I object to it."

Sophia Udy was then sworn as interpreter between the Court and the witness, and the evidence went to show that defendant, on several occasions, and in several places, had connection with her.

On cross-examination.—Mr. McCarthy asked: Q. "Do you know Charlie Smith? A. No. He never done nothing. Q. Do you know him? A. Charlie won't hurt me. Q. Do you know Charlie Smith? A. No. Charlie never did anything. Bobby never said a word to me. Q. Who is Bobby? A. Bobby Colmer. Q. Where does Bobby live? A. Lives at Mrs. Stewart's. Q. Did you ever live at Archer's? A. No, I never. Q. Did you ever live at Archer's? A. Yes, I did. Q. How long did you live at Archer's—Tom Archer's?

A. A month. Q. Was that all? A. Yes. Only one month? A. Five months. Q. Did you ever go to Archer's when you were living at Stewart's? A. Mrs. Stewart's. Q. Did you ever go to Archer's when living at Stewart's? A. Tom Archer's. Q. Did you ever go to Archer's when you were living at Mrs. Stewart's? Did you ever go there? A. Yes. Q. How often did you go? A. Mrs. Stewart's. Q. How often did you go there? A. Tom Archer's. Q. How often did you go to Mrs. Archer's? A. I went to Tom Archer's and came back to Mrs. Stewart's. Q. Do you remember being out one night—out all night? A. All night and all day. Q. Where were you that night you were locked out? A. All night. Q. Where were you all night? A. In the bushes. Q. Why did you go to the bushes? A. Laid in the bushes all night. Q. Why did you go to the bushes—what made you go? A. I laid in the bushes all night. Q. When did you come home? A. I came home in the falls. Q. When did you go back to Stewart's after being in the bushes all night? A. I was in the bushes all night and went back to Mrs. Stewart's. Q. When? A. Back in the morning. Q. Whom did you see there when you went back in the morning? A. I went back in the morning? A. I went back in the morning to Mrs. Stewart's. Q. Who was with you in the woods that night? A. Henry Stewart. Q. Was he there all night with you? A. All night and all day till the next morning. Q. Whose woods was it? A. The woods on the boundary. Q. Was Henry Stewart in bed one night with you? A. Yes, he slept with me all night. Q. Was Henry Stewart with you in the bush one night and in the bed another night? A. In the woods all night, all night and morning night. Q. What room were you sleeping in the night that Henry Stewart slept with you? A. In another bed-room. Q. Do you know the name of the room you were sleeping in, was it the sitting room or sleeping room, or what? A. The little room in the other part. Q. Do you remember sleeping in the summer kitchen one night? A. All night. Q. Who was with you that night? A. Henry Stewart. Q. What did you sleep on

in the summer kitchen—what did you lie on? A. I lay on the top of the bed all night. Q. Was there a bed in the summer kitchen? A. Yes. Q. Do you know what the open kitchen is? A. Open in the kitchen. Q. Did you ever sleep there all night? A. All night and all day and all night. Q. And who was with you then, who slept with you then? A. Henry Stewart. Q. Can you count the number of times Henry Stewart slept with you—how many times did Henry Stewart hurt you? A. A month. Q. How many times did Henry Stewart hurt you? A. He knocked me down. Q. How many times? All the time for a month. Q. Do you know the days of the week. A. Yes. Q. What are they? A. Two. Q. Do you know what day Sunday is? A. Last Sunday morning. Q. Is there any difference between Sunday and Monday? A. Yes, and Sunday morning. Q. Count 1, 2, 3? The witness then counted to 17, and then said 11, 12.

The jury found a verdict for the plaintiff, and judgment was directed to be entered in his favor.

During Michaelmas sittings, November 16, 1885, *J. A. Barron* obtained an order *nisi* to set aside the verdict of the jury, and the judgment directed to be entered thereon, and to enter judgment for the defendant, or for a new trial, on the ground of the improper admission of the evidence of Elizabeth Udy, the plaintiff's daughter, on account of incompetency to give evidence, from weakness of intellect and unsoundness of mind, being wholly incapable of comprehending the nature of an oath or affirmation; also on the ground that the sister of the said witness was improperly permitted to act as interpreter between the witness and the court and jury; also on the ground that the court improperly allowed the alleged likeness between the defendant and the child, born in consequence of the alleged seduction, to be considered by the jury, and counsel was permitted to comment on the alleged resemblance to the jury.

During Michaelmas Sittings, December 1, 1885, *Osler*,

Q. C., and *J. A. Barron*, supported the order *nisi*, and referred to *Ball* v. *Goodman*, 10 C. P. 174; *Annual Prac.*, p. 250-1; 17 Car. II. ch. 8, sec. 1,; C. L. P. Act, R. S. O. ch. 50, secs. 228, 237; O. J. Act, Rule 383; *Tidd's* Prac., 8th ed., p. 1188; *Griffith* v. *Williams*, 1 Cr. & J. 47; *Ireland* v. *Champneys*, 4 Taunt. 884; *Neil* v. *McMillan*, 27 U. C. R. 257; *Harrison's* C. L. P. Act, 2nd ed., sec. 47; 21 *Central Law Journal* p. 390; *Hanawalt* v. *State*, 24 N. W. Rep. 489; *Wills* on Circumstantial Evidence, 120; *Rex* v. *Williams*, 7 C. & P. 320; *Taylor* on Evidence, 8th ed., p. 1169, secs. 1375-8; *Best* on Evidence, 7th ed., 146.

G. T. Blackstock, contra, referred to *Wilson's* J. Act, 4th ed., 238, O. J. Act, sec, 90; *Maclennan's* O. J. Act, 2nd ed., Rule 326; *Archbold's* Prac., 14th ed., 1028; *Griffith* v. *Williams*, 1 C. & J. 47; *Turner* v. *London and South Western R. W. Co.*, L. R. 17 Eq. 561; *Hemming* v. *Batchelor*, L. R. 10 Ex. 54; *Moore* v. *Roberts*, 27 L. J. N. S. C. P. 161; *Garnett* v. *Bradley*, 3 App. Cas. 944, 965; *District of Columbia* v. *Armes*, 107 U. S. Sup. Ct. 519; *The State* v. *Smith*, 54 Iowa 104; *Nicholas's* Adulterine Bastardy, 140; *Ruston's* Case, 1 Leach C. C. 408; *Regina* v. *Whitehead*, L. R. 1 C. C. 33.

Osler, Q. C., in reply, referred to *Bridges* v. *Smyth*, 8 Bing. 29.

The arguments sufficiently appear from the judgment.

December 19, 1885. CAMERON, C. J.—On the 16th day of November, 1885, the order *nisi* was granted, and was set down on the list for argument, but when reached Mr. Osler, Q. C., on behalf of the defendant announced that after the granting of the order the plaintiff died, and the action was thereby abated. Mr. Blackstock, for the plaintiff, while he did not dispute the correctness of Mr. Osler's statement, said he had not been advised of his client's death by his solicitors; and the matter was allowed to stand over until the 1st day of December, to enable Mr. Blackstock to make enquiries and determine what course he would pursue.

On the said 1st day of December Mr. Blackstock ad-

mitted that the plaintiff had died after the order *nisi* had been granted and served; but he contended that the action had not abated by the death of the plaintiff, as by the statute 17 Car. II. ch. 8, where the death of a sole plaintiff or defendant in any action occurred after verdict such death could not be assigned for error if judgment was entered within two terms after the verdict; and he shewed cause to the order *nisi*.

Mr. Osler, protesting that in supporting his rule he should not be prejudiced in his contention that the action had abated, and that there was no one authorized to act on behalf of the plaintiff, supported and moved absolute the order *nisi*.

It may be well in the first place to consider whether the action is or is not at an end by reason of the death of the plaintiff, a question that in the changes in the law effected by the Common Law Procedure Act and the Ontario Judicature Act, is surrounded by a good deal of difficulty.

There is no doubt since the case of *Ball* v. *Goodman*, 10 C. P. 174, which expressly decides that point, that the action of seduction does not survive to the plaintiff's representatives. It is a purely personal action for a wrong not affecting the corpus of the plaintiff's estate, and comes within the maxim, "*actio personalis moritur cum persona.*"

But that is not conclusive of the question now to be decided, for it is equally clear that the statute, 17 Car. II. ch. 8, prevents the death of either plaintiff or defendant, in such an action, being a cause assignable as error where the death, as in this case, has happened after verdict and before the lapse of two terms.

The Common Law Proceedure Act has a provision identical with that of the 17 Car. II. ch. 8 in section 236 of R. S. O. ch. 50, which declares: "The death of either party between the verdict and judgment shall not be alleged for error, in case such judgment is entered within two terms after the verdict."

Then came the Ontario Judicature Act, which makes the following provision, Rule 383: "An action shall not become

abated by reason of the marriage, death, or bankruptcy of any of the parties, *if the cause of action survive or continue*, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*." This provision by force of its own language would only extend to save from abatement such actions as would survive to the personal representatives—that is, to such actions as they could originate and bring after the death of the testator or intestate: *Kirk* v. *Todd*, 21 Ch. D. 484; *Twycross* v. *Grant*, 4 C. P. D. 40.

The Judicature Act, by sec. 90, sub-sec. 2, repeals any enactment inconsistent with the Act itself; and the question presents itself: is the 17 Car. II., ch. 8, or the Common Law Procedure Act ch. 50, sec. 236, inconsistent with the Judicature Act?

This section 236 saves from abatement, and continues to a deceased person's representatives the benefit of a verdict obtained in any kind of action whatever, while rule 383 of the Judicature Act in express terms is confined to cases where the cause of action would survive him who first had it, and thus makes the Statute and Common Law one. Can it be said then that a provision which gives a right that the Common Law would not and which the Judicature Act would not, is not inconsistent with the latter, more especially as by rule 471, sec. 2, proceedings in error are abolished? And there would be no practice or authority by which a judgment signed at any time could be questioned, the proceeding in error being abolished.

It seems to me the Statute of Charles and the Common Law Procedure Act, as far as this provision is concerned, must be regarded as inconsistent enactments. The rule of the Imperial Judicature Act, corresponding with our rule 383, expressly provides for the case of death between verdict and judgment by having added after the words "*pendente lite*" the following: "And, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judg-

ment may in such case be entered notwithstanding the death." This was not in the English rule when the Act was first passed; and its subsequent introduction is an argument that it was thought necessary to save the cases saved by the Statute of Charles and the Common Law Procedure Act.

If this view is correct the action fails, and the decision of the points raised by the rule is not essential.

But the question as to the admissibility of the evidence of the witness Elizabeth Udy is of importance, as it is, as far as I am aware, the first case of incompetency relating to the mental capacity of a witness having been presented under like circumstances in this Province.

The witness was neither deaf nor absolutely dumb, nor is she idiotic or insane, as idiotcy and insanity are usually understood. But, as far as known, she is not capable of understanding or appreciating the nature of an oath, or the obligation she assumes in swearing to tell the truth.

It is not enough that a witness desires to tell the truth. If that fact be questioned, it must appear that he or she is able at least to comprehend the nature of an oath, and the temporal consequences at all events of not telling the truth. Then assume that the witness here really understood what telling the truth meant—but from the description of the instruction she received and the answers she gave to questions put to her it seems impossible to be certain she does understand it—there was nothing to show she understood the consequence of telling a lie. From her inability to speak with intelligible distinctness, and not being able to write, it would seem practically impossible to ascertain whether she in fact knows what a lie means. To tell her a thousand times not to tell lies would convey no idea to her mind without some illustration. Her sister and others only conversed with her on the subject of household duties or work; and it cannot be inferred because she knew what to scrub meant, and when told to wash dishes she knew enough to do it, she could from the instruction she had received, comprehend the nature of a falsehood. To scrub

and wash dishes are things that she could be instructed through the eyes to understand the meaning of; but she could receive no assistance from the eyes in distinguishing between truth and falsehood.

I think, therefore, that her evidence was inadmissible, and should have been rejected.

The competency of a witness is to be determined by the court, and the evidence being received, it is for the jury to attach what weight to it they may think proper. But the reception of such evidence by the Judge presiding at the trial is open to review by the court. The witness should to be competent, not only able to understand and answer simple questions, but should have intelligence enough to understand all reasonable questions put to her on cross examination, otherwise the opposite party would be deprived of this very material and important safe guard against imposition.

It is by no means apparent that the witness with the previous instruction and education she had received could connect the birth of her child with the alleged sexual intercourse between the defendant and her nine months before. According to the interpretation of her evidence given by her sister she called the child Henry Stewart's, and did not speak of it as her own, which was singular if uninstructed in the matter at all. It was quite impossible to get at her knowledge of such subjects from her inability to understand questions put to her. From her answers, while some are intelligent enough, it is manifest she did not understand very simple questions, and she may have been very easily imposed upon.

If she was correctly interpreted, which I do not wish to express any doubt about, she may have only been repeating a lesson taught her. It is not necessary to say that in fact she was instructed to tell the tale she told or not. It is sufficient, if by her want of intelligence or inability to comprehend questions put to her, the defendant was deprived of the means of ascertaining by cross-examination whether she was so instructed.

The general rule as to the exclusion of witnesses from want of intelligence is thus stated by Mr. *Taylor* in his work on Evidence, 8th ed., sec. 1375: "The *last class* of persons rejected by the law as witnesses includes all those who are incapable of comprehending the nature of an oath or affirmation, or of giving a moderately rational answer to a sensible question. It makes no difference from what cause the incapacity may arise; for whether it be occasioned by a congenital want of intellect, or by some temporary obscuration of the reasoning faculties, or by mere unripeness of understanding,—whether the person be an idiot, a lunatic, a drunkard, or a child,—he cannot so long as the defect exists, be examined as a witness." And in reference to the examination of persons deaf and dumb who were once, in contemplation of law, idiots, but are no longer, so, the same author says, sec. 1376, "Still, when a deaf mute is adduced as a witness, the court, in the exercise of due caution, will take care to ascertain before he is examined, that he posseses the requisite amount of intelligence, and that he understands the nature of an oath."

In the present case it is quite clear the witness comes nearer to the condition of a deaf mute or child of unripe understanding than any other class, and did not understand the nature of an oath. Though it was sworn she knew what telling a lie was, and that by telling a lie she would go to hell, and by telling the truth to heaven, she was not capable of giving an idea of her conception of either heaven or hell; and, in her own examination, her answers shew she did not understand this. On being told by the Judge that she would have to kiss the Bible, and asked what would happen to her after that if she did not tell the truth, she is interpreted to have answered "Hell." Then on being asked, "why will you go to hell?" she answered incoherently or without relevancy to the question, "Up in heaven." Again on being asked, "if you are bad when you die where will you go?" she answered "Up there," shewing, I think, it was impossible to form the opinion that she understood the questions put to her.

I have examined the cases Mr. Blackstock referred to, none of which will go the length of supporting the competency of this witness.

There is no evidence whatever, without the girl's testimony, that could be submitted to the jury, and none that can be said to corroborate her statement; the defendant's conversation with the witness Colmer falling far short of anything like an admission of guilt.

The plaintiff's action therefore should have been dismissed, and must be so now.

Were it otherwise I do not think that the verdict ought to be allowed to stand on the weight of evidence, as the girl's statement, where she connects the defendant's wife with a knowledge of any impropriety between her and the defendant, is most positively contradicted both by the defendant and his wife; and as they are intelligent people, knowing what they are doing and the nature of the oath they had taken, more reliance should be placed on what they say than on what this witness for the plaintiff said.

To grant a new trial would virtually put an end to the action, because the cause does not survive, and the court could not very well in such a case grant a new trial on terms to prevent the death of the plaintiff being resorted to by the defendant to abate the action. Perhaps the most correct order to make is one staying all further proceedings in the action.

The objection to the daughter of the plaintiff being allowed to act as interpreter is one that I should have much difficulty in dealing with if the case depended upon that alone. The works on evidence that I have had access to do not treat of the question.

In criminal cases, it is a common thing for the relative of a deaf and dumb witness to interpret for him; but in that case the witness, though the principal one for the Crown, is not a party to the suit. And if the interpreter is performing a *quasi judicial* function his relationship to either of the litigants would be a disqualification.

Then, again, in a case like the present, it may be that no

one except a relative would be capable of interpreting; and I do not think it necessary in disposing of the rights of the parties to express any opinion upon the question. I shall hold myself free to deal with the point when it must be decided if it should again arise.

It is not necessary either to decide the question as to the admissibility in evidence of a comparison of the defendant and the child, to ascertain whether there was any resemblance between them or not, for the purpose of drawing from such resemblance the inference that the defendant was the father, or from the want of resemblance that he was not. It is a kind of evidence, in cases like the present, that at least should be very sparingly resorted to. It could scarcely be said that a want of resemblance between the defendant and the child could be treated as a strong circumstance against the alleged paternity; and resemblances traced in an infant or very young child must very often prove wholly illusory. There was no objection to the course taken in the case at the trial, and it was too late after verdict to object.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

CHRISTIE V. BURNETT.

Statute of Frauds—Note or memorandum in writing—Parol evidence—Words, meaning of.

Parol evidence is always admissible to shew the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties.

When there is no actual agreement as to price or time for payment, the law will supply the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price, and by implying, in the absence of evidence to the contrary, that payment should be made on delivery.

Held, that the letters of the defendant, set out below, and read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within the 17th sec. of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to.

STATEMENT OF CLAIM.

(2) That shortly before 17th October, 1881, defendant instructed plaintiff to manufacture and procure for him the machinery and plant required by him in the construction of a mill which he was then erecting on Manitoulin Island. (3) That on 17th of October, 1881, defendant wrote to plaintiff an order for, and particulars of such machinery and plant. (4) That in accordance with such instructions and order of defendant, plaintiff manufactured and procured for him said machinery and plant, and delivered same to defendant as same was agreed to be delivered to him, namely, a portion thereof on board the steamer Jane Miller on 24th November, 1881, and the other portion on board the steamer Wiarton Belle on December 2, 1881. (5) That the prices charged for said machinery and plant were fair and reasonable, amounting in the whole to $968.05, and the plaintiff claimed that sum.

The defendant by his statement denied the allegations in the plaintiff's statement, and alleged (2) That the only agreement entered into between the plaintiff and defendant was entered into in the middle of September, 1881, and

plaintiff thereby agreed to furnish the defendant all the machinery necessary for a certain saw mill defendant was then erecting, and to deliver and safely set up same and have said mill complete with all machinery ready for use by 15th December, 1881, defendant giving plaintiff to understand that he intended to use said mill the following winter to saw and manufacture railway ties. (3) That after making said agreement, plaintiff, finding that owing to the lateness of the season it would be difficult to complete said mill by the time above mentioned, requested defendant to extend the time for completion of said mill until the following spring, promising to have sufficient of said machinery delivered and set up to enable defendant to saw and manufacture ties by 15th December, 1881, and further requested defendant to procure as skilled a millwright as he could obtain on said Island and have him waiting to receive and set up said machinery, which defendant promised to send forward as soon as he had the same manufactured, said millwright in all respects to be plaintiff's servant and take instruction from plaintiff and his foreman. (4) That at plaintiff's request defendant consented to an extension of time for the completion of said mill, provided same was sufficiently complete to allow him to saw ties by 15th December, 1881; and it was thereupon further understood and agreed between plaintiff and defendant that in the event of an early closing of navigation preventing defendant from having the whole of said machinery delivered on said Island before close of navigation, defendant would, on being notified, have the lighter portions of said machinery conveyed by small boat or on the ice from Tabermoney to said Island, and that plaintiff would send up his skilled workmen only in the following spring to complete said mill, and that after such completion defendant was to give his notes for the prices agreed on for said machinery and such extras as might be found necessary. (5) That except as aforesaid the original agreement in the second paragraph set out was never altered. (6) That defendant never accepted or agreed to

accept said machinery, or any part thereof, on said steamer Jane Miller or at Tabermoney, but, on the contrary, plaintiff was to run all risk of safe delivery, and on that account it was understood and agreed that plaintiff would fully insure the same in his own name. (7) That defendant at great expense obtained a millwright, and kept him waiting for two months to receive said machinery. (8) That defendant was never notified of the shipping of said machinery, or any part thereof, or of the delivery of any part thereof at Tabermoney. (9) That plaintiff did not deliver the machinery pretended to have been sent to Tabermoney to defendant, or to any one on defendant's behalf, but, on the contrary, continued in possession of same, and used same for his own benefit. (10) That no agreement in writing was entered into between plaintiff and defendant in respect of said machinery, nor was any note or memorandum thereof in writing sighed by defendant, or any one in his behalf duly authorized, nor was any earnest money or part payment made to bind the bargain, and defendant claimed the benefit of the 17th section of the Statute of Frauds, and R. S. O. c. 117, sec. 11, and other Statutes in that behalf. (11) That the prices claimed by plaintiff were fully fifty per cent. above the prices agreed on. (12) That defendant, by way of counter-claim, set up that plaintiff, in consideration of defendant purchasing from plaintiff said machinery, agreed to ship same by steamer from Owen Sound to Manitoulin Island, and insure same for its full value against the perils of said voyage, and although plaintiff shipped a portion of said machinery, he did not insure same according to his said promise, and the same was lost to defendant. (13) That defendant also claimed two months wages and board of the millwright obtained and kept waiting for said machinery, and that defendant claimed $600 for breach of the agreement to insure, and $300 for said board and wages.

Reply.

Denial of allegations in counter claim.

Issue.

The cause was tried at the last fall sittings of this Court at Owen Sound, by Rose, J., without a jury.

It appeared that plaintiff was a manufacturer of mill machinery in Owen Sound, and that defendent was a saw miller in Manitoulin Island: that in the latter part of September, 1881, defendant came to Owen Sound to see if he could purchase a second hand saw rig: that he went and saw plaintiff, and got talking with him: that plaintiff asked him his business down and he told him he wanted to get a second hand saw rig: that he had a good shingle mill then, and that if he had a saw mill he could attach it to the engine and run it as well: that he had a large engine and boiler and it would not pay to run it as it was: that he had to get a saw rig: that defendant thereupon bargained with plaintiff to manufacture for and furnish him with a saw rig: that so much of the machinery of the saw rig as could be got ready for the last trip of the Jane Miller, a steamer running to Manitoulin Island from Owen Sound, was to be put on board of her, and the balance was to be sent by a steamer, if one was running, or, if not, by waggons or sleighs, to Tabermoney: that nothing was said about the price except that it was to be reasonable.

The plaintiff was examined and gave the following evidence as to the payment of the price. Q. It was to be paid for by him giving his notes after the mill was running, except for certain things which was to be paid in cash save belting and other things you had to buy? A. Yes, I had to buy these. Q. But the reason of these being paid in cash was you would have to buy them? A. Yes. Q. The rest was to be paid for by notes when the mill would be put up? A. There was no definite arrangement as to that. The Court. Q. What did you mean by no definite arrangement? A. What I meant is there was no definite time stated, and if he could not send me cash as he promised to, I was to take his note and discount it at the bank. Q. Let me understand now about the payments, as I understand you, there was nothing definite arranged

about the payments? A. No, I was to get some money. Q. And the balance in a note to be discounted at the bank? A. Yes. The Court. If he could not pay cash you were to take his note and discount it? A. Yes.

The plaintiff's son and book-keeper was examined and gave this evidence, Q. It was you that wrote the letter sending up the notes for signature, that is, the letter of the 29th of October. Is that true the saws and the belts were cash? A. Yes. Q. And in case the defendant was not able to send the money for the saws and belts you sent him up notes to sign for them? A. Yes.

The defendant was then examined and gave this evidence. Q. When did you first hear of any loss? A. Well, I think it was a letter I received from them in October, that was the only letter I ever got from them. That is the letter containing those two notes, but he did not say what sums to put on the notes, he said he had most of the machinery ready, he sent two blank notes for me to sign and said he had to pay cash for these saws. It was not understood I was to give anything until after the mill was started running. If it had been stated in the letter what the saws and belts cost, and he had made out his notes, I should have signed the notes, because I thought it was all in good faith, but it was not stated what these things came to, and I did not sign the note. I said to myself, there is no machinery, I have got nothing to show for anything.

It appeared from the defendant's evidence that in his interview with plaintiff, when the bargain was made, plaintiff said that defendant would give him the dimensions of his mill and what way it stood, and he would make the rig without going up, and that defendant said he could tell him the size of the mill, and where the engine stood, and where the boiler stood, and where he wanted the saw rig to stand; and plaintiff allowed they could do with that, and that they would go to work and get it up. Accordingly, on 17th October, 1881, defendant caused a plan of his mill to be sent to plaintiff, with this letter, written by defendant's instructions, by one James

Kendrick, a millwright, addressed to plaintiff: "I shall try to give you as good an idea as possible. Engine shaft 13 feet from south end of mill, and 7 ft. long and 5½ in. diameter, piston rod 2 in. diameter, connecting rod 2¼ in., small plan cylinder 9½ in. bore and 24 in. stroke; size furnace, 4 ft. 6 in. wide by 2 ft. deep; size boiler, 20 ft. long by 40 in. diameter; driving pully, 72 in., 12 in. face built by me can be altered to 60 in. by making new coats; main building, 32x60 feet; boiler house, 24x60; 1 pulley 24 in. diameter, 12 in. face, 4 in. hole; 1 pulley 30 in. diameter, 16 in. face, 4⅝ in. hole; 1 pulley 32 in. diameter, 12 in. face, 5½ in. hole; 2 tightening pulleys, 15 in. diameter, 14 in. face; 1 hard pulley on spider, 46 in. diameter and 8 in. face. These are all the pulleys that are here, only some small wood pulleys, and the governor pulley is 8 in. diam.; draw of engine shaft, 5½ in. diam."

On 29th October, 1881, plaintiff wrote to defendant as follows: "We are pretty well ahead with your machinery, and expect to have it ready to ship before the close of navigation, Do you want me to furnish the belt? If so, what kind of a one do you want? As I mentioned, the saw is cash, also belt. I enclose you two blank notes to sign in case you cannot send any money. Shall I ship to Lonely or to Providence Bay?"

On 4th of November, 1881, defendant wrote to plaintiff as follows: "I trust you received, by hands of Mr. A. Leslie, a letter of instructions, dated 17th ult., regarding mill, &c. It contained a plan of same one-eighth inch to foot, which would give you a fair idea of everything, placing you in position to make any suggestions of improvements. In respect of belting, I have here 40 feet of 12 inch 4 ply American rubber, intended for the big saw. Melville has also at Providence Bay 44 feet 4 ply American rubber 14 inch face at $1.12½ per foot, intended to drive from engine pulley, which I would buy if you cannot do better as to price. I think it necessary to widen the furnace; for this purpose would require two more sawdust grates; the size is 4 feet 6 inches long by 12¾ inches. I

think you have size on hand. In the matter of the swing button saw, I will require it large enough to saw shingle bolts say 36 inches diameter. I hope you are pushing on the work with all haste, and if anything is to be crowded out let it be some non-essential, such as saw dust elevators, &c."

On 16th November, 1881, plaintiff wrote to defendant as follows: "Yours of the 4th inst. to hand. We are pushing your work rapidly to completion, and have seen Captain Post, who says he will be sure to land it at Lonely Bay before the close of navigation. With reference to belting, you had better buy the belting there as I can do no better with regard to price. The only saw-dust grate I have is five feet by seven inches, and as there is not time to make a pattern this fall will send you three of this pattern, which I think will answer. Before receiving yours I had ordered two saws, one a twenty-two inch butting and the other a sixteen inch rip, would have ordered a larger butting but do not think your engine capable of driving any more than we are preparing for it. You will have to do now till spring, as there is not time to make any alterations. We received your letter of instructions per Mr. Leslie."

On the same day plaintiff again wrote to defendant as follows: "I enclosed you two blank notes to sign to your address, Shegiemdat. Please sign and return on receipt."

On 24th November, 1881, plaintiff wrote to defendant as follows: "I have to-day shipped per Jane Miller all that I could get ready, and the balance will have to be sent to Tabermoney as arranged. I will have it all ready in about two weeks, and would like further instructions from you before sending it there. Please reply per Captain Post. I am exceedingly sorry that it could not all be sent this time, but it was impossible in the time. When you were here we arranged that what could not be got ready for Jane Miller was to be sent to Tabermoney, and you would get it across. Let me know whether to send it on as soon as finished or not."

On the 2nd December, 1881, the balance of the goods were shipped to Tabermoney by the steamer Wiarton Belle.

The steamer Jane Miller never reached her destination, but was lost with all on board.

Defendant swore that plaintiff agreed to insure the goods sent by the Jane Miller. This plaintiff denied. On 8th of December, 1881, plaintiff wrote to defendant as follows: "I am sory to inform you that the bulk of the mill machinery was on the Jane Miller when she was lost, and of course will never be got, as the boat went down in 300 feet of water. The balance is at Tabermoney, but of course is no use to you without the other."

On 14th January, 1882, defendant wrote to plaintiff as follows: "I received your letter of 8th ult. by last mail, which arrived last week only. Had been expecting a letter from you for some time previously, as every one here was in doubt as to the fate of the Miller until recently. Respecting the 'rig,' kindly send full particulars stating what was on board and what part of it is laying at Tabermoney, and the exact amount of loss, which I trust is covered by insurance. Mr. R. A. Lyon told me that upon his recommendation you had promised to insure. The disaster has been a great disappointment all round. There was a great quantity of custom sawing to do, and the settlers are also disappointed about the sawing of their ties. I received your previous letter upon my return home from Lonely Bay after the boats had stopped running, and was in doubt whether you had been able to get the 'rig' ready for shipment, and also what had detained the Miller, and was awaiting your further advice in the matter, and also what amount you wished the indorsed blank notes filled in for, having had no invoice. I hope to hear from you again immediately, as I must have another rig got ready for early shipment in spring."

On 7th February, 1882, the plaintiff wrote to the defendant as follows: "Yours of the 14th January to hand. The bulk of the machinery was on the Miller when she went down. The saws and two long shafts with some

smaller stuff are lying at Tabermoney. I suppose what was lost will be worth something about five hundred (500) dollars, but I cannot tell exactly just now. I did not insure it, as I was not advised to do so by you."

The learned Judge ruled that no contract was proven within the statute, and directed judgment for defendant, dismissing the action with costs, the defendant consenting, in the event of the Court finding that the contract was shewn in writing, that judgment be entered for plaintiff for $945 and costs.

13th January, 1886. *Creasor*, Q. C., moved to set aside the judgment and to enter it for the plaintiff for $945, pursuant to leave reserved at the trial, on the ground that the contract between the parties for the manufacture and sale of the goods in question was substantially contained in the correspondence between plaintiff and defendant; and on the law and evidence.

Masson, Q. C., shewed cause.

February 13, 1886. ARMOUR, J.—I am of opinion that there was in this case a sufficient note or memorandum in writing within the 17th section of the Statute of Frauds, and within the 11th section of R. S. O. ch. 117, and that the plaintiff is therefore entitled to recover.

Parol evidence is always admissible to shew the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties. See per Tindal, C. J., in *Sweet* v. *Lee*, 3 M. & G. 466; *Newell* v. *Radford*, L. R., 3 C. P. 52; *Benjamin* on Sales, Am. ed. by Corbin, sec. 211 *et seq.*, and cases there cited.

We thus have the fact that the plaintiff was a manufacturer of mill machinery, and the defendant a saw-miller, and the inference deducible from their relative trades that the plaintiff was the seller and the defendant the purchaser.

Then we have the letter of the defendant of the 4th November, 1881, to the plaintiff: "I hope you are pushing on the work with all haste and if anything is to be crowded out let it be some non-essential such as sawdust elevators, &c."

I think it could be shewn by parol what the "work" was which was to be pushed on with all haste: see *Macdonald* v. *Longbottom*, 1 El. & El. 977; *Shardlow* v. *Cotterell*, L. R., 20 Chy. Div. 90.

Then we have the letter of the 14th of January, 1882, and this although written after the loss of the goods, can be resorted to to establish the contract: see *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; *Wilkinson* v. *Evans*, L. R., 1 C. P. 407; *Buxton* v. *Rust*, L. R., 7 Exch. at p. 282; *The Leather Cloth Co.* v. *Hieronimus*, L. R., 10 Q. B. 140.

The term "rig," made use of in this letter, is subject to the same mode of interpretation and identification, that is, by parol, as the word "work" in the previous letter.

These two letters taken together, and read in the light of the parol evidence, which is properly admissible in my opinion, sufficiently established a bargain made for the goods in question by the defendant with the plaintiff within the statute. See *Newell* v. *Radford*, L. R. 3 C. P. 52, and *The Salmon Falls Manufacturing Co.* v. *Goddard*, 14 Howard 446.

It is clear from the evidence that no price was agreed upon for the goods in question, but the rule of law is, that where there is no actual agreement as to price the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. See *Benjamin*, s. 251.

Nor do I think the fair inference from the evidence to be that any time was agreed upon when payment for the goods was to be made, and the law would supply this also: the law would imply the payment on delivery, and I am unable to see anything upon the evidence which, by any reasonable inference, shows that any agreement was come

to which would displace the legal implication. See *McDonald* v. *Murray*, 2 O. R. 573; *Lightbound* v. *Warnock*, 4 O. R. 187.

The conclusion I arrive at upon the evidence is, that there was no agreement made that the plaintiff should insure the goods. Apart from the evidence of the plaintiff and of Martin, the letter of the defendant of the 14th January, 1882, I think entirely overthrows the defendant's contention that there was.

In my opinion the motion should be absolute, and judgment should be entered for the plaintiff for $945, with full costs of suit.

WILSON, C. J., concurred.

O'CONNOR, J., not having been present during the argument, took no part in the judgment.

Judgment for plaintiff.

[QUEEN'S BENCH DIVISION.]

LEGACY v. PITCHER ET AL.

Local venue—Abolition by Judicature Act—Vexatious Actions Act, R. S. O. ch. 73—O. J. A., Rule 254.

Held, that the effect of Rule 254 of the Ontario Judicature Act is to abolish all local venues as well as those made so by statute as at the common law, except actions of ejectment.

STATEMENT of claim.

2. That defendants, on 10th day of March, 1885, at the township of Brantford, in the county of Brant, assaulted plaintiff, and caused him to be apprehended by, and given into custody of, a constable, and to be imprisoned.

3. That defendants, on said 10th March, at the township of North Norwich, in the county of Oxford, pursuant to and confirming the previous illegal apprehension at the aforesaid township of Brantford, under a warrant issued by defendant D. S. Butterfield and James Barr, of the plaintiff, assaulted said plaintiff and caused him to be detained, &c.

4. That defendants, on said 10th March, 1885, at the aforesaid village of Norwich, by the pretence of a remand of plaintiff springing from, and grounded upon, the illegal apprehension at the aforesaid township of Brantford, under a warrant issued by the defendant D. S. Butterfield and one James Barr, of plaintiff, being then before defendants by virtue thereof, assaulted plaintiff and gave him into custody of a constable, and caused him to be imprisoned in the lock-up house in the aforesaid village of Norwich for the space of, to wit, twenty-four hours.

5. That defendants, on 11th March, 1885, at the aforesaid village of Norwich, by a pretence of a remand of plaintiff springing from, and grounded upon, the illegal apprehension at the aforesaid township of Brantford, under a warrant issued by the defendant D. S. Butterfield and one James Barr, of plaintiff, being then before the defendants by virtue thereof and of such pretence of a remand,

assaulted plaintiff and gave him into custody to a constable, and caused him to be imprisoned, &c.

6. That defendants on 16th March, 1885, at the aforesaid village of Norwich, by a pretence of a remand of plaintiff springing from and grounded upon the illegal apprehension at the aforesaid township of Brantford, under a warrant issued by the defendant D. S. Butterfield and one James Barr, of plaintiff, being then before defendants, by virtue thereof, and of such pretence of remands, assaulted plaintiff and gave him into custody to a constable and caused him to be imprisoned, &c.

7. That defendants on the 17th March, 1885, at the town of Woodstock, in the county of Oxford, by their order and warrant of commitment founded thereon, both springing from and grounded upon the illegal apprehension at the township of Brantford, in the county of Brant, under a warrant issued by defendant D. S. Butterfield and one James Barr, of the plaintiff, assaulted said plaintiff and gave him into custody to a constable and caused him to be imprisoned, &c.

Paragraphs 8, 9, 10, 11, 12, and 13, were similar in terms to paragraphs 2, 3, 4, 5, 6, and 7, except in alleging that the acts therein complained of were done maliciously and without reasonable and probable cause.

Plaintiff claimed $5000 damages.

DEFENCE.

Not guilty by statute R. S. O. cap. 73, secs. 1, 3, 7, 8, 9, 10, 11, 16, 17, 11 Geo. ii. cap. 19, secs. 1, 3, 4.

The cause was tried at the last fall sittings of this Court at Brantford before Cameron, C. J., and a jury.

It appeared that plaintiff and one Ireland were the lessees of one Stephen Lossing of the south halves of lots No. 1, No. 2, and No. 3, excepting a portion owned by Solomon Lossing, of about ten acres, in the 7th concession of the township of South Norwich, under a demise for one year from 1st April, 1884, at a rental of $200 payable in $100 instalments on 1st of November, 1884, and 2nd

February, 1885. The lessees left the demised premises, as they alleged, on 26th January, 1885, and, as the lessor's agent alleged, on the 2nd February, 1885, taking their goods with them. On 7th March, 1885, a sworn information was laid by one Abraham Post Millar at Norwich, aforesaid, before said Barr and defendant Butterfield, J. Ps., "that plaintiff and Ireland, of the township of South Norwich, within the space of three months, to wit, on or about 2nd February, 1885, at said township of South Norwich, fraudulently and clandestinely conveyed and removed from the premises (the north halves of lots 1, 2, and 3 in the 7th concession of South Norwich), of which premises said plaintiff and Ireland were tenants under lease for one year, their goods and chattels, to prevent said goods and chattels being distrained for $100 rent due, the same being within the value of £50."

On the same day said James Barr and defendant Butterfield issued their warrant for the arrest of the plaintiff and Ireland.

This warrant was delivered by a constable of the county of Oxford to be executed, who went to the township of Brantford, whither Legacy and Ireland had moved, and who having procured said warrant to be backed by a Justice of the Peace of that county, arrested said Legacy and Ireland on 10th March, 1885, and brought them to the village of Norwich, and on the following morning they were brought before defendants, and the following was the record thereof made by defendants :

"Special Sessions of the Peace, held at Dake's Hotel at Norwich, March 11th, 1885, before S. Pitcher and D. S. Butterfield, two of Her Majesty's Justices for the county of Oxford. In the matter of A. P. Miller versus Dennis Legacy and Robert Ireland. The complaint being read, they plead guilty to the charge that the value of the goods removed to be $100. Court adjourned until to-morrow morning at 9 o'clock."

Plaintiff and Ireland were illiteratemen, and they swore that what they pleaded guilty to was removing

the goods on 26th of January, but not on 2nd of February. This was denied by witnesses for the defence. Plaintiff and Ireland were again brought before defendants on 12th of March, and the case was then adjourned at the request of their counsel till 16th March, and this record thereof was made by the defendants: "An adjourned Session of the Peace, held at J. Rose's office on March 12th, at 9 o'clock a. m., before J. Barr, S. Pitcher, and D. S. Butterfield, Esqs. Court adjourned, to meet Monday, March 16th, at one o'clock p. m."

Plaintiff and Ireland were again brought before defendants on 16th March, 1885, and the following was their record of what then took place: "Norwich, March 16th, 1 o'clock p.m., At an adjourned Session of the Peace held at J. Barr's office, Court opened. Note :—Counsel for the defence object to further admission of evidence on the part of the plaintiff in this case. Homer Lossing, sworn, says, remembers Legacy and Ireland being in possession of Lossing's place, lots 1, 2, concession 7, South Norwich: they had a team of horses that were worth between eighty and one hundred dollars; also had a wagon: in all was worth one hundred dollars: were removed about the first of February last, at the time he rented the premises. Homer Lossing."

"We, the undersigned Justices of the Peace, after defendants confessing, and hearing the evidence as to the value of the property so taken away and documents
do hereby adjudge that the defendants do pay the sum of $100 and costs $32.75, to be paid forthwith, and on failing to do so a warrant of distress is issued for said amount of debt and costs, and in default to be committed for the term of six months in the common goal in Woodstock, if the said several sums are not sooner paid.

"SIMON PITCHER, J.P.
"D. S. BUTTERFIELD, J.P."

Plaintiff and Ireland were not represented by counsel on 11th March, when it was alleged they pleaded guilty, but on 12th March they were so represented and a request

made of defendants to allow plaintiff and Ireland to withdraw their plea, as they had pleaded guilty through ignorance, but this defendants refused. Defendant Pitcher was a brother-in-law of the landlord Lossing. The formal order drawn up and signed was as follows:

Canada, Province of Ontario, County of Oxford, To wit: } Be it remembered that on the seventh day of March, 1885, complaint was made before the undersigned, one of Her Majesty's Justices of the Peace in and for the said county of Oxford, and also James Barr, one of Her Majesty's Justices of the Peace for said county, for that Dennis Legacy and Robert Ireland, on the second day of February, one thousand eight hundred and eighty-five, at the township of South Norwich in the county of Oxford, did, being tenants of certain lands and premises whereof one A. P. Miller was, and is, agent in the said Township of South Norwich, to wit, the North halves of lots one, two, and three, in the seventh concession of said township, unlawfully and clandestinely remove from the said lands and premises and conceal certain goods and chattels, being then liable to distress for the sum of one hundred dollars rent due on the first day of February, 1885, at the time of such removal aforesaid. And whereas the said Dennis Legacy and Robert Ireland did on the eleventh day of March, 1885, appear before the undersigned, two of Her Majesty's Justices of the Peace in and for the said county of Oxford, plead guilty to the said complaint; and now having heard the matter of the said complaint we do adjudge the said Dennis Legacy and Robert Ireland to pay to the said A. P. Miller the said sum of one hundred dollars forthwith, and also to pay to the said A. P. Millar the sum of thirty-two dollars and seventy-five cents for his costs in this behalf, and if the said several sums be not paid forthwith we hereby order that the same be levied by distress and sale of the goods and chattels of the said Dennis Legacy and Robert Ireland, and in default of sufficient distress in that behalf we adjudge the said Dennis Legacy and Robert Ireland to be imprisoned in the common goal of the said county of Oxford for the space of six months, unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said Dennis Legacy and Robert Ireland to the said common goal shall be sooner paid. Given under our hands and seals this sixteenth day of March, A. D. 1885.

SENECA PITCHER, J. P.
D. S. BUTTERFIELD, J. P.

On the same day a warrant of distress was issued by defendants and delivered to a constable of the county of Oxford, who on the same day returned that he had made diligent search for the goods and chattels of the said Dennis Legacy and Robert Ireland, and that he could find no sufficient goods or chattels of the said Dennis Legacy and Robert Ireland whereon to levy the said sums; and on the same day the plaintiff and the said Ireland were committed by defendants to the common gaol of the county of Oxford, and were there imprisoned until 27th March, 1885, when they were discharged upon *habeas corpus*, and on 8th September, 1885, said order was quashed. Notice of this action was proved to have been given more than one month before the bringing thereof. This and the case of Ireland against the same defendants were tried together.

The learned Chief Justice submitted the following questions to the jury and they answered them as follows:

1. Did the defendants in causing the plaintiffs respectively to be apprehended and imprisoned, as in their respective statements of claim alleged, act in their magisterial capacity of Justices of the Peace? A. They did illegally.

2. If they were not acting within their jurisdiction as Justices of the Peace, did they in good faith believe that they were acting as such Justices of the Peace and within their jurisdiction? A. They did.

3. Did the defendants act maliciously in causing the apprehension of the plaintiffs respectively? A. Maliciously.

4. Did the plaintiffs respectively, when brought before the defendants on 11th March, 1885, on the charge of having clandestinely and fraudulently removed their goods after their rent became due, plead guilty thereto, or did they only plead guilty to the removal of the goods on 26th January or before their rent was due? A. They pleaded guilty of removing on January 26th, 1885.

5. Did the plaintiffs in fact remove their goods fraudulently and clandestinely after their rent had become due? A. No, they did not.

6. Did they suffer a longer term of imprisonment than by law could be awarded for the offence charged against them? A. No.

7. How do you find on the whole case, for the plaintiffs or defendants? A. For plaintiffs.

8. What damages have the plaintiffs respectively suffered by reason of the wrongs in their respective statement of claims alleged? A. $25.00 each.

9. Where did the defendants reside at the time of committing the alleged wrongs in the plaintiffs' statement of mentioned, and at the time this action was commenced? A. In Oxford County.

The learned Chief Justice thereupon, on the findings that the defendants believed they were acting within their jurisdiction as Justices of the Peace, and that the defendants resided in the County of Oxford, directed that judgment should be entered for the defendants, with costs of defence.

19th November, 1885. *V. Mackenzie*, Q.C., obtained an order *nisi* to set aside the verdict, so far as adverse, and the judgment, and to enter judgment for the plaintiff, or for a new trial, on the following grounds: (1) That the learned Judge at the trial should have given effect to the plaintiffs' contention that the transactions creating the cause of action, and assigned as such in the statement of claim, constituted one continuing grievance, and that the action was therefore rightly brought in the county where the arrest was made. (2) That the learned Judge at the trial improperly asked the jury to find whether or not the magistrates, when causing the plaintiffs to be apprehended, were acting in their magisterial capacity, and that the finding so returned by them should have been discarded as gratuitous and impertinent. (3) That the learned Judge at the trial should have directed the jury to find that the plaintiff in any case was entitled to recover from the defendants, or from the defendant Butterfield, damages for such of the subjects of grievance as occurred in the county

of Brant. (4) That the learned Judge at the trial should have directed the jury that, with trespass established against the defendants, the plaintiff was entitled to recover both the costs and charges incurred in obtaining his release. (5) That the learned Judge should have directed the jury to find that the defendant Pitcher was liable, jointly with his co-defendant, for the whole of the grievances charged. (6) That the learned Judge improperly instructed the jury that they might find the plaintiff guilty of the offence with which he was charged before the magistrates, and entitled only to these costs and damages. (7) That the prosecution before the magistrates seeking as its outcome a mere order for the payment of money, and the learned Judge having ruled that they might exercise a discretion as to the issue of a summons in the first instance, the second finding of the jury was arrived at through misconception. (8) That on the findings of the jury the entry of judgment for the defendants, or for either the plaintiff or the defendants, was and would have been unwarranted. (9) That the verdict was contrary to evidence, and was perverse.

He also gave notice of motion to the same effect and on the same grounds, except substituting for the ninth ground above mentioned the following: (9) That the Judicature Act abolished local actions.

G. T. Blackstock also moved for an order *nisi* to set aside the findings of the jury so far as adverse to defendants' and to enter a non-suit, or a verdict for defendants, or for a new trial, on the law and evidence, the weight of evidence and the learned Judge's charge; or to dismiss the action on grounds stated to the learned Judge at the close of the plaintiff's case, and again at the close of the whole case.

January 13, 1886, *Mackenzie*, Q. C., shewed cause and supported the order *nisi* and motion.

Blackstock, contra.

February, 13, 1886. ARMOUR, J.—The defendants could only be held jointly liable for acts committed by them jointly, and as the defendants only began to act jointly when the

plaintiff was brought before them at the village of Norwich, in the county of Oxford, and as they continued to act jointly thereafter only in the county of Oxford, the acts complained of were committed and the cause of action arose only in the county of Oxford.

The plaintiff in his statement of claim named Brantford, in the county of Brant, as the county town in which he proposed the action should be tried, and the action was tried there.

The learned Chief Justice, being of opinion that sections 11 and 16 of the R. S. O. ch. 73 were unaffected by the Ontario Judicature Act, 1881, gave judgment dismissing the action.

It is provided by section 11 that "in every such action the venue shall be laid in the county where the act complained of was committed," and by section 16 that "if at the trial of any such action the plaintiff does not prove that the cause of action arose in the county or place laid as venue in the margin of the declaration, then and in any such case the plaintiff shall be non-suited, or a verdict shall be given for the defendant."

By the Ontario Judicature Act, 1881, section 12, it is provided that "the jurisdiction of the High Court of Justice and the Court of Appeal respectively shall be exercised, so far as regards procedure and practice, in the manner provided by this Act, or by such rules and orders of Court as may be made pursuant to this Act;" and by section 53 it is provided that "the rules of Court in the schedule to this Act shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court;" and by section 90 it is provided that "from and after the commencement of this Act there shall be repealed, so far as relates to this Province, any enactment inconsistent with this Act;" and by order 31, rule 1, it is provided that "there shall be no local venue for the trial of any action, except an action of ejectment, but the plaintiff shall in his statement of claim

name the county town in which he proposes that the action should be tried, and the action shall, unless a Judge otherwise orders, be tried in the place so named."

The general purpose of the Ontario Judicature Act, 1881, was to establish as far as possible uniformity of procedure and practice in all actions in the High Court, and so it was provided that the jurisdiction of the High Court should be exercised, so far as regarded procedure and practice, in the manner thereby provided.

The particular purpose of order 31, rule 1, was to abolish all distinctions between local and transitory actions, and to make all actions transitory, except only actions of ejectment, and so it was provided that there should be no local venue for the trial of any action except an action of ejectment, and it can hardly be said that actions made local by statute were not within the contemplation of the legislature when they made this rule, and that had they intended that the rule should not apply to them they would not have excepted them as they did the action of ejectment.

The rule itself is couched in the plainest and strongest language possible and is negative in its terms, and is therefore imperative. *Rex* v. *Leicester*, 7 B. & C. 6.

It is quite clear also that the provisions of R. S. O. ch. 73, sections 11 and 16, are altogether inconsistent with this rule, that they cannot both stand together, and that therefore those provisions are repealed by the express words of the Ontario Judicature Act 1881.

By the Imperial Act 38 and 39 Vict. ch. 77, order 36, rule 1, it was provided that "there shall be no local venue for the trial of any action," and by the Supreme Court Rules 1883 that rule was amended by adding thereto the words "except where otherwise provided by statute," shewing that the Judges who made that amendment were of opinion that it was necessary, and that without it local venues made so by statute would be abolished.

In *Bryson* v. *Russell*, 51 L. T. N. S. 90, I find that Smith, J., in giving judgment assumes and states that the effect of the Imperial Act 38 and 39 Vict. ch. 77, order 36, rule 1, was to abolish local venues made so by statute.

In my opinion therefore the provisions of R. S. O. ch. 73 as to venue are repealed by the Ontario Judicature Act 1881, order 31, rule 1. I see nothing in *Garnet* v. *Bradley*, 3 Ex. D. 349, 3 App. Ca. 944, which, when rightly considered, militates against the view I have taken, and it must always be borne in mind that the language of the rule under discussion in that case is widely different from that under discussion in this.

Had I come to a different conclusion I would have been for granting a new trial and changing the venue to the county of Oxford, for I do not think that any one ought to be deprived of his rights upon a technical provision of such doubtful existence.

There was no very definite evidence given of what amount of costs the plaintiff had paid to procure his release from custody, nor was the learned Chief Justice asked to charge the jury with respect to the recovery of such costs by way of damages in this suit, nor was any objection taken to his charge for his not having done so.

The defendants acted clearly without jurisdiction in imprisoning the plaintiff for the cause and in the manner they did, and I see no reason why we should grant a new trial on behalf of either party. The plaintiff's counsel offered the defendants' counsel to take a new trial, the defendants' counsel did not accept the offer, and I see no valid reason why we should grant one.

In my opinion the plaintiff's motion should be absolute to enter the judgment for the plaintiff for twenty-five dollars, the damages assessed, with full costs of suit, and that the orders *nisi* obtained by each party should be discharged, without costs.

WILSON, C.J.—The only question is, whether the venue in this action should have been laid in the county where the act complained of was committed, according to the R. S. O. ch. 73, the "Act to protect Justices of the Peace and other officers from vexatious actions?" Rule 254 of the Judicature Act provides "There shall be no local

venue for the trial of any action, except in actions of ejectment, &c."

The language is as positive as it is possible to be, *there shall be no local venue*, and it is emphasised by the further declaration, *except in an action of ejectment.*

The "Vexatious Actions" statute provides in the first section the form of action shall be an action on the case for a tort. That has necessarily been altered by the Judicature Act, as there is no longer such a form of action. There is no reason why the like effect should not follow with respect to the *venue* by this later legislation.

O'CONNOR, J., not having been present at the argument, took no part in the judgment.

*Judgment accordingly.**

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*IRELAND V. PITCHER ET AL.

This was a similar case in the Common Pleas Division, and was tried at the same time before Cameron, C. J., and a jury, when a like verdict for the defendants was entered. Similar orders *nisi* were obtained and argued by the same counsel.

March 6, 1886. ROSE, J., delivered the judgment of the Court. We think we ought to follow the decision of the Queen's Bench Division in *Legacy* v. *Pitcher*.

The motion for the plaintiff must be allowed, and judgment entered for him for $25, the damages assessed; and the defendant's motion dismissed.

The plaintiff will be entitled to the costs of the motion as costs in the cause. There is nothing in the case to lead us to make any order as to the scale of costs. They will be taxed according to such scale and with such rights as to set-off as the statute and rules of Court may direct.

Reference may be had to the County Courts Act, R. S. O., ch. 43, sec. 18, sub-sec. 5, and to the Division Courts Act R. S. O., ch. 47, sec. 53, sub-sec. 7, excluding from the jurisdiction of these Courts actions against a Justice of the Peace for anything done by him in the execution of his office, *if he objects thereto.*

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

SHERIDAN v. PIGEON.

Medical practitioner—Negligence—Addendum to verdict.

In an action against the defendant, as a surgeon, for negligence, the jury found for the plaintiff, but added to their verdict the following: "We are of the opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention."

Held, a mere expression of opinion, and that it did not nullify or affect the verdict.

STATEMENT OF CLAIM:

(1) That plaintiff was a spinster residing in the village of Ashburnham, in the county of Peterborough, and carried on the business of a music teacher at the town of Peterborough in said county. (2) That defendant was a physician and surgeon residing and practising at Peterborough aforesaid. (3) That in October, 1884, plaintiff having fractured the bone of her left arm, near to the shoulder joint, retained defendant for the purpose of being properly treated by him for said fracture. (4) That defendant negligently, improperly, and unskillfully treated plaintiff for said fracture. (5) That in consequence of such negligent, improper and unskilful treatment as aforesaid plaintiff's said arm failed to properly heal, and plaintiff suffered great pain of body, and had permanently lost the use of her said arm, and had been greatly injured in her said business, and she claimed $2,000.

Defence.

(1) Admission of truth of statements in the 1st and 2nd paragraphs of statement of claim. (2) Denial of truth of allegations in the 4th and 5th paragraphs of plaintiff's statement of claim, alleging that the cause of action did not result from any negligent, improper, and unskilful treatment. (3) That defendant exercised due, proper and reasonable skill in and about the treatment of the fracture of plaintiff's arm, and used his best efforts, skill, and ability in such treatment.

Issue.

The cause was tried at the last [Fall Sittings of this Court at Peterbourgh by O'Connor, J., with a jury.

It appeared that on the 31st of October, 1884, the plaintiff was standing on a stepladder at some distance from the floor, when the ladder gave way and she was precipitated upon the floor, dislocating her left shoulder and fracturing her left humerus. The defendant was called in to attend her and did so till the month of January, 1885, when he was discharged by the plaintiff, and another medical man called in. Dr. Kincaid, one of the witnesses called for the plaintiff, examined the plaintiff about the 1st of July, 1885, and found that the fracture was not united, the bones slightly overlapped, the condition of the limb was bad, the elbow joint partially stiffened, the next joint very stiff, the fingers immovable almost, the fingers stiff. He said he would not attempt to set the fracture of the humerus and dislocation of the shoulder without placing the patient under chloroform and sending for surgical assistance. He was asked and answered as follows: "Q. We also hear from the plaintiff that she was troubled with an intense pain in the elbow and burning pain in the fingers and numbness of the whole arm, and that she complained of that to the defendant; what would that indicate? A. The burning sensation would indicate want of circulation in the limb, and the pain would indicate that the fragments of the bones were not in place and pressing upon the nerves. Q. The burning sensation would indicate bad circulation? A. Yes. Q. And the pain would indicate the part of the bones not being in apposition and pressing on the nerves of the arm? A. Yes. Q. Supposing you had a patient that had a fractured humerus, that had sustained the same injury as this plaintiff, and complained to you continually of that feeling, what would you do? A. I would attempt to relieve it. Q. In what way? A. I would take my bandaging off, my splints, and see where the difficulty was. If I was not able to remedy the evil I would call in somebody that knew more than I did myself."

Evidence was given on both sides as to the propriety of the treatment the defendant adopted, and as to what that treatment was, and as to the condition of the patient when such treatment was being continued.

The jury found a verdict for the plaintiff and $400 damages, and appended to their verdict the following: "We are of the opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention."

November 17, 1885. *Nesbitt* obtained an order *nisi* to set aside the verdict and for a new trial, or a nonsuit, on the grounds: (1) That there was no evidence to go to the jury of improper treatment, or unskilful or negligent conduct on the part of the defendant. (2) That the verdict was against evidence and the weight of evidence. (3) That on the special return of the jury negativing improper, unskilful, or negligent treatment on the part of the defendant the learned Judge should have entered judgment for the defendant. (4) That the special finding disentitled the general verdict of the jury to any weight. (5) And that the verdict and judgment were against law and evidence. He also gave notice of motion to set aside the judgment and to enter it for the defendant, on the ground that on the special finding of the jury, neglect, or improper and unskilful treatment on the part of the defendant was negatived, and that the learned Judge was wrong in refusing a nonsuit, there being no proper evidence of unskilful or improper treatment, or neglect, on the part of the defendant.

January 13, 1886, *Masson*, Q. C., (*Stone* with him) shewed cause, and *Nesbitt* (*Woods* with him) supported the order and motion.

February 13, 1886. ARMOUR, J.—I see no valid ground upon the evidence for entering a non-suit or for disturbing the verdict for the plaintiff, and if the verdict must be set aside it must only be by reason of the addendum the jury made to it.

This addendum had probably reference to the evidence given by Dr. Kincaid, and which is above quoted.

I do not think that the jury intended by it to indicate the ground upon which they found against the defendant, or to at all detract from the effect of the verdict they had rendered; but it seems to me that it was intended by them as a mere expression of opinion in mitigation of the conduct of the defendant, or, to use a common expression, it was for the purpose of "letting him down easy."

The jury, in effect, said, "we have found that your treatment of the plaintiff was unskilful to such a degree as to make you liable for negligence, but we are of opinion that it was so through ignorance, and not through design or want of attention to her, and that you ought to have called in some medical man who had the skill which you lacked."

This is the more apparent if we treat the general finding and the addendum as one finding, which is the way most favourable to the defendant expanding the general finding to its legal effect. It will thus read as follows: "We find that the defendant in his treatment of the plaintiff was wanting in competent and ordinary care and skill, and to such a degree as to have led to the bad result which has followed; and we are of opinion that he made a mistake in not calling in skilled assistance, but not wilfully or through inattention."

Thus read the latter part of the finding is not inconsistent with or contradictory of the former part, and the finding of want of skill stands unimpaired.

In my opinion the order *nisi* and motion should be dismissed, with costs.

I refer to *Rich* v. *Pierpont*, 3 F. & F. 35; *Lanphier* v. *Phipos*, 8 C. & P. 475; *Slater* v. *Baker*, 2 Wils. 359.

WILSON, C. J.—The addition to the verdict of the jury is presented to us in a twofold way; firstly, that the addition is legally a part and parcel of the verdict and qualifies it to that extent that the effect of the whole finding is to acquit the defendant; secondly, if the addition be not

strictly a part of the verdict, that it is an important matter, and entitled to be considered in granting a new trial, for it shews the jury have not found strictly upon the issue before them that the defendant is guilty of the charge imputed to him.

It certainly may be considered in this last view, and may well entitle the party in such a case to a new trial if the other facts in evidence are of a doubtful nature as to the negligence which is charged.

We were of opinion we could not interfere upon the facts or merits, and it remained over to consider whether or not the defendant is of right entitled to read the addition in question as a part of the verdict, or whether it is not wholly surplusage and to be rejected.

The complaint of the plaintiff is contained in these few words, that "the defendant negligently, improperly, and unskilfully treated the plaintiff for the said fracture," and the addition made by the jury to this verdict is, "We are of opinion that the defendant made a mistake in not calling in skilled assistance, but not wilfully or through inattention."

If the verdict means that the defendant "is guilty of negligence and unskilled treatment of the fracture, in manner following, that is to say, he made a mistake in not calling in skilled assistance, but not wilfully or through inattention," that is an acquittal of the defendant, because it is a finding against the issue, and because it is a finding that the defendant, in not calling in such skilled assistance, did not act either wilfully or through inattention, which is no part of the charge or issue.

In *Vaughan* 150, *Bushell's Case*, it is said "The legal verdict of the jury to be recorded is finding for the plaintiff or defendant. What they answer, if asked, to questions concerning some particular fact is not of their verdict essentially, nor are they bound to agree in such particulars: if they all agree to find their issue for the plaintiff or defendant they may differ in their motives wherefore, as well as Judges in giving judgment for the plaintiff or

defendant may differ in the reasons wherefore they give that judgment, which is very ordinary."

A verdict that the damages "are to be paid for in * * if by law it may be" is a good finding of the damages, but the mode they are to be paid is void. *Taylor* v. *Willes*, Cro. Car. 219.

In a special verdict whereby any man is to be charged, or tried, or convicted, though jury find matter of evidence enough for them to find the fact and give verdict against him, yet if they do not find the fact, I say such matter, though pregnant evidence, yet it cannot be enough to empower the Judge to intend the fact or condemn him as guilty of it. *Rex* v. *Plummer*, 12 Mod. 627. *Tonkin* v. *Croker*, 2 Ld. Ray 860, shews that where the issue is found that which follows after it, if contrary to what is admitted upon the pleadings, may be rejected as surplusage.

In action on the case and non-assumpsit pleaded, if the jury find the defendant non-assumpsit, "notwithstanding if the two witnesses H. and W. say true, as we think they do, then we find the defendant did not assumpsit, &c.," and refer it to the Court. This last part is void because it is not directly found, and yet the first part shall stand, and is a perfect verdict for the defendant: *Vin. Abr. Trial*, Vol. 21, p. 395.

The addition to the verdict, I think, must be regarded as surplusage. The jury have found the issue for the plaintiff; they have not found anything directly against that issue. Their opinion of what the defendant should have done or of his conduct cannot in law affect or nullify their actual verdict.

I am therefore of opinion the judgment on the actual facts, as they are found, must be rendered for the plaintiff, and that the order *nisi* must be discharged, with costs.

O'CONNOR, J., concurred.

Order nisi and motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

LEMAY v. CHAMBERLAIN.

Libel—Privileged communication—Nominal damages—New trial refused.

The defendant published of and concerning the plaintiff, a business man, in a written circular, called "Legal Record Co., Renfrew," a statement meaning that plaintiff had given a chattel mortgage on his property, whereas he had only assigned one held by him against another.

Held, libellous, and not privileged. The jury having found no damages, an order *nisi* for a new trial was discharged, without costs.

LIBEL for publishing, in a written circular or periodical issued by the defendant in the town of Pembroke, in the county of Renfrew, called the "Legal Record Company Renfrew," upon the 20th of November, 1884, of the plaintiff, and with reference to his business as a blacksmith in Pembroke, the following statement: "Chattel mortgage. 7. Lemay, Octave, Pembroke, Blacksmith, J. E. Whelan $555," meaning that the plaintiff had executed and given a chattel mortgage on his, the plaintiff's, goods and chattels to the said J. E. Whelan for $555, and which publication was alleged to be false and malicious; and that the defendant sent to a large number of persons and business men of Pembroke and the neighbourhood, to wit, to four persons and firms, business people, naming them, and to others, business men also, copies of the said circular or periodical containing the libel, whereby, &c.

The defendant denied the allegations of the statement of claim; he denied the publication; the publication with the meaning alleged; that the words were false to his knowledge, or were published maliciously.

6. The writing and publication, if proved, were made under the following circumstances: The business men of Pembroke were desirous of obtaining information of all specially indorsed writs issued, judgments entered, and bills of sale and chattel mortgages filed, in the several public offices in the County of Renfrew; and they employed the defendant to search twice in each month in the said

public offices, and furnish to each of such persons so employing him a statement of all such specially endorsed writs, &c., for the private and confidential use of such persons, and not for general publication, nor were any such statements sold to persons other than to those who so employed the defendant.

7. In the course of such employment the defendant sent his clerk, on the 20th of November, 1884, to the office of the Clerk of the County Court of the county of Renfrew, to make search for bills of sale and chattel mortgages filed in the said office, and the Clerk of the County Court then stated to the defendant's clerk that a chattel mortgage was filed in his office from the plaintiff to one J. E. Whelan for $555; and the defendant's clerk, relying upon such information, entered the same upon said statement, and such statement was sent to the defendant's said employers containing such information.

8. The defendant did not know the information was incorrect until the plaintiff complained to him of it in February, 1885.

9. The defendant discovered the instrument described in the statement sent to the persons aforesaid was not a chattel mortgage, but was an assignment made by the plaintiff to J. E. Whelan of a chattel mortgage made by one Solomon Leveillè to the plaintiff.

10. Thereupon the defendant gave notice to the persons to whom the statement had been sent of such mistake, and in his statement published next after the discovery of the mistake he published in it: "Erratum—In No. 22 of this record, issued November 20, 1884, under head of chattel mortgages entry, Octave Lemay to Joseph E. Whelan $555, should read, assignment of chattel mortgage (from Solomon Leveillè to Octave Lemay) to Joseph E. Whelan; please alter, and note correction."

11. Publication did not, nor was it calculated to, injure the plaintiff, nor had the plaintiff been damaged by the same in his business.

12. The assignment contained a covenant by the plaintiff that if the assignee should be unable to recover the money secured by the mortgage he, the plaintiff, would repay the deficiency upon demand, provided diligence was used on the part of the assignee, and the instrument was calculated to mislead, and did mislead, the defendant and others, and led them to believe that the instrument was a mortgage from the plaintiff to Whelan.

13. The publication was a privileged publication.

Issue.

The action was tried at the last Fall Assizes held at Pembroke, before Thomas Deacon, Q.C., sitting for Rose, J., and the jury found the plaintiff had sustained no damage.

The learned Queen's Counsel noted his judgment as follows:

"There being no dispute between the parties as to the circumstances under which the communication of the 20th November, 1884, containing the libel complained of, was made, I rule that the said communication is a privileged communication; and there being no evidence of actual malice, which the plaintiff's counsel concedes, I dismiss this action, with costs to the defendant, but direct the jury to assess the damages of the plaintiff (if any), and reserve leave to the plaintiff to move to enter judgment for the plaintiff for the amount found by the jury, in case my ruling be not sustained. No judgment to be entered by or for defendant until the fifth day of the next Sittings of the Divisional Court."

The evidence was long, but the pleadings contained the whole facts of the case and they were not disputed.

November 18, 1885, *Delamere*, for the plaintiff, obtained an order *nisi* to set aside the verdict and judgment, and for a new trial, on the ground that the ruling of the learned Queen's Counsel that the publication was privileged was erroneous; or to enter a verdict for the plaintiff, or for a new trial, on the law and evidence; and for misdirection in directing the jury that the publication

was privileged; also, because it was not left to the jury to say whether or not the publication was not published in reference to the business of the plaintiff, and whether it was or was not calculated to injure the plaintiff in that behalf; also because the jury should have been directed that the publication being in reference to the plaintiff's business, he was entitled to damages without proof of special damage.

November 26, 1885, *Arnoldi* shewed cause. He referred to *McIntee* v. *McCullough*, 2 Err. & App. 390; *Bennett* v. *Deacon*, 2 C. B. 628; *Waller* v. *Loch*, 7 Q. B. D. 619. As to damages, *Embrey* v. *Owen*, 6 Ex. 353; *Hadley* v. *Baxendale*, 9 Ex. 341; *Knight* v. *Egerton*, 7 Ex. 407; *The Metropolitan Bank (Limited)* v. *Pooley*, 10 App. Cas. 210.

Delamere, in support of the motion, cited *Blake* v. *Stevens*, 4 F. & F. 235; *Folkard's* Law of Libel and Slander, 246, 254, 289; *Odgen* on Libel and Slander 196; *Brett* v. *Watson*, 20 W. R. 723; *Dominion Telegraph Co.* v. *Silver*, 10 S. C. 238; *McNally* v. *Oldham*, 8 L. T. N. S. 604; *McLean* v. *Dunn*, 39 U. C. R. 257, 1 A. R. 153.

February 13, 1886. WILSON, C. J.—In reading the charge of the learned Queen's Counsel who tried the case, it appears he expressly stated the publication in question was a privileged communication, and that all the jury had to do was to determine what damages they thought the plaintiff was entitled to, in case the Court should think the words complained of were not protected as a privileged communication.

The case seems to have been put substantially in this form: "This publication is a libel, and you, the jury, are to assess the damages to which you think the plaintiff is entitled for that libel. I will not, however, enter a verdict for the plaintiff for the damages which you may find, because I am of opinion the publication was a privileged communication, and although a libel, the defendant was justified in publishing it as he did to his customers or employers who engaged him for the purpose. I shall enter

the verdict for the defendant. I have asked you to assess the damages now to save the necessity of another trial being had to assess the damages in case the Court should think I am in error in holding this to be a privileged communication, and if it is found I am in error and that the plaintiff should have had a verdict, he will get the damages which you may now find him entitled to."

The rest of the charge was taken up in stating to the jury the facts of the case as they appeared in the evidence, with a view to the question of damages which the jury were to assess.

The exceptions to the charge were: (1) That the jury should not have been told to take into consideration the means by which the defendant got knowledge of the mortgage so as to guide them in mitigation of damages, that is, by the County Court Clerk having called out that the document was a chattel mortgage, and that the defendant's clerk had noted down just what the County Court clerk had described it to be. (2) The jury should have been told that in the action, even if the plaintiff failed to prove special damage, they were bound, the libel being proved, to give at least nominal if not general damages, for the plaintiff is not bound to prove special damage.

The notes shew the learned Queen's Counsel to this second objection said:

"That is just what the statute says I should not do. In regard to the surroundings under which the libel is published it is also a matter for the jury to take them into consideration."

There is nothing to object to under the first exception taken to the charge. If damages had to be assessed, it was necessary the jury should assess them upon the particular facts of the evidence.

If the defendant's clerk had wilfully, to injure the plaintiff, put down that which was libellous as the information he had received from the County Court Clerk, when it was not that which was told to him, the measure of damage would be quite different from that which would be given

if the defendant's clerk had noted down just what he had been told by the County Court Clerk, but told erroneously, the defendant's clerk believing that which he was told to be the truth.

As to the second objection, it will not be disputed that if a libel be proved the plaintiff is entitled to have damages assessed to him, although he may have failed to prove the special damage he has laid. The statement of claim, assuming it to be a libel, and it may be libellous, did not require special damage to support it.

The plaintiff, I understand, claims special as well as general damage by reason of the publication; general damage done to his credit, and special damage because his reputation in his business was impaired.

It appears the plaintiff's credit was not in fact injured, for the only persons he called to prove that ground of damage said they did not refuse him credit in consequence of the publication, and it appeared that most of the credit they had given to him was after the publication. If so, there was no claim proved for either special or general damage. The plaintiff's counsel at the trial admitted "that if the publication of the alleged libel were correct without any mistake at all, and it injured the credit of the plaintiff, that the plaintiff could not sustain an action; that is, he admitted the publication, but for the mistake, was a privileged communication, and it is certain he also admitted there was no malice on the part of the defendant. If then the cause of action be founded upon a mere mistake on the part of the defendant's clerk, which he was led into by the public officer who gave him the erroneous information, and if that mistake was corrected by the defendant whenever he was told of it, and if the credit or the business reputation of the plaintiff was not in fact injured, what damage was done to the plaintiff? The jury say none, but the plaintiff's counsel contends he is at any rate entitled to nominal damages.

I think it has been decided that since the Judicature Act the plaintiff is not as of course entitled to nominal

damages, unless it may be in an action for the establishment of a right of way, or ferry, or the like.

That is not the case here. There is no right involved, and if the jury find no damages it is in effect a verdict for the defendant under our present system.

Under the former law, when the plaintiff could only recover costs when he recovered damages, the Court would enter a verdict for a nominal sum when it was manifest the plaintiff was entitled to recover some damage: *Feize* v. *Thompson*, 1 Taunt 121; *The Queen* v. *Fall*, 1 Q. B. 636; *Dods* v. *Evans*, 15 C. B. N. S. at p. 624.

Applying this rule in the strictest form, the plaintiff is not entitled to nominal damages, even if the publication in question be not a privileged communication.

The evidence was that the defendant was acting as a mercantile agency house for certain business men, and he furnished them fortnightly with the information he got at the public office of bills of sale, &c., filed or appearing there.

In doing so, the defendant, so far as the plaintiff is concerned, communicated the information to upwards of thirty business men, with none of whom the plaintiff had any business dealings, excepting with one or two of them. Is that a privileged communication? It is not necessary to say whether the circular is a libel or not, as it was treated as a libel at the trial. I may say, however, that to write of another *he has made a chattel mortgage on his property*, when he has only *assigned a chattel mortgage which he held over the property of another*, even although he has guaranteed to his assignee the payment of that mortgage, is or may be libellous.

The case of *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502, is a case somewhat like the present case.

In that case the proprietor of a periodical publication circulating among booksellers and stationers, by mistake in the arrangement of the *London Gazette* announcements, inserted the name of the plaintiff's firm, who were stationers, under the head, "First Meetings under Bankruptcy Act,"

instead of under "Dissolution of Partnerships." The blunder was explained by a circular sent to about 4,000 of the trade. Held to be a libel. There it was the defendant's own mistake: here it was in consequence of the mistake of the Clerk of the County Court.

In *Blake* v. *Stevens*, 4 F. & F. 232, the defendant, in a work on the Law of Attorneys, having referred to a case in which the plaintiff was said to have been struck off the roll, when, by the report of the case, he had been suspended for two years, held, he was answerable for the libel.

In *Tompson* v. *Dashwood*, 11 Q. B. D. 43, the defendant wrote a letter containing defamatory statements of the plaintiff, and beginning "Dear Colonel Wood," which was a privileged communication to Colonel Wood. By mistake the defendant placed the letter in an envelope directed to another person, who received and read it. Held, that as the letter was privileged to Colonel Wood, the mistake in sending it to another was also privileged in the absence of malice. See, also, another case, in which the party was led into making a mis-statement to the prejudice of the plaintiff by the mistake of another: *Brett* v. *Watson*, 20 W. R. 723.

In *Goldstein* v. *Foss*, 6 B. & C. 154, affirmed in the Exch. Ch. 4 Bing. 489, a letter written to the members of a society that the plaintiff was an improper person to be admitted a member of the society, innuendo, that he was a swindler, Held, the action would have been maintainable if the innuendo had been sufficiently connected with the introductory averment.

A privileged communication is said to be the communication "by a person who is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, and, if *bonâ fide* and without malice, does tell them," per Blackburn, J., in *Davies* v. *Snead*, L. R. 5 Q. B. at p. 611, referred to in *Waller* v. *Loch*, 7 Q. B. D. at pp. 621, 622. And in *Harrison* v. *Bush*, 5 E. & B. at p. 348, Lord Campbell, C. J., said: "A communication made *bonâ fide* upon any subject matter in

which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable."

I do not see any objection to a mercantile agency procuring certain information which it communicates to those who apply for it respecting the financial condition of the person enquired about by one having an interest to procure such information, or representing that he has such an interest. If that can lawfully be done, is there any difference in substance between such a case and that of the defendant who sent circulars to his different employers or customers containing the like information which is given by the mercantile agencies, the customers requiring the defendant to make that communication fortnightly?

In the one case particular enquiries are made from time to time by those who are interested in making them; in the other a general stock of information is supplied at regular periods to business men "of all specially indorsed writs issued, judgments entered, and bills of sale and chattel mortgages filed, in the several public offices in the county of Renfrew," against every body.

In such case the affairs of all such persons are made known to the customers of the defendant although they may be in no way interested in one half, or it may be in any one, of the persons whose affairs are so disclosed to them, and made known by a person who has no interest in such persons, or in those to whom he makes the communication further than the profit he derives from the business he does in making, or the profit he derives from the fact of giving the information.

It is very true the truth of the publication would be a defence if pleaded, but here the truth could not be pleaded, because the information he gave was not the truth. It was, by a mistake, although not on his part, incorrect and misleading, and injurious to the plaintiff, and the defendant can have no further defence than that he was privi-

leged in making the publication. But was he privileged when the information was incorrect, and when he had no interest or duty but that arising from his own personal gain by making such publication, either in or to himself, or in or to his customers? I am of opinion he had not.

A circular of this kind is not a confidential communication: *Getting* v. *Foss*, 3 C. & P. 160. A communication which is a slander is not privileged by the speaker saying he speaks in confidence, when there is no interest or duty to speak: *Picton* v. *Jackman*, 4 C. & P. 257; *Folkard* on Law of Libel and Slander, 289; *Odger* on Law of Libel and Slander, 212.

In *Bennett* v. *Deacon*, 2 C. B. 628, the Court was equally divided whether a statement voluntarily made by one to a tradesman not to trust another was a privileged communication. Tindal, C. J., and Erle, J., were of opinion that it was, Coltman, and Cresswell, JJ., that it was not.

The difference between such cases and the present is, that the communication complained of in this action is to many persons between whom and the plaintiff there is no dealing or privity whatever, and the more numerous the defendants customers are the more is the plaintiff needlessly and mischievously harmed. I am of opinion the communication to all the subscribers of the defendant's circular, on the facts stated, was not privileged; but notwithstanding that, I am of opinion the plaintiff is not entitled to have the verdict entered for him, because the jury found that even if the communication were not privileged, that is, assuming the communication to be a libel, the plaintiff had sustained no damage, and the verdict should not be entered for merely nominal damages. It would have been better if the plaintiff had been contented with the prompt and full correction of the mistake which was made, particularly when it had happened from no fault of the defendant.

ARMOUR, J.—The learned Queen's Counsel seems to have directed the jury solely with a view to the actual

damages alleged to have been sustained by the plaintiff from the publication of the alleged libel. The following paragraph of his charge seems to indicate this: "Now, as I said before, the subject of damages is wholly in your hands, and it is for you to say whether, having heard all the evidence, the plaintiff has sustained any damages. If you think he has sustained any damages, in consequence of the issue of this, say so; but you may look at it and take into consideration the whole of the circumstances under which it was prepared and under which it was issued, and say what damages, if any, you will allow the plaintiff. If you allow any damages it will be entered, and it will be open for plaintiff to move at the Court in Toronto to have a verdict entered for him for the amount which you assess, if you assess any. You can find any verdict you like, but all I ask you to do, without taking away your right to do as you please, is to say what damages, if any, under all the circumstances, you find the plaintiff justly entitled to. If you think he is not entitled to any, say so. If you think he is entitled to some, say so; but then the damages should be because of the publication of this book and the injury which has resulted to the plaintiff from the publication of it."

The defendant's counsel objected to the learned Queen's Counsel's charge as follows: "In a case of libel the moment it is proven to have been written and published the jury then are bound to give a judgment for nominal damages, because in a case of libel we are not compelled to prove special damages;" in answer to which the learned Queen's Counsel said, "That is just what the statute says I shall not do."

I think that the learned Queen's Counsel should have told the jury that if they found that the circular was libellous, and that it was published by the defendant, they might give nominal damages, although the plaintiff suffered no actual damage.

I think, also, that the learned Queen's Counsel was wrong in ruling that the publication was privileged.

I do not think we ought to grant a new trial merely for nominal damages. I think our best course is, to dismiss this motion and the action, without costs.

O'CONNOR, J., not having been present during the argument, took no part in the judgment.

Order nisi discharged, without costs.

QUEEN'S BENCH DIVISION.]

REYNOLDS V. ROXBURGH ET AL.

Letting of chattel for hire—Implied warranty of fitness—Negligence.

Plaintiff sued the defendants for the value of a portable engine and boiler which had been hired by the defendants, and which boiler had exploded when in their possession immediately after they had begun to use it, and while in charge of a competent engineer.

Held, that as the lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff, in the absence of negligence on the part of the defendants, could not recover.

Per ARMOUR, J.—The plaintiff was bound to establish beyond reasonable doubt that the defendants were guilty of negligence, and that such negligence caused the explosion and destruction of the boiler and engine, and the negligence required to be established was ordinary negligence, for the hirer of a chattel is required to use no more than that degree of diligence which prudent men use, that is, which the generality of men use in keeping their own goods of the same kind.

The explosion and destruction of the engine and boiler not being legally attributable to the negligence of the defendants, they were relieved from the performance of their promise to return them, and the contract of hiring was dissolved.

STATEMENT OF CLAIM:

(1) That on 3rd February, 1885, plaintiff was the owner of a portable steam engine and boiler, which on that day he leased to the defendants for a term of 100 days for the consideration of $100, to be paid by defendants. (2) That defendants also agreed to return said portable steam engine and boiler at the end of said term in good order. (3) That

defendants took possession of said steam engine and boiler and kept it during said term of 100 days. (4) That defendants, by their gross negligence and want of reasonable and ordinary skill, caused said boiler to explode, whereby said engine and boiler were utterly destroyed and made valueless to the plaintiff. (5) That defendants had not returned said portable steam engine and boiler to plaintiff, nor paid said sum of $100, and plaintiff claimed to be paid the sum of $575, being the said sum of $100 and the value of said engine and boiler amounting to $475.

Defence:

Denial of allegations contained in 1st, 2nd, 3rd, and 4th paragraphs of plaintiff's statement, alleging that said portable engine and boiler were never leased by them from plaintiff, nor did they ever have or keep said engine and boiler in their possession, or under their control; nor did they ever agree to return same to plaintiff in good order, or otherwise; and the explosion of said boiler was not caused by or through the negligence and want of reasonable and ordinary skill on their part; and further, that at the time of the alleged leasing by plaintiff to defendants of said engine and boiler, said boiler was defective and out of repair, and was not fit for the purpose for which it was intended, and by reason of such defects and want of repair said boiler was caused to explode, and not by reason of any negligence or want of ordinary skill on the part of defendants.

Issue.

The cause was tried at the last Peterborough sittings of this Court, by O'Connor, J., without a jury.

It appeared that one Dafoe had purchased in 1880 a steam thresher, consisting of the engine and boiler in question and a threshing machine, from the Joseph Hall Manufacturing Company. He had used it for three seasons, and had let the engine and boiler to different persons at different times, but during the last season, before he he sold it, he had not used it, and it had never been kept under cover. He said it was in good order as far as he

knew, but he had never run it, and had no experience in running an engine. He said it was fitted with a safety valve, steam guage, cocks for testing the steam, and all the necessary requirements for an engine for that purpose. In January, 1885, Dafoe sold the engine and boiler to plaintiff, and plaintiff immediately let the engine and boiler to defendants for one hundred days at one hundred dollars, to be returned in the same condition as they received it, and on 2nd February, 1885, delivered it to them at Norwood. The machinery was all right on the engine, only just the wheels taken off and set on the sleigh. Two brothers named Forner were sawing for the defendants in a wood shed about four miles from Norwood with an engine and boiler of insufficient power to do the work they required to do, and defendants hired this engine and boiler to be used, as the plaintiff knew, by the Forners as an auxiliary engine and boiler to the one they were then running, and it was taken to the woods and set up along with the other engine and boiler. Plaintiff knew that the engine and boiler had not been used for about a year, but it did not appear that he communicated this fact to the defendants, nor that they or the Forners knew it. On a Monday morning the Forners started steam in the boiler, and had the engine running during the day trying to adjust it with the other engine so as to run them together, and on Tuesday morning, in trying to get up steam, the boiler exploded, killing a man named Black and severely injuring one of the Forners, and completely destroying the engine and boiler.

Robert Small, a son of Alexander Small, was called for plaintiff, and said that he was there on the Monday: that he saw 110 lbs. of steam on, that he read it on the guage: that he saw the weight on the safety valve, it was at the end of the bar and tied on with a leather string: that there was no steam escaping from the safety valve; he said he heard his father say that if they started to saw with the two engines they had equal to 210 lbs., 110 lbs. on the one and 100 on the other: that they did not start to saw while he was there.

John Patterson was called for plaintiff and said he was there on the Monday, and that he noticed the ball on the end of the safety valve bar. Luke Cooper was also called for the plaintiff and said that they had on 120 lbs. of steam on the Monday night: that he saw it on the gauge. The water was left in the boiler over night and the fire was allowed to go out, and it was a very cold night. The only witness called by the plaintiff when the explosion took place was Luke Cooper, who said that he got there about 7 a. m. and that they fired from half past six until half past nine, the time of the explosion: that they kept all the fire they could trying to raise steam: that they could not get up steam: that they got between 60 and 70 lbs.

The witnesses Robert Small, John Patterson, and Luke Cooper knew nothing about engines or boilers. Alexander Small was called for defendants and said that he was there on the Monday afternoon: he said there were 110 lbs. on both boilers, but it might have been 105 lbs., 55 lbs. on one and 50 lbs. on the other: that he did not see it any higher, and that his son must have been mistaken in saying that he said it was 210 lbs.: that he saw by the guage that there were five pounds more on one than on the other: that Joseph Forner told him he intended to make them at two eightys.

Robert Ferguson, one of the defendants, said he was there for ten to fifteen minutes before the explosion and till the explosion: that there were from 40 to 60 lbs. of steam on; he would not say for certain for a few pounds either way: that the ball was on the centre of the safety valve: that he looked at it, and was positive about it: that he remembered it as well as if it was yesterday: that there was a water gauge on the boiler at the time of the explosion: that he was not looking at it at the moment, but five minutes before he was, and he also tried one of the coolers, and the glass gauge was certainly half full of water, and there was water in the boiler.

Joseph Forner, called for defendants, said that he had been working with engines about twelve years, and had

them under his charge for eight years: that he was in charge of the boiler at the time of the explosion: that there was a glass water gauge on it at the time: that they turned the water out of it the night before so that it would not freeze, and that it was turned on again in the morning, and that there were between two and three inches of water in the water guage at the time of the explosion: that at the time of the explosion he was looking at it and at the steam guage, and that there was about 60 lbs. of pressure on by the steam guage, and that they intended to run with about 80 lbs on each engine: that he never had anything like 110 lbs on this boiler: that the ball when the steam was up was never out farther than the farthest notch: that he had it blowing off freely at thirty pounds in the guage at the first notch: that the safety valve allowed the steam to escape with 30 lbs: that the ball was about the centre of the lever, and with the ball there it should escape at 60 lbs: that the boiler was calculated to carry the ball out to the end: that it should be safe with the ball at the end: that the night before there was a little over 100 lbs on the two: that he had the safety valve blowing out freely at 30 lbs when the ball was at the first notch: that he loosened the valve in the morning: that it was in the middle of the lever: that he was quite positive it was not further out: that it was not tied with a string.

Edward Forner, called] for defendants, said that his brother Joseph had charge of this boiler: that he was there on both days: that on Monday the highest pressure was 110 to 115 lbs. on both boilers: that the ball on the end of the governor bar was tied with a leather string: that they started a fire about seven the morning of the explosion, and the explosion took place about 8:30 a. m.: that there was nothing extraordinary in it taking that length of time at that season of the year to fire up: that there was plenty of water in the boiler: that the ball was resting in the centre of the safety valve bar: that he was quite positive this ball was not tied with a string, and that Robert Small

must have been mistaken in thinking that this ball was tied with a string: that everything was in good order in the morning except the trycocks, and they were always frozen in the morning, and that they were thawed out before they fired up: that they had about 40 or 50 lbs. of steam on that morning.

Charles Favals, called for the plaintiff, said that he had run this engine for three seasons: that it generally had on from 60 to 110 lbs.: that he considered it was safe at 110: that at that pressure the ball would rest about the centre: that he would not consider it safe with the ball at the outer end.

William Foster, called for the plaintiff, said that in order to have the safety valve where it would be really safe he thought that with the weight on the end that would be as far as it would be safe: that the boiler ought to be perfectly safe with the ball at the outer end of the lever: that he would put on a pressure of 70 to 80 lbs.

William H. Law, called for the plaintiff, said that from the dimensions of the boiler and the thickness of the plate, he should say 80 pounds was all she should carry.

Dafoe said the boiler was made for a pressure from 60 to 100 or 110 lbs., but he thought 110 lbs. was about the highest: that he thought that at 110 lbs. the ball would be on the centre notch.

Evidence was given to shew that in starting a new boiler or one that had not been used for sometime, the steam guage and safety valve ought to be tested to see whether they accurately denoted the pressure of steam, and this was not done.

Evidence was given on both sides as to the quality of iron used in the construction of this boiler, as to its being of sufficient thickness, as to the sufficiency of the bolts, as to the screws being sufficiently threaded, as to the bolts being sufficiently riveted, as to the condition of the boiler, as to its being deteriorated, and as to its being crusted, and as to the sufficiency of its construction.

A calculation was also made by Mr. Low to show the pressure that must have been exerted to throw the exploded boiler the distance it was thrown about 80 or 90 feet. Mr. Low said he could not tell for certain what caused the explosion, and no witness ventured to state what caused it, except the general cause, over-pressure.

The learned Judge gave judgment for the plaintiff for $345 damages and costs of suit.

January 12, 1886, *Nesbitt*, (*Edmison* with him), moved to set aside the judgment and to enter it for the defendants, or for a new trial, on the grounds, (1) That the judgment was not warranted by the evidence. (2) That it was against the weight of evidence. (3) For the improper reception of evidence. (4) Discovery of fresh evidence.

D. W. Dumble shewed cause.

February 13, 1886. ARMOUR, J.—The plaintiff was bound to establish beyond reasonable doubt that the defendants were guilty of negligence, and that such negligence caused the explosion and destruction of the boiler and engine, and the negligence required to be established was ordinary negligence, for the hirer of a chattel is required to use no more than that degree of diligence which prudent men use; that is, which the generality of men use in keeping their own goods of the same kind. See *Jones* on Bailments, 86; *Coggs* v. *Bernard*, 1 Sm. L. C. 188; *Story* on Bailments, 8th ed., pp. 397-399.

Adopting this rule, then, what was the negligence of the defendants which caused the explosion? Was it in having an incompetent person in charge of the engine and boiler? Joseph Forner was proved to have been in charge, and he showed that he had been working with engines for twelve years, and had had them in charge eight years, and no evidence was adduced to show that he was incompetent, or that he was not possessed of the same skill as is possessed by hundreds of per-

sons who are engaged in running similar engines, and without whose services such engines could not be used for the benefit of the public to the extent to which they are now used. Besides, no evidence was adduced to shew that the incompetence of the person in charge caused the explosion.

The learned Judge charged the defendants with negligence, because he thought that they ought to have had the steam guage and safety valve tested before they commenced to run the engine, to see if they accurately denoted the pressure of the steam upon the boiler; but there is no evidence to shew that the neglect of this test caused the explosion, nor to shew that the steam guage and safety valve did not accurately denote the pressure of steam upon the boiler,

But was it the duty of the defendants to have had the steam gauge and safety valve tested before commencing to run the engine? I think it was the plaintiff's. He was letting the steam engine and boiler to the defendants for hire, and it was his duty to see that they were reasonably fit for the purpose for which they were let, and this involved the duty of seeing that the steam gauge and safety valve accurately denoted the pressure of the steam upon the boiler, and not having done so, he cannot make the defendants liable for not doing what it was his duty to do. See *Hyman* v. *Nye*, 6 Q. B. D. 685, and cases there cited; *Chew* v. *Jones*, 10 L. T. 231; *Sutton* v. *Temple*, 12 M. & W. 52.

It was suggested that the boiler having stood over night, a very cold night, with water in it, might have been damaged by it, but there was no proof that such was the case, or that such damage caused the explosion.

It may be taken as proved that the boiler exploded from over-pressure, but this does not prove that such over-pressure was the result of the defendants' negligence. It may just as well have arisen from the boiler being gauged by the manufacturer to bear a higher pressure than its structure and material would stand, or by its becoming

deteriorated by age and use, and thus rendered incapable of standing the pressure it was originally gauged to stand.

I have read and re-read the evidence, and I am unable to point out any evidence shewing that the defendants were, beyond reasonable doubt, guilty of negligence, and that such negligence, beyond reasonable doubt, caused the explosion and destruction of the engine and boiler.

The explosion and destruction of the engine and boiler not being legally attributable to the negligence of the defendants, they were relieved from the performance of their promise to return them, and the contract of hiring was dissolved.

"It may, we think, be safely asserted to be now *English* law that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this responsibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to re-deliver the chattel:" *Taylor* v. *Caldwell*, 3 B. & S. at p. 838. See also *Chamberlain* v. *Trenouth*, 23 C. P. 497; *Boswell* v. *Sutherland*, 32 C. P. 131, S. C. 8 A. R. 233.

In my opinion the motion must prevail and the action be dismissed, with costs.

WILSON, C. J.—The question is whether the lessor or hirer of the steam engine, the boiler of which burst, or the lessee of it is answerable for the injury done to it.

The learned Judge said the lessee should have tested it before raising the steam in it. The counsel for the lessee contended it was the duty of the lessor to deliver a sound, safe, and secure article to the lessee.

In *Blakemore* v. *The Bristol and Exeter R. W. Co.*, 8, E. & B. 1035, the rule seems to be that if a company set up a crane for the moving of heavy goods on to or off their trucks, and suffer it to be used by all those who find it necessary to use it for such purpose, it was properly found

the company had held out to the public the crane might be used for such purpose; and that the company allowing the crane to be used by the deceased were answerable for injury done to him by the breaking of the hoisting chain, they knowing it to be too weak and quite unfit to be used for the raising of such heavy weights. The duty of the company was not to conceal from the borrower these defects, which were known to them and which made it perilous or unprofitable to be used.

A gratuitous lender of an article is not liable for injury to the borrower or his servant, while using it, by reason of its defective state, if the lender was not aware of it: *McCarthy* v. *Young*, 6 H. & N. 329.

An action will lie against a person who sent a girl, of the age of about fourteen, to the house to get his gun, and with a message to one Leman in the house to take the priming out, and to give the girl the gun. It was alleged the girl was too young and unfit to be entrusted with it. It was loaded. The girl in play drew the trigger while presenting it at a child of about eight; it went off and knocked out his right eye and two of his teeth: *Dixon* v. *Bell*, 5 M. & S. 198.

I assume, if an adult with a knowledge of the danger of loaded fire arms, were to borrow a gun from the owner which happend to the knowledge of the lender to be loaded—but which fact he did not communicate to the borrower—and the borrower not knowing whether it was loaded or not, used it in a manner as if it were not loaded, and it went off and did him harm, he could not maintain an action against the lender, because he did not tell him it was loaded.

In *Blakemore* v. *The Bristol and Exeter R. W. Co.*, 8 E. & B. 1035, before mentioned, Coleridge, J., in giving the judgment of the Court, said, at p. 1050: "The lender must be taken to lend for the purpose of a beneficial use by the borrower. The borrower, therefore, is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill—above all, for anything which

may be called legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which the borrower is injured. Would it not be monstrous to hold that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceals them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? See on this last illustration *Fowler* v. *Locke*, L. R. 7 C. P. 272, L. R. 10 C. P. 90.

Delivering goods of a dangerous nature, without notice of the nature of the goods to carry is liable if injury happen to the carrier by reason of their dangerous nature: *Farrant* v. *Barnes*, 11 C. B. N. S. 553. There is no implied warranty that land demised is fit for the purpose for which it is taken: *Sutton* v. *Temple*, 12 M. & W. 52.

If a chattel be sold for a particular purpose there is an implied warranty it is fit for that purpose; otherwise, if the purchaser takes it upon his own judgment: *Brant* v. *Eddington*, 2 M. & G., 279; *Stanton* v. *Richardson*, L. R. 9 C. P. 390; *Francis* v. *Cockrell*, L. R. 5, Q. B. 184.

It appears to me, if it is leased or let on hire for a particular purpose, there is an implied warranty that it is fit for that purpose.

I agree that the judgment should be set aside, and the action be dismissed, with costs.

O'CONNOR, J., not having been present during the argument, took no part in the judgment.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA v. FEARMAN.

Criminal law—Larceny under the "Indian Act, 1880," 43 Vic. ch. 28, sec. 66, (D.)—Conviction.

The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vic. ch. 28, sec. 66, (D.), and was convicted: *Held*, WILSON, J., diss., that he ought not to have been convicted, because, *per* ARMOUR, J., the wood, the subject of the alleged larceny, was not in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act; and because, *per* O'CONNOR, J., the affidavit required by sec. 64, had not been made, and was a condition precedent to a seizure.

Per WILSON, C. J.—Section 64 cannot apply to trees found by the officer of the department in the act of being removed from the lot on which they have been wrongfully cut, or where there can be no doubt they have been unlawfully cut, for such an application would make it impossible to effect a seizure in such cases.

THIS was a prosecution for larceny under the provisions of the "Indian Act, 1880," 43 Victoria, ch. 28, secs. 64 and 66, (D.)

The case was tried at the last Autumn Assizes, at Brantford, before Cameron, C. J.

The prisoner was convicted, but the learned Chief Justice reserved a case for the opinion of this Division of the High Court, on certain questions founded on objections which had been urged by counsel for the defence, but overruled at the time.

The evidence shewed that a quantity of wood had been seized on behalf of the Indian Department, which had been cut on Indian lands. The bailiff who made the seizure took the wood to the place of one Johnson for safe-keeping, and while in safe-keeping the wood was taken away by the prisoner and several other persons, and disposed of by them. The wood in question had been taken from a lot located to an Indian woman, and taken with her assent, and she was to be interested in the proceeds of the sale.

December 3, 1885. *E. F. B. Johnston, Deputy Attorney-General,* appeared for the Crown.

V. McKenzie, Q. C., contra.

February 13, 1886. WILSON, C. J.—The prisoner was charged with larceny under sec. 66 of the Indian Act of 1880.

It is provided by section 28 that if any Indian, without license in writing from the Superintendent-General, or some person deputed by him for that purpose, carts, carries away, or removes from any portion of the reserve of his land for sale, (and not for the immediate use of himself and his family), any trees, &c. thereon . . . he shall be liable to all the fines, &c.

That section I understand to apply to any Indian cutting on his own located land, trees, &c., for sale, and not for the immediate use of his family.

If that be so the license from the Indian woman to the prisoner to cut the trees upon her located land would not give him authority to cut or remove the same.

The Superintendent-General, or any officer or agent authorized by him, may grant license to cut trees on reserves and ungranted Indian lands: sec. 56.

If the trees, &c., be cut without authority, the person cutting them, or who assists, &c., shall not acquire any right to the same; or if the same, or the products thereof, cannot be found, the person cutting them, &c., shall, in addition to the loss of his labour and disbursement, forfeit a sum of $3 for every tree cut: sec. 63.

Then by section 64: "Whenever satisfactory information, supported by affidavit, is received by the Superintendent-General, or any other officer or agent acting under him, that any trees have been cut without authority on Indian lands, and describing where the same, or the logs, timber, or other products thereof can be found, the Superintendent-General, officer or agent, may seize the same in Her Majesty's name wherever found, and place the same under proper custody until a decision can be had in the matter from competent authority.

The seizure made in this case was made without affidavit being previously made. A seizure of timber may be made for nonpayment of dues under section 60. So for trees, &c., cut without authority under section 63.

I do not think section 64 requires that in every case of seizure of trees, &c., cut without authority, there must first of necessity be an affidavit made of the fact of cutting before the seizure can be made.

The section has reference rather to a seizure under exceptional circumstances; that is, although the trees, logs, or products thereof are at a saw mill some distance away, or in a lumber yard, having been bought by the owner of the yard in good faith, or in the form of lumber being used in a building or the like; or when there is a doubt of the identity of the trees or their products, the trees or their products so described as the section states, may nevertheless be seized, as the section says, *wherever found*, "whenever satisfactory information, supported by affidavit, is received by the Superintendent-General, or any other officer or agent acting under him"; and when seized they are to be placed "under proper custody until a decision can be had in the matter from competent authority."

That enactment can not apply to trees, &c., found by the agent or officer of the department in the act of being removed from the lot upon which they have been wrongfully cut; nor to any case where there can be no doubt the trees, etc., have been unlawfully cut. If the enactment be held to apply to every case of unauthorized cutting, it will be impossible to make a seizure, for the stuff would be gone beyond the chance of discovery if the satisfactory information has in every case to be supported by an affidavit before the seizure is made.

The affidavit could not, in most cases, be drawn at all; and if drawn, it could not be drawn before a Justice of the Peace or other competent authority, for these officers are not to be found scattered through the woods to meet such an emergency. The clause cannot apply to a party *taken with the mainor*.

There is no reason to doubt that the trees, or their products, taken in this case by the officers of the Indian Department were properly taken and put in the custody

of Johnson, and that the prisoner was one of the persons who wrongfully took the trees or their products out of the lawful custody of Johnson.

There may be a seizure under the Act without an affidavit being first made to authorize the seizure. The person from whom the trees, &c., were seized may give notice within a month from that time that he claims the same. If there be no such notice, the trees, &c., are condemned. If notice be given the matter may be tried under sec. 67, sub-sec. 2.

The trees, &c., must be kept in proper custody until a decision is had upon the matter.

The trees, &c., taken in this case were taken as subject to forfeiture under the Act, and for that purpose I do not, as I have said, think it was necessary, as a condition precedent, there should have been an affidavit made to authorize such seizure.

The seizure was apparently justified under the Act. The goods were properly put into Johnson's custody until it could be determined whether the seizure was or was not rightly made. The prisoner had the right to have his claim tried under the Act. He did not take such a proceeding. The officer was bound to keep the trees, &c., for one month, that is, for so long as the prisoner had the right to contest the seizure. While he had the trees, &c., the prisoner unlawfully took them away, contrary to section 66, and the indictment is framed as an offence against that section, and in my opinion was rightly framed, and the prisoner was properly convicted.

ARMOUR, J.—The first enquiry seems to me to be, did the wood, the subject of the alleged larceny, come within the terms of the 66th section of the Indian Act, 1880, upon which the indictment was framed, as being "any trees, logs, timber, or other product thereof seized and detained as subject to forfeiture under this Act?"

The Act authorizes the seizure and detention of "trees, logs, timber, or other product thereof," firstly, for non-pay-

ment of dues where the trees have been cut under license; and, secondly, where the trees have been cut without authority.

Sections 60, 61, and 62 apply to the seizure and detention for non-payment of dues, and sections 63 and 64 apply where the trees have been cut without authority.

I think that trees, logs, timber, or other product thereof, seized and detained for non-payment of dues, would properly be said to be seized and detained as subject to forfeiture, although the opinion of Draper, J., upon 12 Vic., c. 30, (which is the foundation of the clauses in question,) in *Miller* v. *Clarke*, 10 U. C. R. 9, is to the contrary.

He there says, "But no forfeiture is contemplated under this part of the Act; so far from it that if a sale be necessary to raise the dues and the costs of seizure and sale, any surplus is to go to the licensee." But surely the property of the licensee in the trees, logs, timber, or other product is forfeited by the sale, and such property is not the less forfeited by the balance of the proceeds of the sale, after deducting the dues and the costs of seizure going to the licensee.

I think, also, that where trees are cut without authority, and the wood, timber, logs, or other product thereof, have been made up or intermingled with other wood, timber, logs, or other products, into a crib, dam, or raft, or in any other manner, so that it is difficult to distinguish the timber cut on reserves or Indian land from the other timber with which it is made up or intermingled, and the whole of the timber so made up or intermingled is seized and detained as provided for by section 64, sub-section 2, the timber so seized and detained would be properly said to be seized and detained as subject to forfeiture, because the property in the wood, timber, logs, or other product thereof, not cut on reserves or Indian land, would be forfeited to the owner, unless satisfactory evidence should be adduced shewing the probable quantity not cut on Indian lands.

But I do not think that where trees are cut without authority upon reserves or Indian lands, and the wood, timber, logs, or other product thereof, have not been made up or intermingled with other wood, timber, logs, or other product thereof, and such trees, wood, timber, logs, or other products thereof, have been seized and detained, they can properly be said to be seized and detained as subject to forfeiture, because, by section 63 no person could acquire any right to the trees so cut, or any claim to any remuneration for cutting or preparing the same for market, or conveying the same to or towards market, and there would be nothing to forfeit, the property not being changed by the cutting of the trees or by anything done to the product thereof.

I think, therefore, that the wood, the subject of the alleged larceny, was not seized and detained as subject to forfeiture under this Act.

There is no express authority given by the Act to the Superintendent-General, or any other officer or agent acting under him, to seize and detain any trees so cut without authority, or the logs, timber, or other product thereof, except only wherever satisfactory information, supported by affidavit, made before a Justice of the Peace or before any other competent authority, is received as provided for by the 64th section, and as such information was not received with respect to the wood, the subject of the alleged larceny, it could not properly be said to be seized and detained as subject to forfeiture under this Act.

It is singular that no express authority is given by the Act to the Superintendent-General, or any other officer or agent acting under him, to seize and detain any trees so cut without authority, or the logs, timber or other product thereof, except upon such information, even when the trees have been so cut within their own knowledge. No doubt they have the power to do so at common law, apart altogether from this Act, just as any owner of lands, his servants and agents, can seize and detain trees cut without authority on his lands, and the logs, timber, and other pro-

duct thereof, and this their power is expressly recognized in the 63rd section, by the provision, "and when the trees, or logs, or timber, or other products thereof, have been removed, so that the same cannot, in the opinion of the Superintendent-General, conveniently be seized, &c.;" but trees and the logs, timber and other products so seized cannot, in my opinion, be said to be "trees, logs, timber or other product thereof seized and detained as subject to forfeiture under this Act."

The prisoner might have been indicted for larceny at the common law; for it was always holden at common law that if the owner, or a stranger, sever trees from a freehold, and another man come and steal them; or if the thief sever them at one time, and at another come and take them away, it is a larceny. But he was not so indicted, but under the 66th section of this Act, and being so indicted, was not, in my opinion, properly convicted, and the conviction must be quashed.

I may add that the power given to the Commissioner by 2 Vic. ch. 15, sec. 5, Con. Stat, U. C., ch. 81, sec. 12, is put an end to by the repeal effected by 39 Vic., ch. 18, sec. 99. (D.)

O'CONNOR, J.—The indictment does not, as it appears, allege that the prisoner knew that the woman he dealt with as regards the wood was an Indian, or that he knew the land on which the wood was cut was Indian land or ungranted; nor does it appear that such an objection was raised at the trial; and now the defect, if it be a defect, is cured by the verdict. It appears by the case that no information had been laid under section 64 of the Act; but the wood had been seized by bailiffs under a general authority in writing, signed by the Superintendent and Commissioner of Indian Affairs.

Hereupon arises the difficulty in the case and the only matter for decision.

The Act provides for two classes of cases respecting trees, logs, and timber cut on Indian lands. (1.) Sections 60, 61

and 62, provide for cases of trees, &c., cut on lands respecting which licenses to cut trees on reserves and ungranted Indian lands have been granted.

(2.) Section 63 provides punishment and forfeiture, if any person, without authority, cuts, &c., or removes, or carries away, &c., trees cut from Indian lands, this clause evidently applying to timber or trees cut upon or removed from Indian lands, respecting which no license to cut trees has been granted.

Section 64, *in pari materiâ*, provides that, "Wherever satisfactory information, supported by affidavit, made before a Justice of the Peace, or before any other competent authority, is received by the Superintendent-General, or any other officer or agent acting under him, that any trees have been cut without authority on Indian lands, and describing where the same, or the logs, timber, or other products thereof can be found, the said Superintendent-General, officer, or agent, or anyone of them, may seize, or cause to be seized, the same in Her Majesty's name, wherever found, and place the same under proper custody, until a decision can be had in the matter from competent authority."

Section 66 provides that "Whosoever, whether pretending to be the owner or not, either secretly or openly, and whether with or without force or violence, takes or carries away, without permission of the officer or person who seized the same, or of some competent authority, any trees, logs, timber or other product thereof, seized and detained as subject to forfeiture under this Act, before the same has been declared by competent authority to have been seized without due cause, shall be deemed to have stolen the same, as being the property of the Crown, and guilty of felony, and liable to punishment accordingly."

The clauses of the Act in question are highly penal, and ought to be construed strictly. "Our law," says Best, C. J., "will not allow of constructive offences; no man incurs a penalty unless the Act which subjects him to it is clearly within the spirit and letter of the statute imposing such penalty:" 3 Bing., at p. 196. "If these rules are violated,

the fate of accused persons is decided by the arbitrary discretion of Judges, and not by the express authority of the laws," per Best, C. J., in *Fletcher* v. *Lord Sondes*, 3 Bing., at p. 580. *Wilberforce* on Statute Law, 247, *et seq.*, and *Hardcastle* on Statutory Law, 249-255, are to the same effect. The offence and the ground of it are statutory, and must be read together, and construed strictly according to the plain meaning of the language of the clauses in question, unless, indeed, something in the context makes a different construction necessary. But I have been unable to find anything in the Act which interferes with or varies the meaning of those clauses.

The reserved case states distinctly that the "information, supported by affidavit," required by section 64, was not received, but that the seizure was made without that formality.

I think the "information, supported by affidavit," was essential as a condition precedent to the seizure.

I therefore think the taking of the wood was not, under the circumstances, an offence under the Act, and that the prisoner ought not to have been convicted.

Conviction quashed.

[CHANCERY DIVISION.]

TAYLOR V. MAGRATH.

Trust for sale—Wilful default—Delay of many years—Account rendered by trustee—Appropriation of receipts—Principal and interest—Error in accounts—Sums paid by trustee to land agent and accountant—Costs—Trustee-solicitor—Compensation—Double commission.

C. M., a solicitor, invested money of T. in a third mortgage of the E. property. Afterwards, in 1862, the property was put up for auction under a decree for sale at the suit of the first mortgagor. A. M. held the mortgage on the property next after the first mortgage. Finding, that owing to the great depreciation of the value of the E. property, it would, if sold then, scarcely fetch enough to pay off the first mortgage, it was agreed between C. M. and A. M. that C. M. should, out of his own moneys, buy in the property by paying off the first mortgage, and then hold the same in trust to sell, and out of the proceeds to first repay himself the amount so advanced by him, with interest from the date of the sale, then to pay A. M. his claim on the property, with interest, and then to pay T. his claim, with interest. C. M. accordingly advanced sufficient to buy in the property as agreed. In 1864 a formal deed of trust was drawn up and executed by the first mortgagee, and by C. M., A. M. and T., whereby the property was conveyed to C. M. on trust to sell "without delay," and apply the proceeds as aforesaid, and giving him power to lease in the meanwhile, and making him answerable only for loss resulting from his own "wilful neglect and default."

C. M. leased the property from time to time, but he did not sell it until 1883, when T.'s executrix brought an action charging him with default and breach of trust, and claiming an account and damages.

The evidence showed that the property had all through been of a very unsaleable kind, consisting of a farm, very stumpy, and badly fenced, and an old mill which had quite lost its value. It also appeared that C. M. had never advertised the property for sale, but at the same time that it was well known in the neighbourhood that it was for sale, and that it was not the sort of property that was likely to be bought by a stranger. There was, also, no positive evidence that at any time C. M. could have effected a more advantageous sale than that he effected in 1883; and it appeared that up to 1880 neither A. M. nor T. had complained of the delay, but if anything, acquiesced in it.

Held, under all the circumstances of the case, affirming the decision of the Master in Ordinary, that C. M. was not proved to have been guilty of neglect and default as trustee, nor did the evidence afford any basis for assessing damages against him.

It also appeared that in 1880, on T.'s solicitors demanding an account from C. M. of his dealings with the trust estate, C. M. employed S., a professional accountant, to make out from his books a detailed account, and S., in so doing, applied receipts from time to time in liquidation of the principal moneys due to C. M. under the trust deed, instead of applying them in the first instance in liquidation of the interest accruing due thereon, and the account so drawn up was delivered to the solicitors of T. An affidavit of C. M., moreover, was produced in the Master's office, wherein he stated that this account was correct, and made out under his supervision, and he spoke to the same effect in an examination taken *de bene esse* in this action. After judgment in this action, which referred it to the Master in Ordinary to take the account of C. M.'s deal-

ings as trustee, and before the same was taken into the Master's office, C. M. died, and on return of the Master's warrant to bring in the account C. M.'s executors brought in a new account, differing from that rendered as aforesaid to T.'s solicitors, in that they applied receipts in liquidation in the first instance of the interest accruing on C. M.'s claim, which method made a difference in the result of many thousand dollars. No account had been rendered to A. M.

Held, that as against T., C. M. and his executors were bound by the account previously rendered to T.'s solicitors and by the method of appropriation of receipts to principal contained therein, but were not so bound as against A. M., as against whom the account brought in by C. M.'s executors could stand.

In the account thus delivered in 1880, after the principal moneys were satisfied by application as aforesaid of receipts, interest was charged at ten per cent. on all subsequent receipts against C. M.

Held, that this was an error in the account, and the executors of C. M. were not bound by it, and to this extent the account might be rectified. *McGregor* v. *Gaulin*, 4 U. C. R., 378, considered and distinguished.

Held, by the Master in Ordinary, that the amounts paid by C. M. to a professional land agent in connection with the sale of the property, and a certain sum paid by C. M. to a professional accountant for making up the account delivered in 1880 should be allowed to him in his accounts.

But that sums paid by C. M.'s executors to a professional accountant for making up the account brought in by them into the Master's office, and a certain sum paid to C. M.'s solicitors on account of their costs in the action should not be allowed to C. M. in his accounts.

Held, also, by the Master in Ordinary, that C. M., as trustee-solicitor, was not entitled to profit costs, but, nevertheless, he was entitled to a commission of five per cent. on the amounts coming to A. M. and T., from which, however, must be deducted a certain sum paid as commission to a land agent for effecting the sale of the property, since double commissions cannot be allowed.

THIS was an action by Charlotte Barbara Taylor, the executrix of Colonel Phillpotts Wright Taylor, deceased, against Charles Magrath, for an account of his dealings as trustee with a certain property known as the Elgin Mills property, and for damages for alleged breach of duty as such trustee.

It appeared that the trust in question was created by a certain deed dated March 2nd, 1864, and made between Charles Magrath of the first part, Alexander Mitchell of the second part, and Phillpotts Wright Taylor of the third part. This was a deed of trust collateral and of even date with a certain deed of conveyance, whereby the Elgin Mills property was conveyed to Charles Magrath to hold upon and subject to the trusts, provisions, declarations and agreements contained in the collateral deed of trust. The inception of the trust appeared to have been as follows: Magrath, a solicitor of the Court, some time prior to 1862, had advanced certain moneys of P. W. Taylor, for whom

he acted in the matter of the investment of money on mortgage security, upon a third mortgage on the property in question. At that time there was a grist mill in operation upon the property and it, so far as appeared, was at the time of the said advance adequate security therefor.

Prior to 1862, however, the value of the property so far as the mill was concerned had disappeared, inasmuch as certain railways which were constructed, had the effect of leading people no longer to have their grain ground at the mill in question, which was situate on Yonge street, near Richmond Hill, but either in Toronto or elsewhere. This being the state of things, on June 5th, 1860, the holder of the first mortgage obtained a decree for sale of the property, and by his report dated February 22nd, 1861, the Master found the sums respectively due to the first mortgagee, to Mitchell, as second incumbrancer, and to Taylor as third incumbrancer, and on March 4th, 1862, the premises were offered for sale by auction under a final order for sale obtained in the said mortgage suit. Magrath, as solicitor for Taylor, and the solicitor for Mitchell deeming the property would not fetch more than enough, to pay off the first mortgage if sold at that time, it was agreed betwen them that it should be bought in by Magrath, who agreed to advance money for that purpose, and that he should hold it on trust to sell, and out of the proceeds repay himself the advances thus made by him, with interest, and then pay Mitchell the amount of his claim with interest, and then pay Taylor the amount of his claim with interest.

Magrath accordingly advanced sufficient money to pay off the first mortgage, and by the deed of conveyance of March 2nd, 1864, above mentioned, which recited the proceedings in the mortgage suit, the property was conveyed to Magrath, to hold on the trusts contained in the collateral deed.

The collateral deed of trust, after reciting the deed of conveyance, declared that Magrath stood seized of the property:

"Upon trust without delay to sell and absolutely dispose of the said lands, hereditaments and premises with the appurtenances, either together or in parcels in such way and manner as to him, the said Charles Magrath, shall seem meet and to convey and assure the same when sold to the purchaser or purchasers his, her, or their heirs and assigns, or as he, she or they shall desire and appoint, and in the meantime and until such sale or sales to make any lease or leases thereof or of any part of the said lands as he shall think fit, and it is hereby agreed and declared that the said Charles Magrath shall stand and be seized and possessed of the said lands, tenements and hereditaments, and of all the rents and profits thereof until sale, and after sale of the proceeds arising therefrom upon trust in the first place to deduct and retain thereout all costs, charges and expenses which shall or may be necessarily incurred, laid out or expended in or about the preparation of the said recited indenture, and of these presents, and in and attending upon the execution of the trusts herein contained, and in the care and maintenance of the said premises whether in payment for taxes, the insurance of the buildings thereon or otherwise, together with interest thereon at the rate of ten per cent. per annum, and in the next place to deduct and retain and pay himself thereout the sum of £217 19s. 10d. with interest thereon from the 1st day of May, 1862, at the rate of ten per cent. per annum; also the further sum of £15 and interest thereon at the rate aforesaid from May 1st, 1863: and also the further sum of £1236 8s. 2d. with interest thereon from the date hereof at the rate of ten per cent. per annum, and after payment thereof do and shall pay to the said Alex. Mitchell, his executors, administrators or assigns the sum of £527 5s. 10d. with interest thereon at the rate of six per cent. per annum from February 22nd, 1861, or so much thereof as the said proceeds shall be sufficient to satisfy, and after payment thereof do and shall pay to the said P. S. Taylor the sum of £1316 5s. 5d with interest thereon at the rate of 6 per cent. per annum from February 22nd, 1861, or so much thereof as the proceeds of the said sale shall be sufficient to satisfy, and if there should be any surplus after the payments aforesaid such surplus to be divided between the said Alex. Mitchell and the said C. Magrath in the proportion that the said £520 5s. 10d. bears to the said sum of £1316 5s. 5d., the said C. Magrath to have the larger proportion and the said A. Mitchell the smaller proportion, and it is hereby further declared and agreed [Clause as to Magrath's receipts being sufficient indemnity.]

Provided always, and it is hereby declared and agreed, that he, the said C. Magrath, his heirs, executors or administrators, shall not be answerable or accountable for any more monies than he or they shall actually receive by virtue of these presents, nor for any misfortune, loss or damage which may happen to the said lands and premises in the execution of the trusts aforesaid, unless the same shall happen by or through his or their own wilful neglect or default. In witness whereof, &c.

The deed of conveyance was executed by Taylor himself, and by the executors of the first mortgagee; the deed

of trust was executed by Magrath, and by Mitchell by his attorney Hector Cameron, and by Taylor by his attorney John Crickmore.

Though a small part of the property was sold at an earlier date, no sale of the great bulk of the property was effected by C. Magrath, until June 22nd, 1883, when he sold it to William Nicol and James Nicol, for $60 an acre.

The writ of summons in the present action was issued on the 22nd of January, 1884, and by her statement of claim, the plaintiff set out the deed of trust, and alleged that the defendant Charles Magrath neglected and failed properly to execute and carry out the trusts thereof, and failed to effect a sale as directed thereby, by reason of which a large loss had accrued to the estate of P. W. Taylor, and that though the defendant had lately sold the premises, the same had not realized sufficient to pay any sum to her or the estate of P. W. Taylor: that had the defendant properly executed the said trusts, the property would have sold for a very large amount of money, and there would have been ample to pay the whole amount of P. W. Taylor's claim; and that the defendant had been in possession of the rents and profits, and received large sums for insurance and other charges; and the plaintiff claimed that the defendant might be made liable for the loss occasioned by his breach of duty in not selling the lands at an earlier date; and an account taken of his receipts and of his other dealings with the trust estate, and for further relief.

The defendant in his statement of defence denied that he had neglected his duties as trustee as alleged, or that any loss had accrued to the trust estate by reason of any conduct on his part in executing the trusts: and alleged that he was and had always been ready to render a full account of his receipts in respect of the trust premises: and that in allhis dealings with the said premises he had acted to the best of his knowledge and ability for the best interest of all concerned.

The action came on for trial on May 3rd, 1884, before Boyd, C., when a judgment was delivered by consent

referring it to the Master-in-Ordinary to take an account of the dealings of the defendant as trustee under the trust deed in question, and reserving further directions and the question of costs until after the report.

Subsequently to the said judgment but prior to the carriage thereof into the Master's Office the defendant, who had for long been in delicate health, died, and his executors William Magrath and C. E. Fleming were made defendants by revivor.

Shortly before his death, and on April 28th, 1884, Charles Magrath swore to an affidavit, in which he deposed that in or about 1880, the firm of Leith, Kingstone & Brough, solicitors practising in Toronto, were appointed by power of attorney to represent and guard the interests of P. W. Taylor: that about January, 1882, he caused an account to be carefully prepared from his books and vouchers of his dealings with reference to the trust estate by one Sorley a professional accountant, which account was made an exhibit to the said affidavit: that the said account "was prepared under my supervision and was carefully revised by me, and sets forth according to the best of my knowledge, information, and belief a full, true, and particular, account of the particulars of my dealings with the trust premises up to April 13th, 1880, and of the rents and profits which have come to my hands * * and of the disbursements, allowances, and payments made by me in respect of the said trust premises:" he then verified similarly an account of receipts and disbursements subsequent to April 13th, 1880, up to the date of his affidavit: and went on to depose that he had not received any rents or profits or any money in respect thereof, save as mentioned in the said accounts, and that the said accounts did not contain any item of disbursement or payment other than actually paid: that on or about January 13th, 1882, he delivered to C. A. Brough of the firm of the plaintiff's solicitors but formerly of the firm of Leith Kingstone & Brough, a copy of the account first above referred to, which may be shortly spoken of as Sorley's account: that he

was over 75 years of age and in very infirm health, and added: "I have made this affidavit in case I should be unable to make a further affidavit or state my accounts and dealings as trustee of the trust premises in question in this action in any different shape pursuant to any reference which the Court may see fit to order in this action.

On April 30th, 1884, the said Charles Magrath was further examined *de bene esse;* and amongst other things he was questioned about Sorley's account, and swore again that the same was correct, and that he satisfied himself before delivering it to Mr. Brough, that it was correct: that he employed Mr. Sorley to make out the account for his information, he not being prepared to do it himself; and in answer to the question why he thought Sorley's account correct, he answered: "because it is copied from a book that was kept at my office, that I bought for the purpose, and marked on it 'Elgin Mills property;'" that he had revised it and was satisfied that it was correct.

In Sorley's account, thus referred to, it appeared that on the face of it all receipts were appropriated in liquidation in the first instance of the principal sums named in the trust deed as due Charles Magrath, instead of to the interest accruing due at ten per cent. thereon, the result of which was, that under date May 18th, 1876, the said account shewed the whole of the said principal sums as paid and satisfied, and a sum of $5,256.09, being interest only, due to Magrath. Subsequently to the said date the said account charged Mr. Magrath with interest at ten per cent. on all future receipts, so that on April 13th, 1880, at which date as above mentioned, the account terminated there was a balance of $3,349.01 of interest only due to him.

In May, 1884, Mr. Magrath died, and the defendants, by revivor, having applied for and obtained the carriage of the reference, brought the judgment into the Master's office, and on return of the warrant to examine and determine they brought in and filed the affidavit of Charles Magrath, above referred to, with Sorley's account as an exhibit thereto, and also the depositions *de bene esse.*

They also brought in and tendered as their account one containing the same items of receipts and disbursements as Sorley's account, but in which all receipts were applied in the first instance in reduction of the interest accruing due on the principal sums of money, to which under the trust deed Charles Magrath was entitled, with the result that on May 18th, 1876, this amount shewed $6,256.07 due to Charles Magrath for principal money, and $1,879.17 for interest, and on April 13th, 1880, at which date Sorley's account terminated, there appeared on this account $6,256.07, due to Charles Magrath for principal and $2,998.28 for interest, thus leading to a final result by many thousand dollars more favourable to Charles Magrath, than would result if they were held bound to adhere to Sorley's account.

It may be mentioned here that the Elgin Mills property book referred to as above mentioned in the evidence taken, *de bene esse*, simply set out the items of receipt and disbursement seriatim, but shewed no computations of interest nor any applications of receipts in one way or another.

Alexander Mitchell was added as a party to the suit in the Master's Office and both he and the plaintiff delivered similar surcharges as follows:—

Objections or surcharges to the accounts of the defendants filed herein pursuant to the judgment in this action:

1. The plaintiff states, and the fact is, that Charles Magrath, the defendant, by original action appropriated in reduction of principal certain moneys received by him and furnished to the plaintiff an account of his dealings with the trust premises in question herein shewing receipts by him of such moneys, and applying and appropriating these moneys in reduction of the amount due him for principal moneys under the trust indenture mentioned in the pleadings, and the plaintiff submits that the defendants are bound by such appropriation and application, and cannot now ask that such moneys be applied in reduction of such principal, and the plaintiff claims that the defendants must in this respect be remitted to and abide by the account so furnished by the said Charles Magrath.

2. The trust deed in question in this action directs the defendant, Charles Magrath, to sell and dispose of the lands conveyed to him without delay, and the plaintiff submits that by his omission to sell and negligence in not selling the said lands until after a lapse of twenty years he has wholly disentitled himself to charge as against the plaintiff any inter-

est whatever upon the principal sum, payable to him under the said trust deed, and that the accounts of the defendants ought to be reduced by the amount charged by them for interest.

3. The plaintiff submits that in any event the defendants are not entitled to charge as against her any interest after the date of the sale of the premises in question herein, viz., the 22nd day of June, A. D. 1883, and that the accounts of the defendants must be reduced by the amount charged therein for interest after that date.

4. The plaintiff objects to the following items and interest thereon in the accounts of the defendants, and submits that the said items and interest are improperly charged as against her:

Payment to J. B. Sorley on the 13th of April, 1880, $20.

Payment to H. W. Eddis on the 13th of January, 1885, $20.

Payment to Robinson, O'Brien & Co. on the 15th of June, 1884, $150.

Payments to J. W. G. Whitney: May 18th, 1883, $12.25; December 31st, 1883, $196.34; March 4th, 1884, $15; December 12th, 1884, $10.

Payment to Blake, Kerr, Lash & Cassels March 6th, 1884, $2.80.

Supplemental objections or surcharges:

1. In addition to the objections filed and delivered by the plaintiff on the 17th day of February, A. D. 1885, the plaintiff objects to the allowance of any sum to the defendants for personal services of the defendant, Charles Magrath, as set out and claimed in the supplemental account filed by the defendants herein.

With reference to the fourth matter of surcharge it should be mentioned that the item of $20 paid to J. B. Sorley, was paid for his work of making up the account spoken of above as Sorley's account; the item $20 paid to H. W. Eddis, was a payment to Mr. Eddis, who was also a professional accountant, for his work of making up the new account of the defendants by revivor above mentioned: the item of $150 paid to Robinson, O'Brien & Co., was a payment made to them as solicitors first for Charles Magrath and afterwards for the defendants by revivor, on account of their costs of this present action: the item of $12.25 paid to Mr. Whitney was for going out to the Elgins Mills property at Mr. Charles Magrath's request in May, 1883, to report upon what he considered its value and the best means of disposing of it; the item of $196.34 also paid to Mr. Whitney was his commission as land agent on the sale of the trust premises to the Nicols being 2½ per cent. on the first $4000, and 1½ on the surplus: the item of $15 also paid to Mr. Whitney was a sum paid to

him for making certain enquiries in regard to some question of dower which arose in connection with the trust property: the item of $10 was charged as paid to Mr. Whitney for several attendances by him on Mr. Charles Magrath and his solicitors in connection with this action: the item of $2.80 paid to Blake & Co., appeared to have been for a copy of the trust deed.

On June 13th, 1885, oral evidence was taken before the Master in connection with the above surcharges, and so far as the management of the trust property was concerned, it may be shortly stated to have shewn: That the trust property had all through been of a very unsaleable kind, consisting of a farm, very stumpy, and badly fenced, and the old grist mill, which had quite lost its value for milling purposes; that it would have been inadvisable to sell the timber on the land separately, as to do so would have injured the sale of the rest of the property; that Charles Magrath had never advertised the property for sale, but at the same time that it was well known in the neighbourhood that it was for sale, and that it was not the sort of property that was likely to be bought by a stranger; that the present purchasers, the Nicols, had for some time before the sale been resident in the neighbourhood of the lands. There was, also, no positive evidence that at any time Charles Magrath could have effected a more advantageous sale than that he effected in 1883; and it also appeared that up to 1880 neither Alexander Mitchell nor Colonel Taylor had complained of the delay; but on the contrary Mitchell had distinctly acquiesced in it. Sorley himself was not called by either side.

Before making his report the Master delivered written reasons, as follows:

June 27th, 1885. THE MASTER-IN-ORDINARY.—The evidence in this case proves that the original defendant held the property in question under a declaration of trust dated March 2nd, 1864, under which he was, "without delay," to sell and dispose of the lands in such manner as to him

should seem meet, and in the meantime and until such sale to make any lease or leases thereof as he should think fit; and out of such rents and purchase money to pay himself his costs, charges, and expenses, taxes, and insurance, £217-19s. 10d., £15, and £1236 8s. 2d., with interest on the said sums and his expenditures at ten per cent. per annum. And after such payment to himself to pay to the defendant Mitchell £527 5s. 10d., with interest at six per cent., and next to pay one P. W. Taylor the sum of £1316 5s. 5d., with interest. The lands were not sold until 1883, but were at various times and up to the time of sale rented by the said defendant who has duly accounted for the rents received.

Prior to the institution of this action and in 1880, the said defendant rendered to the solicitor of P. W. Taylor, through whom the plaintiff claims, an account in detail of all the moneys received, crediting all receipts against principal, and carrying forward a debit balance composed entirely of interest. Before the hearing, the said defendant, who was then in delicate health, made an affidavit sworn on April 28th, 1884, in which he stated that the account was carefully prepared by a professional book-keeper from his books and vouchers, under his sanction and supervision, and was carefully revised by him, and contained a full, true, and particular account of his dealings with the trust premises in question. Shortly afterwards he was examined *de bene esse*, and, referring to the same account, he stated in answer to the question, "Did you satisfy yourself that it was correct? Is it correct?" "It is correct. I have sworn to it. I satisfied myself that Mr. Sorley made a correct statement." And again, "Did you revise this account of Sorley's?" "I have already answered you that I did; I went over it, and was satisfied it was correct, before I let Mr. Brough have it."

Shortly afterwards the said defendant died, and the action was revived in the names of his executors, who now claim to bring in a new account, based upon a different principle, charging the receipts primarily to the reduction of interest,

and claiming, instead of the sum of $3,349.01, the balance shewn by the original defendant's account, the sum of $10,324.32.

It was optional to the said defendant to make his account in the form claimed by his executors. He deliberately chose not to do so, but to make out, deliver, and ultimately to pledge his oath on two occasions to the mode of accounting, and the correctness of the account, in the form above referred to.

The doctrine of the appropriation of payments between ordinary creditors and debtors is well known, and well settled, that in the absence of a specific appropriation by the party paying, the receiver of the money has the right to apply it in any manner he may think proper: *Campbell* v. *Hodgson*, Gow 74; *Merriman* v. *Ward*, 1 Jo. & H. 371. But if the creditor makes no specific appropriation, the money will be applied according to the presumed intention of the partie: *Chitty* v. *Naish*, 2 Dowl., P. C. 511.

The parties paying the defendant Charles Magrath in respect of this property had no right of appropriation; and he had therefore the right to satisfy the interest on his claim first out of the moneys received, and he had such right up to the time he delivered the account to Taylor's solicitors.

The case of *Simson* v. *Ingham*, 2 B. & C. 65, shews that a person receiving moneys and having a right to make appropriation of the payments is not precluded by entries in his books, but has a reasonable time to make such appropriation; but when the entries in the books or the specific appropriation is communicated to the opposite party, the person so commuicating is bound, and cannot thereafter vary the appropriation. Bayley, J., said: "If a book had been kept for the common use of both parties as a pass book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to

the opposite party. Until that time, he continues to have the option of applying the several payments as he thinks fit."

Here the defendant Charles Magrath appears not to have made any appropriation of these payments in his books; and, up to the time he communicated his specific appropriation of his receipts to the opposite party, he had the option referred to; but when the account was delivered, he was bound by the appropriation; and he has since pledged his oath to the account shewing such appropriation, and has in effect sworn that the balance due to him on account of the trust is the accrued interest and no more.

The defendants, the executors, must, therefore, I think, be held bound by the account so rendered.

The plaintiff seeks to charge the defendants with wilful default in not making greater efforts to sell the property earlier than 1883. On several grounds, I think their claim cannot be maintained. The defendant Charles Magrath was the first and chief creditor; and those who were subsequent to his claims concurred in his appointment as trustee; one of them constituted him his agent; and the agent of the other appears, from the evidence, to have concurred in the delay. They knew that though he was to sell "without delay" he had also the right to lease from time to time as he should think fit. Up to 1880, at least, they made no complaint. The evidence establishes that the property was not easily saleable. The beneficiaries do not contend that the only offers to purchase made to him, were such as he ought to have accepted. And they have furnished me with no criterion by which the measure of loss or of damages can be estimated.

The sale made in 1883, realized more than the sums offered by proposed purchasers in 1872 and 1875. And there is no evidence before me on which I can find that had Charles Magrath advertised or made greater efforts to sell this property, he could have found a purchaser at a price higher than that realized at the sale referred to; nothing on which I can find that there has been "a loss

directly attributable to the neglect or breach of duty by the trustee :" *Inglis* v. *Beaty*, 2 A. R. at p. 490. The surcharges filed by the plaintiff and the defendant Mitchell, must therefore be disallowed as to that claim.

As to the disputed items, I think the amounts paid to Mr. Whitney and Mr. Sorley, should be allowed. The latter, on the authority of *New* v. *Jones*, cited in *Lewin* on Trusts, 8th ed., p. 633 : *Henderson* v. *M'Iver*, 3 Mad. 275. The other items must be disallowed.

As to the claim of the defendant Magrath's executors for his costs, as trustee-solicitor, the trust deed gives him the costs, charges, and expenses which may be necessarily incurred, laid out, or expended by him in respect of the trust estate; words which according to *Moore* v. *Frowd*, 3 My. & C. 45, do not give a trustee-solicitor profit costs. I can only allow him therefore such professional costs, charges, and expenses as he has actually disbursed. But prior to R. S. O. ch. 107, s. 37, the Court could, in special cases, grant a solicitor-trustee some remuneration or compensation for his loss of time and trouble, not, however, allowing him the usual professional charges against the trust fund of his *cestui que trust* : *Marshall* v. *Hollow ay*, 2 Swans. at p. 453; *Bainbrigge* v. *Blair*, 8 Beav. 588. This is now recognized by legislative enactment; and as I find the late defendant Magrath had not been guilty of any wilful default in the administration of his trust, I think his executors are entitled to a commission of five per cent. on the amounts coming to the defendant Mitchell and the plaintiff, which will be charged on the respective amounts to which they are entitled. And as double commissions cannot be allowed, (*Valentine* v. *Valentine*, 2 Barb. Ch., 430 ; *Aston's Estate*, 5 Whar. at p. 240,) this per centage must be reduced by the proportionate charge on those amounts, of the sum paid to Mr. Whitney as his commission for the sale of the trust property.

Accordingly the Master reported specially that Charles Magrath had not been guilty of such wilful default as alleged by the plaintiff, and also that the defendants by

revivor were bound by the prior account, above referred to as Sorley's account and the appropriation of receipts to liquidation of principal therein contained.

It may be added that immediately after the delivery of the Master's written reasons, application was made by the defendants by revivor that the evidence of the solicitor who drew the above mentioned affidavit of Charles Magrath should be taken as to the meaning and intention thereof as affecting the question of the appropriation of moneys in Sorley's account, on the ground that the surcharges were so worded as to lead the defendants by revivor to conclude that the mere delivery of the said account was relied on as establishing the said appropriation, but, as reported specially by the Master in the eighth paragraph of his report he declined to admit the said evidence.

The defendants by revivor forthwith served notice of appeal from the Master's report on the following grounds:

1. That the said Master should not have ruled that the defendants by revivor were bound by the account rendered by the late Charles Magrath to the solicitors for the plaintiff prior to the commencement of this action, or at all events should not have held the said defendants were bound by the said account as against the said defendant, Alexander Mitchell, and should not have ruled that the said account contained any binding appropriation of receipts in liquidation of principal as in the said paragraph mentioned, and should not have ruled that the said C. Magrath ever made any such appropriation either by the rendering of the said account or by the affidavit in the said paragraph mentioned, or in any other manner, and should not have rejected the account brought into his office by the said defendants by revivor wherein they applied receipts in liquidation in the first instance of interest accruing due upon the moneys coming to the said Charles Magrath under the trust deed in the pleadings mentioned in the usual and ordinary manner in such cases, and the said Master exceeded the powers conferred upon him by the judgment in this action in assuming to take the account against the defendants by revivor in the manner in which he has taken the said account.

2. Upon the ground that the Master has found a far less sum as due to the appellants out of the proceeds of the trust estate in question than is really due.

3. And upon the ground that the Master should not have rejected the evidence tendered by the defendants by revivor as in the eighth paragraph of the said report mentioned inasmuch as neither the said defendant, Charles Magrath, nor the defendants by revivor ever at any time had notice that the affidavit of Charles Magrath was relied upon by the

defendant Alexander Mitchell as constituting or evidencing such appropriation as in the report mentioned, and the surcharges af the plaintiff and the defendant Alexander Mitchell set up the delivery of the prior account only as constituting or evidencing such appropriation, and they should have been held strictly to the words of their surcharges, and an opportunity should have been afforded to the appellants of shewing the circumstances under which the said affidavit was made.

The plaintiff thereupon served notice of cross-appeal on the following grounds:

1. That the master should have found that the defendant, Charles Magrath, now deceased, was guilty of wilful neglect and default in the execution of the trusts set forth in the deed of trust in the pleadings mentioned in that the said Charles Magrath did not without delay sell and absolutely dispose of the lands and premises and the appurtenances in the said trust deed set forth.

2. That the Master should have charged the estate of the said Charles Magrath, now deceased, with the loss or damages to the plaintiff resulting from his said wilful neglect and default to the extent at least of disallowing interest upon the said Charles Magrath's own claims, and by charging him in favor of the plaintiff with an amount equal to the interest payable upon the claim of the defendant, Alexander Mitchell.

The appeal and the cross-appeal came up for hearing together on October 29th, 1885, before Boyd, C., the cross-appeal being taken first.

Lash, Q. C., and *Hamilton Cassels*, for the plaintiff. The evidence shews Magrath could have sold more advantageously years before he did. He never advertised it, but if anything seems to have rather discouraged persons from buying. "Without delay," in the deed gives no more than a year to sell in. As to the duty of a trustee for sale in Magrath's position, we refer to *Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232; *Wightwick* v. *Lord*, 6 H. L. Cas. 217; *Fry* v. *Fry*, 27 Beav. 144; *Lewin* on Trustees, 6th ed., p. 375; *Story's* Equity Jurisprudence, Eng. ed., sec. 978 *a*; *Perry* on Trusts, 2nd ed., sec. 770; *Taylor* v. *Tabrum*, 6 Sim 281; *Graham* v. *Yeomans*, 18 Gr. 238; *Thompson* v. *Holman*, 28 Gr. 35; *Devaynes* v. *Robinson*, 24 Beav. 86, esp. at p. 94; *Emes* v. *Emes*, 11 Gr. 325. Magrath was under great moral obligation to Taylor, having advanced his money on a third mortgage.

C. Moss, Q. C., and *Lefroy*, for the defendants by revivor. The intention of the parties must be looked at to explain the words of the trust deed; *Lewin* on Trustees, 6th ed., p. 269. The very fact that the deed was not executed for two years, shews that there was no change in the view of the parties during that interval. Magrath was only to be responsible for wilful default, as to which, see *Lewis* v. *Great Western R. W. Co.*, 3 Q. B. D., at p. 215. As to the duty of a trustee for sale, see *Palairet* v. *Carew*, 32 Beav. 564; *Marsden* v. *Kent*, 5 Ch. D. 598; *Baxton* v. *Baxton*, 1 My. & Cr. 80, esp. at p. 93. All the cases referred to by Mr. Lash relate to executors under wills, not to such a case as this. This trust arose out of a forlorn hope on the part of those interested that the property would some day fetch, enough to pay their claims. Though selling before would have prevented the accrual of interest on Magrath's claim, it would have also destroyed all hope for the other parties interested, unless it can be shewn that at any time Magrath could have sold for more than enough to pay off himself. No such thing is shewn. By urging on the present sale the other beneficiaries have defeated their own claims.

McPhillips for A. Mitchell cited *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605.

The appeal of the defendants by revivor was then proceeded with.

C. Moss, Q. C., for the appellants. The rule as to appropriation does not apply to a case of principal and interest such as this. Interest, legally speaking, is undoubtedly part of the same debt as the principal: *Hudson* v. *Fawcett*, 7 M. & Gr. 348, and may be recovered without any reference to it on the pleadings. Besides, the judgment here only directs the Master to take an account of the dealings of the trustee under the trust deed. He went beyond his functions.

[BOYD, C.—I think the judgment authorized him to deal with the matter of the alleged appropriation.]

Here there is not a payment made by a debtor and a

creditor in the ordinary way. It is simply a trustee receiving receipts on a general account of the trust. Magrath was a trustee for all parties, and was dealing with a trust fund. The debtor, the estate, could not have insisted on applying the receipts. There is no earlier debt here, or any earlier items to apply receipts to. The whole debt to the plaintiff is applicable altogether in one lump sum, as to which there could be no question of appropriation. It has been held the rendering of an account in a shape not crediting receipts on interest does not preclude another account: *MacGregor* v. *Gaulin*, 4 U. C. R. 378, which was not cited to the Master.

Lefroy, on the same side. As to Magrath's affidavit and depositions, no where in them is any direct mention made of application or appropriation of payments. It is evident nothing said in them has reference to that matter. The "Elgin Mills book" contains no appropriation. All that was intended by the affidavit and depositions was to verify the items of receipt and disbursement in Sorley's account, and the evidence excluded by the Master should have been admitted, if the affidavit was to be at all relied on as confirming the alleged appropriation.

Lash, Q. C., and *Cassels*, for the plaintiff. An account was demanded of Magrath, and Sorley's account was the response, shewing the balance which he then claimed. *McGregor* v. *Goulin*, 4 U. C. R. 378, does not relate to imputation of payments. We refer to *Cockburn* v. *Edwards*, 18 Ch. D. 449; *Addison* on Contracts, 8th ed., p. 1211; *Frazer* v. *Bunn*, 8 C. & P. 704; *Frazer* v. *Locie*, 10 Gr. 207; *Munger* on Appropriations, pp. 62, 126; *Hooper* v. *Keay*, 1 Q. B. D. 178; *Re Brown*, 2 Gr. 111, 590.

McPhillips, for Mitchell, cited *Shaw* v. *Picton*, 4 B. & Cr. 715; *Dickinson* v. *Marrow*, 14 M. & W. 713.

Moss, Q. C., in reply. At all events we never communicated any account to Mitchell. Nor had Magrath any reason for helping Mitchell, whatever might be the case with Taylor. But Sorley's account was not accepted by the plaintiff; at all events they do not proceed on the

footing of a settled account. *Cockburn* v. *Edwards* was a case of a settled account, and has no application. But *Harlock* v. *Ashberry*, 19 Ch. D. 539, is very apposite, shewing, as it does, that as long as an account remains open between parties, receipts may be applied properly. There is no case to shew that there can be appropriation by parties as between principal and interest, though no doubt an express agreement might be come to on the subject: *Tudor's* L. C. Merc. Law, 3rd ed., p. 31; *Munger* on Appropriations, p. 126.

November 4th, 1885. BOYD, C.—Mr. Magrath was a solicitor of this Court, and acted as agent for Colonel Taylor, who lived in England, in the investment of his money. He made an investment of £1,075 for Taylor on the land in question in 1856. This was a third incumbrance, the first being a mortgage from Thompson to McArthur for £1,000, and the second arising out of notes held by McArthur against Thompson on which he recovered judgment for about £550. The loan effected by Magrath was by paying Mr. Hector Cameron, attorney for Mitchell, the £1,057, and procuring an assignment of a then second mortgage which Mitchell held for Thompson. Magrath, in his memorandum of the transaction, says, "Cameron agreed to assign the mortgage Thompson to Mitchell, he having been then fully paid up (part in notes from Thompson)."

After this arrangement it appears that some of these notes not having been paid Mitchell in respect of these came in prior to Taylor, whether unexpectedly to Magrath or not does not appear. The property proved insufficient to answer the incumbrances and was bought in by Magrath, who advanced his own money for that purpose. He then obtained a conveyance to himself with Taylor's assent, and held it in order to pay himself off first, then Mitchell, and then Taylor. He was to have 10 per cent on his expenses and advances to be paid out of the rents and sale of the property.

The deed is made out to Magrath though the property was bid in in Taylor's name, and when that deed was signed, Colonel Taylor was in this country. The deed refers to a deed of trust, and though both are of the same date March 2nd, 1864, Taylor must have been away when the latter was signed as it is executed by John Crickmore as his attorney. Such is the origin of the transaction, a disastrous investment made by a solicitor and agent of the plaintiff's testator and a getting in of the property with intent to save something if possible, and as Magrath says, "mainly to protect Colonel Taylor."

The case in appeal is involved in doubt and difficulty because of the absence of evidence, some inevitable and some that might have been, but was not, procured.

Colonel Taylor died in England in March, 1881. It appears that he appointed Leith, Kingstone & Brough his attorneys in place of Magrath in 1880. No evidence is given of anything being done by them till 1882, when Mr. Brough applied for and obtained a statement of the affairs in Magrath's hands by an account delivered in January 1882. Magrath, who died pending this action, was examined on April 30th, 1884, and he says this account was made out for the information of Leith & Co. upon their being appointed attorneys for Taylor. He says further: "Mr. Brough asked for a statement of the estate in my hands and I not being prepared to do it myself, and being aware that Mr. Sorley was a regular good accountant, employed him. * * I satisfied myself that Mr. Sorley made a correct statement. * * I went over it, and was satisfied it was correct before I let Mr. Brough have it."

Two days before this, on April 28th, 1884, Mr. Magrath made an affidavit verifying the account, a copy of which had been furnished to Mr. Brough in 1882, and in that affidavit were these expressions:

4. In January, 1882, I caused an account to be carefully prepared from my books and vouchers of my dealing in reference to the trust estate by Mr. Sorley, a professional book-keeper.

5. The said account was prepared under my direction and supervision, and was carefully revised by me, and sets forth according to

the best of my knowledge, information and belief, a full, true and particular account of the particulars of my dealings with the trust premises up to April 13th, 1880. * * It contains a like account of the disbursements, allowances, and payments made by me, and the times when the names of the persons to whom and the purposes for which the same was made.

9. I have made this affidavit in case I should be unable to make a further affidavit or state my accounts and dealings as trustee in in any different shape, pursuant to any reference which the Court may see fit to order in this action.

This account shews that the moneys received from rents and sales and insurance moneys were applied in the first place to reduce the principal of the moneys advanced by and due to Magrath, and the result is that on May 18th 1876, these principal moneys were fully paid off, and only interest left to be paid.

After Magrath's death his executor sought to change the form of the account, and brought in one into the Master's office, in which the moneys received were applied (first) in the usual way to the discharge of the interest. This they may do as against Mitchell, but I think that it is too late to claim now to change the previous application of those payments as made by the trustee Magrath.

Special reasons appear to my mind to exist which would influence him so to apply the moneys from this property. He was under obligations to see that Taylor was, as far as possible, recouped; whether these obligations were legal as well as moral I have no means of determining. But in his examination he volunteers the statement: "I have had the good fortune through life of being a correct business man, and I could swear that I have always had the greatest interest in doing the best I could for this trust, especially with the view of trying to secure something for Colonel Taylor."

It is a fair and reasonable inference that an arrangement of this kind as to the application of money received was made by him with Colonel Taylor when the latter was in the country in 1864, and that the making up and tendering of this account was in pursuance of that understanding. I

find it difficult to believe that a solicitor who was in 1882 quite able to protect his own interests, assisted by a "good professional accountant," who acted under his supervision, could have made such an egregious blunder as is now sought to be imputed to them. Mr. Sorley is not called, nor is Mr. Brough, and I must do the best I can by way of inference, remembering this also that I have to be satisfied that the Master was wrong before I undertake to overrule him.

The solicitor, Magrath, must have been perfectly well aware of what Sir James Macauley, in *McGregor* v. *Gaulin*, 4 U. C. R. 378, speaks of as the regular mode of making up the account by placing the payments against the arrears of interest till paid off and the balance in liquidation of the principal. How can his rendering of the account in a different manner by applying the income in reduction and satisfaction of the principal moneys paid be possibly explained, except as a distinct, deliberate application thus of the moneys? Whether this was in pursuance of a previous engagement to that effect or not appears to be of minor moment, so far as the question of appropriation of payments or receipts is concerned, but I judge it to be the result of a pre-existing arrangement: *Henniker* v. *Wigg*, 4 Q. B. 492. The present case so far as concerns this application of the moneys first to the principal is not within the decision referred to in 4 U. C. R. That case arose out of a mere blunder in the computation of the accounts which was rectified within a fortnight after the mistake occurred. The earlier accounts had been preperly made up and rendered, and as stated in the judgment of the Chief Justice the facts there raised no question as to the imputation of payments. That decision is, however, it seems to me applicable to rectify the manner of making up the accounts after the principal moneys were satisfied. Assume, as I think is a reasonable inference, that the parties (solicitor and client) agreed that the receipts from the property should be first applied to discharge the principal; this was satisfied when the principal was all paid off. It is an error in continuing the

accounts to charge interest at 10 per cent against the solicitor in favor of the client. So that from May 18th, 1876, the moneys as received from the property should be at once as received applied in reduction of the accumulated interest account, which would leave the true balance, at the date to which this first account is brought down, about $3,736 instead of $3,349. The Master's results may have to be changed somewhat if the account is continued in this way.

There is nothing at variance with the written instrument of trust in taking the account as rendered by Mr. Magrath. By the terms of the trust he is to receive the incomings and "to deduct, retain, and pay himself" the principal sums specified, "with interest at ten per cent per annum." No time of payment is indicated, and the transaction is just the same as if the moneys received had come from the hands of Colonel Taylor, who upon paying them directed their application to the discharge of the principal sums, and the trustee had received them on that footing. That is not in contravention of the terms of the trust, though it is not the way in which the Court would take the account if there had been no appropriation of the rents and profits.

The trustee having as against the plaintiff applied the sums received to pay himself the principal moneys, having communicated that application by the delivery of the account to Mr. Brough, and having two years afterwards sworn that that account was correct, and exhibited the manner in which those payments had been from time to time made, the onus is on him to get rid of the unmistakeable and deliberate application of the moneys to a particular purpose. So far from this being done, there is positively no evidence which would place his executors in any better position than he was in at the time of his death.

Upon further consideration I do not think that Mitchell is affected by this manner of dealing between the other parties. The trustee has not done or said anything as to him, which disables the executors from bringing in the accounts made up in the usual way. The statement given to Mitchell's solicitor in 1870 supplies no evidence of any

application of the moneys, and what took place between Magrath and Taylor does not enure to Mitchell's benefit. The account may well be taken in the ordinary way as to Mitchell and in the special way intended by Magrath as to the plaintiff. The report should be modified as I have thus indicated both as to the amount due to Magrath as against the plaintiff, and to the amount claimable by Magrath as against Mitchell. Upon the plaintiff's appeal I agree with the Master. I think it better to give no costs of appeal or cross-appeal to any party, as all have failed and succeeded to about the same extent.

The proper mode of taking the account on the footing of this judgment would be thus: ascertain what is due between Magrath and Mitchell, who is second in priority, and let that be paid. Then ascertain what is due as between Magrath and Taylor, (deducting what is paid to Mitchell as a proper disbursement) and let the balance be paid after satisfying Magrath's claim to the plaintiff.

I may add it would be a reasonable settlement of the action if the costs of all parties should be paid out of the fund, and the balance divided as I have indicated. (*a*)

A. H. F. L.

(a) On settling the minutes of this judgment, a dispute arose between the parties, the defendants by revivor claiming that inasmuch as Sorley's account was held binding only as between them and Taylor, and not as between them and Mitchell, and inasmuch as Mitchell had priority over Taylor, they and not Taylor were entitled to that portion of the proceeds of the sale which would have gone to Mitchell, if Sorley's account had been binding as against *him*, and that, after Mitchell had received the small sum which was due to him on this computation, Taylor should be declared entitled only to the residue.

This question being brought up on motion to vary the minutes as settled on November 11th, 1885, BOYD, C., held that the defendants by revivor were only entitled to such portion as was found due to them on taking the account as between them and Taylor, on the basis of Sorley's account. A dispute then arose between Mitchell and Taylor as to whether the former or latter were to get the portion of the proceeds which would have been Mitchell's if Sorley's account had been binding as between him and the defendants by revivor.

Special leave was then given by the Chancellor to argue this point on a subsequent day, but in the meanwhile a settlement was arrived at by consent between the parties REP.

[CHANCERY DIVISION.]

BLEAN V. BLEAN.

Vendor and purchaser—Sale of infants' estate—Title—12 Vic. c. 72—R. S. O. c. 40, s. 76.

Certain infants' lands were sold under an order which appeared upon its face to have been presented under the statutable jurisdiction of the Court of Chancery relating to the sale of infants' estates: 12 Vic. c. 72—R. S. O. c. 40, s. 76. The petition and order were entitled in the matter of the infants, and the subsequent proceedings were taken as provided by the general orders of the Court, the order setting out that what was being done was because it was beneficial to the infants, and the conveyance was executed by the Referee for the infants. A subsequent purchaser objected that the order for sale did not disclose any jurisdiction.

Held, that as the Court would never allow the infants to recede from what was so done for their benefit, a subsequent purchaser could not raise doubts as to jurisdiction, when upon the face of the proceedings the statute authorizing the sale appeared to have been followed.

Calvert v. *Godfrey*, 6 Beav. 97, considered and distinguished.

THIS was an appeal by a purchaser at a judicial sale from a report of the Master at London.

The title disclosed a sale under the direction of the Court of certain infants' property alleged to have been for their benefit; and in the making of title to the purchaser herein the Master held that the purchaser could not go behind the deed made under the order for the sale of the infants' estate, entitled in the matter of the infants and setting out that the sale was for their benefit.

R. M. Meredith, for the appeal.—The order was a Chamber order initiated by the Referee and it does not disclose any jurisdiction. It is said the mother is dead and that that is the reason why she did not join in the conveyance, which was executed by the Referee for the infants, but that is no answer to the defect. I refer to R. S. O., c. 40, s. 76; *Re Wilson*, 7 P. R. 245; *Calvert* v. *Godfrey*, 6 Beav. 97, 107.

H. Becher, Q. C., contra.—My client is not bound to show that the order was proper. The Master has ruled

and we need not go behind the order. It was beneficial to the infants: *Re McDonald*, 1 Ch. Ch. 97; *Re Barker*, 6 P. R. 225; *Dickey* v. *Heron*, 1 Ch. Ch. 151; *Gunn* v. *Doble*, 15 Gr. 655; *McLean* v. *Grant*, 20 Gr. 76; *Shaw* v. *Crawford*, 4 A. R. 385; *Bennett* v. *Hamill*, 2 Sch. & Lef. 566; *Taylor* on Titles, 78.

Meredith, in reply.—The jurisdiction is statutory, and is not to be presumed. The purchaser is anxious to take the title, but it must be free from doubt: *Kelly* v. *Imperial Loan, &c., Co.*, 11 A. R. 526.

December 23, 1885. BOYD, C.—The proceeding to sell the infants' lands appears on the face of the order to have been prosecuted under the statutable jurisdiction of the Court of Chancery relating to the sales of infants' estates. The petition and order are entitled in the matter of the infants as directed by G. O. 527, and presented by their guardian, as by G. O. 528; the depositions were taken before the Master, as by G. O. 532 and 533; a sum in gross is fixed for the widow's dower as provided by sec. 57 of the Chancery Act (12 Vic. c. 72), and the Referee is directed to execute the conveyance for the infants as provided by sec. 53 of the same Act. The order sets forth that what is being done is because it would be beneficial for the infants to proceed to a sale of the said lands; and although the precise nature of the benefit is not disclosed on the face of the order it is of reasonable inference that, owing to the prior incumbrances, the estate, if left in specie, was not productive, and provision is made for distributing the surplus in yearly payments for the benefit of the children. An order framed in this way shews jurisdiction; it need not set it in detail the particulars in respect of which benefit is to accrue so as to bring the case in set terms within sec. 49 of the Chancery Act (12 Vic., cap. 72, &c.). A liberal reading has been given to the language of that Act. Thus, in *Re Bishoprick*, 21 Gr. 591, Blake, V. C., held that it applied to an exchange of lands, because, as

it is said, "It is evident that what is sought is very much for the benefit of the infant." He proceeds: "Great latitude is given as to the cause for which the Court may interfere; it may do so when called upon for certain specified matters, or any other cause." I do not doubt that the infants who have instituted this proceeding and have received the benefits of it are bound by this sale. I refer to passages in the judgment of Spragge, V. C., in *McDougall* v. *Bell*, 10 Gr. 283, "I take the general rule to be clear, that an infant is bound by proceedings in a suit in which he is plaintiff," p. 285. "I must assume that the bill was properly filed," p. 286. "The difference between the decree and the decree on further directions as to the lands directed to be sold for the satisfaction of debts is no evidence of fraud; it was the act of the Court, and I must assume was done upon good and sufficient grounds," p. 288.

It was held in *Calvert* v. *Godfrey*, 6 Beav. 97, "that the Court has no authority to sell the real estate of an infant or to convert it upon the notion that it would be beneficial for the infant." But that has no application to the jurisdiction of the Court in this country, which is empowered by the Canadian Act to sell and deal with the estates of infants for their benefit. But even in England, and apart from statutory jurisdiction, the Court sanctioned the sale of infants' estate under special circumstances: *Garmstone* v. *Gaunt*, 1 Coll. C. C. 577. By sec. 54 of the statute the conveyance executed by the Referee for the infants is to be as effectual as if signed by the children when of age. This being so the Court will never allow them to recede from what has been done for their benefit, and a purchaser cannot conjure up doubts as to jurisdiction when upon the face of the proceedings the statute authorizing a sale appears to have been followed: *Vansagnew* v. *Stewart*, (H. L. Ca., 1822) referred to in *Sugden* on Vendors, pp. 111-113, 14th ed.; *McDonald* v. *Garrett*, 7 Grant 606, and 8 Grant 290.

I dismiss the appeal, with costs.

G. A. B.

[COMMON PLEAS DIVISION.]

THE AUSTIN MINING COMPANY (LIMITED) v. GEMMEL.

Company—Election of directors—Special meeting—Quorum—Detention of books, &c., by secretary.

The plaintiffs were a company incorporated under The Canada Joint Stock Companies' Act, 40 Vic. ch. 43. By sec. 29 the directors were to be elected by the shareholders in general meeting assembled, at such times as the by-laws of the company should prescribe; and by sec. 30, in default of other express provisions therefor in the letters patent or by-laws, such election should take place yearly, upon notice: that at all general meetings each shareholder, who had paid all calls, should be entitled to vote on each share held by him; and that all questions should be determined by the majority of votes. By sec. 31 the failure to elect directors at the proper time should not dissolve the company; but such election should take place at any general meeting of the company duly called for the purpose, the retiring directors to continue in office until the election of their successors. By sec. 32 power is given to the directors to pass by-laws for, amongst other things, the time, &c., of the holding of the annual meeting of the company, the calling of meetings, regular and special, of the directors and of the company, the quorum at such meetings; but every such by-law, unless confirmed at a general meeting of the company, should only be in force until the next annual meeting thereof; one-fourth in value of the shareholders could at all times call a special meeting for the transaction of such business as might be specified in the notice given therefor. By a by-law passed by the directors the last Tuesday in September was fixed as the date of the annual general meeting, and the quorum for such meeting was to consist of five members; but at a special meeting they were required in addition to represent one-third of the capital stock. In 1884 there was no election of directors at the appointed time owing to the office where the meeting therefor was to have been held, being locked up and the defendant refusing to attend the meeting or give up the books, &c.; and in October a special general meeting of the shareholders was held, called on notice, stating the object thereof, on a requisition by one-fourth in value of the shareholders, and directors were elected, who appointed a new secretary. At the meeting there were present three-fourths of the qualified vote and one-third of the subscribed capital, but considerably less than that amount of the nominal capital. In an action by the company against defendant for the non-delivery of the books, &c., to the new secretary, the defendant set up as a defence that he was still secretary, because, as he alleged, the directors who appointed the new secretary were not duly elected, and that there was not a quorum at the meeting to transact business.

Held, under the circumstances, there was authority to call the special general meeting for the election of directors; and that it was duly called by the proper number of shareholders.

Held, also, that the directors could by by-law determine the quorum and all other formal proceedings for the control and conduct of the meetings of the board and shareholders: that there was a proper quorum present at the meeting under the by-law; and if the by-law had required

such one-third to be of the whole capital stock it would have been *ultra vires* as opposed to sec. 32.

Per ROSE, J. The words of sec. 31, "any general meeting of the company duly called for the purpose," properly describe a special meeting, which may be called as provided by sec. 32.

Held, also, that on the evidence the defendant must be deemed to have unlawfully detained the books, &c.: that there was an election of directors *de facto*, and a suit in the company's name; and an officer of the company could not be permitted to withhold what belonged to the company. In any event the defence set up was not the proper way of testing the election of directors, which should have been by motion to stay or set aside the proceedings.

The plaintiffs, a mining company incorporated under the Canada Joint Stock Companies Act, 40 Vic. ch. 43, by letters patent, dated 27th May, 1882, sued the defendant who had been, and still claimed to be, the secretary of the company, for the conversion and detention of certain books, papers, letters, vouchers, and documents belonging to the company.

The defendant in his statement of defence admitted that he had in his possession as secretary of the company, the books, papers, and documents in question; and alleged that they were placed in his possession by the plaintiffs, and that he had always been ready and willing to deliver the same to any one duly authorized to receive them on behalf of the plaintiffs, and that no demand therefor had ever been made upon him by the plaintiffs, or by any one duly authorized to receive them; and he, defendant, had never refused to deliver the same.

The action was partially tried before O'Connor, J., without a jury, at Ottawa, at the last Spring Assizes, and was adjourned by him to be further heard at Toronto, if in the meantime the plaintiffs and defendants should not come to an amicable settlement, to which end a new election of directors should take place, there being a dispute as to whether the board had been duly elected. A new election was held resulting substantially in the selection of the same directors, but no settlement was arrived at.

On the 24th day of July, 1885, the case was further heard before the learned Judge, who delivered judgment dismissing the action, on the ground that the books and

papers having come into the hands of the defendant lawfully, there had been no sufficient demand and refusal to amount to a conversion.

During Michaelmas sittings, *R. W. Scott*, Q. C., moved on notice to set aside this judgment and to enter judgment for the plaintiffs for such damages as should be deemed proper; or for such other judgment as should be deemed proper under the circumstances; or for a new trial, on the ground that the judgment was contrary to law and evidence.

During the same sittings, November 27, 1885, *R. W. Scott*, Q. C., supported the motion.

Chrysler, contra, referred to *Re Cambrian Peat and Fuel Co.*, 23 W. R. 405, 31 L. T. N. S. 773.

January 2, 1886. CAMERON, C. J.—At the conclusion of the argument herein the Court suggested that the plaintiffs' statement of claim should be amended so as to substantially present the case as it really was, a proceeding to obtain from the defendant, the plaintiffs' own officer, a delivery up of the books and papers to a new secretary appointed by the plaintiffs, so that the action might be relieved of any technical difficulty as to whether there had been in law a wrongful conversion of the property of the plaintiffs or not. This amendment has been duly made; and is as follows:

"That a special general meeting of the shareholders of the said company was duly called for the 29th day of October, 1884, for the purpose of electing directors for the year then ensuing, and that said shareholders met on the said 29th day of October, 1884, and at such meeting duly held, a board of directors for the year thence ensuing was elected. The directors so elected met on the 5th day of November, 1884, and appointed R. C. W. MacCuaig, secretary-treasurer of the said company in the place and stead of the defendant. That the plaintiffs, as such company, required for the purposes of their business certain books, particularly the stock book, minute books, cash books, account books, and also certain plans, papers, letters, vouchers, and documents, and the corporate seal and other

property belonging to the said plaintiffs, and they then and theretofore had such books hereinbefore particularly mentioned, and such seal and various papers, reports, and other books and property necessary for the purposes of said business and so required. Such books, papers, and property and seal, the property of the plaintiffs, and last herein mentioned, were and for some time prior thereto, had been in the possession of the defendant as secretary-treasurer of the said company, and in that capacity he had been entrusted with them. After the appointment of the said MacCuaig as secretary-treasurer of the said company in place and stead of the defendant, the said defendant was duly notified and made aware of such appointment, and that his duties as such officer of the company had ceased. That subsequent to the appointment of the said MacCuaig as such secretary-treasurer in the place and stead of the defendant, the plaintiffs requested the defendant to deliver up to them and to the said MacCuaig as secretary-treasurer for them, the books papers, seal, and other property of the said company, and thereafter, to wit, during the months of November and December frequently requested and demanded from the defendant the delivery thereof, but the defendant, notwithstanding such request, and notwithstanding that he was aware of such appointment of MacCuaig, and that his own duties had ceased, refused and still refuses to deliver up the said books, papers, seal, and other property, and detained the same from the plaintiffs. By reason of the acts of the defendant, the plaintiffs are unable to proceed with their business and are greatly prejudiced and injured, and unless the said books, papers, seal, and other property are forthwith delivered up, the plaintiffs will suffer further great loss. The refusal and resistance of the defendant are without justification, as the defendant well knows, and the plaintiffs charge that the object of the defendant is to obstruct the plaintiffs and to bring them into trouble and difficulty in their business and to prevent them carrying on the same. The plaintiffs therefore pray, that an order may be made by this Honourable Court directing the defendant forthwith to deliver up to the plaintiffs the said books, papers, seal, and other property hereinbefore specifically mentioned, &c., such further and other relief as the circumstances of the case may require and to the Court may seem proper."

The learned Judge in the judgment delivered by him, goes fully into the proceedings of the plaintiffs' Board of Directors, their election, and what was done to obtain from the defendant the books and papers.

I am of opinion the plaintiffs are entitled to the relief prayed for, and that the judgment of my Brother O'Connor should be set aside.

The contention of the defendant is not entitled to prevail. That contention, as I understood the argument of Mr. Chrysler, is, that the Board of Directors was not legally elected; and so the secretary appointed by them was not the secretary of the plaintiffs; but the defendant was at the time of action commenced and continues to be the secretary of the company and the custodian of the books and papers.

This contention is based upon what are the alleged requirements of "The Canada Joint Stock Companies' Act, 1877," 40 Vic. ch. 43, with respect to the election of directors.

By section 29, the directors are to "be elected by the shareholders, in general meeting of the company assembled * * at such times, in such wise, and for such term, not exceeding two years, * * as the by-laws of the company may prescribe."

By section 30, "In default only of other express provisions in such behalf, by the letters patent or by-laws of the company,—(1) Such election shall take place yearly. (2) Notice of the time and place for holding general meetings of the company shall be given at least twenty-one days previously thereto, in some public newspaper published in or as near as may be to the place where the chief office or place of business of the company is situate: (3) At all general meetings of the company, each shareholder shall be entitled to give one vote for each share then held by him: such votes may be given in person or by proxy,—the holder of the proxy being himself a shareholder; but no shareholder shall be entitled to vote * * unless he has paid all the calls upon all the shares held by him." All ques-

tions passed at the meeting to be determined by the majority of votes,

By section 31: "If, at any time, an election of directors be not made, or do not take effect at the proper time, the company shall not be dissolved; but such election may take place at any general meeting of the company duly called for the purpose; and the retiring directors shall continue in office until their successors are elected."

By section 32 the directors of the company are given power to administer the affairs of the company in all things, and to make by-laws, not contrary to law, the letters patent, or the Act, for many things specially enumerated; and, among others, "the time at which, and place where the annual meetings of the company shall be held, the calling of meetings, regular and special, of the board of directors and of the company, the quorum, the requirements as to proxies, and the procedure in all things at such meetings, * * but every such by-law, * * unless in the meantime confirmed at a general meeting of the company, duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat, shall, at and from that time only, cease to have force; provided always, that one-fourth part in value of the shareholders of the company shall, at all times, have the right to call a special meeting thereof for the transaction of any business specified in such written requisition and notice as they may issue to that effect."

The directors of the company on the 9th of June, 1882, passed a by-law providing, among other things (19), "the annual general meetings of the company shall be held on the last Tuesday in the month of September in each year at such hour and place as the directors shall determine." (21) "Five members personally present shall be a quorum for an annual general meeting, and five members personally present and representing one-third of the capital stock of the company shall be a quorum for a special general meeting. If within one hour from the time appointed for a special general meeting a quorum be not

present, the meeting shall stand dissolved, but in the case of an annual general meeting it shall stand adjourned till the same day in the next week at the same hour and place."

The difference between the by-law and the statute is, that the former requires the presence of at least five members in person at any annual general meeting, and at a special general meeting the five members must represent one-third of the capital stock, while by the latter, subsection 3 of section 30, no provision is made with respect to a quorum, but the question is to be decided by a majority of votes.

There was no election of directors on the 30th September, 1884, the day the by-law fixed for that purpose, owing to the office, the place wherein by the notice calling the meeting it was to be held, being locked, and the defendant having refused to attend the meeting or give up the books.

The defendant's contention is, that the effect of not holding the meeting was to continue the old directors in office, and the subsequent election at the meeting called for the 29th October, 1884, was not held legally as there was no power in the shareholders under section 32 to call any but a special meeting for the transaction of some special business; and did not authorize the holding of a meeting for the election of directors; and if the meeting could be deemed to be legally called, there was not a sufficient attendance of members or shareholders to enable such meeting to elect directors or transact any business as the by-law required: that there should be at least one-third of the whole capital stock and not merely a third of the subscribed capital stock represented to constitute a quorum: that the stock represented at such meeting in person and by proxy was only 14,275 shares, equal to $71,375, and the requisite amount was $83,333, or 16,666 shares.

By the evidence it appeared that only 25,000 shares had been subscribed for amounting to $125,000. At the time of the meeting of the 29th October, 1884, of these

25,000 shares only about 19,000 were entitled to vote by reason of the calls made thereon not having been paid, and so the shares entitled to vote at the meeting amounted to over three-fourths of the qualified vote and over one-third of the subscribed capital, but considerably less than one-third of the nominal or authorized capital.

There would seem to be no room for reasonable doubt that shareholders of one-fourth in value of the subscribed capital were competent to convene a special general meeting for the election of directors when no annual general meeting had been held, or when, if held, no election had taken place.

Mr. Chrysler did not contend that they would not be competent to call a special meeting for any other specified purpose. But I am not aware that a special meeting may not be called to perform the work of a general meeting if the work to be done or object of the meeting is clearly defined and specified in the notice calling the same.

In the present case it was so clearly specified. Mr. Chrysler's objection to the legality of the manner in which the meeting was called, it would seem therefore is not entitled to prevail.

The other question, the sufficiency of the quorum to transact business, is not quite so free from doubt.

The language of the by-law is, that five members personally present representing one-third of the capital stock shall be a quorum for a special general meeting.

To construe this literally, capital stock, having regard to the language of the charter, would mean the same as capital, or the amount authorized by the charter to be subscribed for the purpose of carrying on the affairs of the company; but having regard to the reason of the thing, and the intention of the by-law gathered from the connection in which the provision appears, I am of opinion it means not the nominal but the actual subscribed capital. The business to be transacted at a general meeting would be as important as that requiring the calling of a special meeting to consider, and if five members in such general

meeting would be competent to transact the business to be done thereat, and competent to elect the directors, though they only represented five shares, it would seem absurd to assume that for a special general meeting the framers of the by-law contemplated that the five members present should represent not one-third of the subscribed capital, but one-third of the whole capital, or several thousand dollars more than the whole paid up capital in existence. The result would be, that provision for the entire management of the company could be made upon far less capital than would be necessary to carry a measure within the scope of the company's business, no matter how unimportant it might be, if it formed the subject of a special general meeting.

I think no violence will be done in this case by holding the provision of the by-law with regard to the quorum necessary to transact business at the meeting of the 29th of October, was complied with.

It was not proved that the by-law was confirmed at the annual meeting held next after the passing thereof as required by section 32 of the Act, in which case the by-law would have ceased to be in force at the next annual meeting after it was passed. That would be in September, 1883. This is most likely a mere omission in proof of a fact on the part of counsel that could readily have been established; and though it may, on the evidence as it is, be of importance, I base my opinion as to the regularity of the election of the directors chosen at the meeting of the 29th October, on the ground that the proceedings at that meeting were regular.

I think, on the evidence adduced before my learned brother O'Connor, I should have little difficulty in finding that the defendant unlawfully detained the plaintiffs' books and papers. There was an election of directors *de facto* on the 29th October, 1884, and this suit was instituted in the name of the company; and it seems to me that an officer of the company could not be permitted as against the company to withhold what belonged to it. If

the suit was not properly brought, that is, there was no proper authorization of it by the company, the proper course would have been to have applied to have the proceedings set aside or stayed. The defence set up was not the correct way of having the validity of the election of directors determined; and the property in the books and papers being undeniably in the plaintiffs and not in the directors, it seems absurd to permit the defendant to set up that the plaintiffs are not the plaintiffs. If the action fails it would be the plaintiffs who would have to pay costs. There is no one else before the Court.

The judgment rendered in the defendant's favour must be set aside and judgment be entered for the plaintiffs, and the defendant be ordered to deliver up the seal, charter, books, papers, and documents in his hands as the former secretary of the company referred to, and claimed in the plaintiffs' statement of claim, and that he pay all costs of the action.

I would add that I think there is no doubt that the directors had a right by law to determine the quorum and all other formal proceedings for the control and conduct of the meetings of the board or shareholders; and I have formed my opinion on this case assuming that to be the law. It was not contrary to the charter or the Act, but in accordance with the express powers conferred by the latter to fix by by-law the quorum necessary to transact business at a special general or general meeting of the board or shareholders. If the by-laws had provided that no special meeting should be called unless the notice calling the same was signed by at least five members representing one-third of the capital stock, it would have been *ultra vires* as directly opposed to the proviso in section 32 of the Act, and contrary thereto.

The case of *Re Cambrian Peat and Fuel Co.*, 23 W. R. 405, cited by Mr. Chrysler, would, I think, be a clear authority for that proposition; but it does not support the defendant's contention on the facts as proved.

ROSE, J.—By sec. 31 of 40 Vic. ch. 43, (D.), it is provided that if an election of directors be not made at the proper time, it may take place at any general meeting of the company duly called for that purpose.

By sec. 32 it is provided that one-fourth part in value of the shareholders shall at all times have the right to call a special meeting thereof for the transaction of any business specified in such written requisition and notice thereof as they may issue to that effect.

It is clear, loooking at sections 30 and 31, that there may be more than one general meeting in the year; and by by-laws 19 and 20 the distinction is made between annual general meetings and special general meetings.

In Mr. *Brice's* work on *Ultra Vires*, 2nd ed., p. 40, it is said: "Meetings are of two kinds, ordinary or general, and extraordinary or special. The former are held periodically at appointed times, and for the consideration of matters in general. The latter are called upon emergencies, and for the transaction of particular business."

Whether, therefore, a meeting of shareholders is to be called general or special depends according to the above definition upon the purpose for which it is called, *i.e.*, general or special business.

According to Mr. *Brice's* definition the terms "special general" would seem to be inconsistent, for special meetings would not be held periodically at appointed times.

According to the by-law it would seem to have been the intention of the company to provide for calling meetings of the shareholders to attend to business generally without specifying any special business. If a meeting be called for transacting special business it would be properly called a special meeting. There might, of course, be a meeting called for the transaction of general business, and special notice might be given of some business that would be brought before the meeting. When, therefore, the statute speaks of an election taking place "at any general meeting of the company duly called for that purpose," the language more correctly describes a special meeting,

for if the meeting were called for a purpose it would for such purpose be a special meeting.

It could hardly be meant that the directors might be elected at any general meeting if prior notice had been given of the intention to hold such election at such general meeting, for the meeting would not be called for that purpose, but for transacting general business, and notice would be given of special business to be brought forward.

In this case the shareholders generally were duly called together to a meeting for the purpose of electing directors and did elect directors accordingly.

I am of the opinion that the words of section 31 above discussed, describe a special meeting which may be called under sec. 32, by one-fourth part in value of the shareholders as above pointed out.

Coming to this conclusion I am relieved from considering the difficulties suggested as to the sufficiency of the quorum to transact business at a general or special general meeting.

The usual rule of law is that at any meeting of shareholders the majority present will bind the minority.

No provision is made in the by-laws for holding special meetings, nor were we referred to any in the statute as to either quorum or governing majorities at such meeting.

If sub-sec. 3 of sec. 30 can be held to apply, the election was duly made; and, if not, then under the provisions of the general law the objections fail.

I agree that the judgment must be for the plaintiffs, with costs.

GALT, J., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

CLEGG v. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Accident—Negligence—Omission to pack frog—44 Vic. ch. 22 (O.)—46 Vic. ch. 24 (D.)—Statement of claim—Omission of necessary averments.

Action by plaintiff, an administrator of C., for damages under 44 Vic. ch. 22 (O.) by reason of the omission to pack a frog on the Midland Railway which the defendants were operating, whereby C.'s foot was caught in the frog and he was killed by a train.

Held, that defendants were not liable: that the Midland Railway was a railway connecting with or crossing the defendants' railway, and under 46 Vic. ch. 24 (D.), was exempt from the operation of the Ontario Act.

Held, also, that the omission to state in the statement of claim, as required by sub-sec. 2 of sec. 8 of said Ontario Act, and to prove, that the defendants knew that the frog was not packed, or that the deceased did not know it, or that he had notified the defendants or any person superior to himself in the service of the defendants, or that such person was not aware thereof, would preclude any recovery.

THIS was an action brought by the plaintiff, the widow of John Clegg, deceased, as the administratrix of his personal estate and effects, to recover compensation from the defendants under the Act of the Legislature of this Province, 44 Vic. ch. 22, by reason of the defendants not having caused a certain frog in the rails near the Peterborough station of the Midland Railway, which railway the defendants were operating, to be packed as required by the above Act, whereby the deceased's foot was caught in the said frog, and he was knocked down and killed by the cars which he was then engaged in assisting to shunt as a brakesman in the employment of the defendants.

The statement of claim, as contained in the fourth paragraph, was as follows: "The said John Clegg on the 4th June, 1884, was in the employment of the defendants as lessees of the Midland Railway, working upon the said Midland Railway at the town of Peterborough, as a brakesman; and through the negligence of the defendants in not filling a frog upon the said railway at Peterborough aforesaid, and by the defendants' negligence in

not furnishing him with sufficient and necessary assistance, he was caught therein and run over and killed by a locomotive negligently managed, worked and used by the defendants as such lessees of the said Midland Railway. The said John Clegg was not guilty of contributory negligence."

The plaintiff's statement of claim did not allege that the defendants knew that the frog was not packed, nor that the deceased did not know of the neglect, nor that he had notified the defendants or any person superior to himself in the service of the defendants, nor that he was aware that the defendants or such superior already knew of the default or negligence so as to come within sub-section 2 of section 8 of the said Act.

The cause was tried before O'Connor, J., and a jury, at Peterborough, at the Fall Assizes of 1885.

It was proved as a fact that after the first day of January, 1884, the Midland Railway went under the control and management of the defendants; but by what authority or means the defendants came to exercise the right of working the Midland Railway, was not made to appear.

It was also proved that the frog never had been packed; at all events not for two years prior to the injury to the deceased; and that the deceased had worked there every day for a long time previous to the 4th of June, when the accident happened.

At the close of the plaintiff's case *Wallace Nesbitt* for defendants, contended that there was no case to be submitted to the jury: that the Midland railway had by reason of the passing of the Dominion Act, 46 Vic. ch. 24, being a railway connecting with and crossing the Grand Trunk railway, ceased to be a railway under the control of the Legislature of the Province of Ontario and was taken out of the operation of the said Act, 44 Vic. ch. 22, both by the fact that it was declared to be a work for the general advantage of Canada, and also by the express provision in the said Act of the Ontario Legislature limiting the effect and operation thereof to railways

and railway companies in respect of which the Legislature of Ontario has authority to enact such provisions; and the plaintiff was concluded by the decision of the Court of Appeal in *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637: that as to any common law right of action in the plaintiff, the omission to pack the frog would not amount to negligence: and, if it did, it was the neglect of a fellow-servant of the deceased, and no liability would attach to the defendants for such negligence.

The learned Judge overruled these objections, and left certain questions to the jury, upon which they found that deceased came to his death by reason of the frog not being packed as required by the statute; that having reference to the employment and occupation of deceased, he could not by any reasonable precaution have avoided the accident and that the frog in question, apart altogether from the statute, was not in a reasonably safe condition.

They assessed the plaintiff's damages at $1,000.

In Michaelmas sittings, November 17, 1885, *Wallace Nesbitt* obtained an order *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside and judgment entered for the defendants; or for a nonsuit; or why a new trial should not be had between the parties on substantially the objections taken at the trial; and the further ground that the verdict was contrary to law and evidence; and for non-direction of the learned Judge in not telling the jury, that the Midland Railway, being a branch of the Grand Trunk Railway, or a railway connecting with the same, and forming part of the Grand Trunk Railway system, was a Dominion railway and subject to the jurisdiction of the Parliament of the Dominion only, therefore the defendants were not liable; and for misdirection on the part of the learned Judge in telling the jury, that the defendants were bound to keep the frog in a condition reasonably safe for their servants as well as the public; and on the ground of improper reception of evidence, in receiving the statement

of two witnesses, that the deceased shortly before his death had told them that he had caught his foot in the frog and the injury was thus caused; and on the ground that there was no proper evidence that the defendants were either the owners, or lessees, or contractors working or operating the Midland Railway, and no liability on their part to pack the frog was shewn; and on the ground that the evidence established contributory negligence on the part of the deceased; and the accident, if caused by the negligence of any one, was caused by the negligence of a fellow servant of the deceased.

During the same sittings, December 2, 1885, *Wallace Nesbitt* supported the motion and referred to *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637; *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658; *Darling* v. *Midland R. W. Co.*, 11 P. R. 32; *Taff Vale R. W. Co.* v. *McNabb*, 42 L. J. N. S. Q. B. 153; *Griffiths* v. *London and St. Katharine Docks Co.*, 13 Q. B. D. 259; *Holmes* v. *Clark*, 6 H. & N. 349; *Gibbs* v. *Great Western R. W. Co.*, 12 Q. B. D. 208; *Cripps* v. *Judge*, 13 Q. B. D. 583; *Stuart* v. *Evans*, 49 L. T. N. S. 138, 31 W. R. 706; *McFarlane* v. *Gilmour*, 5 O. R. 302; *Deverill* v. *Grand Trunk R. W. Co.*, 25 U. C. R. 517; *Wilson* v. *Hume*, 30 C. P. 542; *Woodley* v. *Metropolitan District R. W. Co.*, 2 Ex. D. 384; *South Eastern R. W. Co.* v. *Railway Commissioners*, 19 Hun N. Y. 509; *Britton* v. *Great Western Cotton Co.*, L. R. 7 Ex. 130; *Debates in Dominion Parliament*, 13 Hansard, 1210; *Regina* v. *Bishop of Oxford*, 4 Q. B. D. 525; *South Eastern R. W. Co.*, v. *Railway Commissioners*, 50 L. J. N. S. Q. B. 201.

G. T. Blackstock, contra, referred to *Macdonell* on Master and Servant, 302; *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658; *Queen Ins. Co.* v. *Parsons*, 7 App. Cas. 96; *Levoy* v. *Midland R. W. Co.*, 3 O. R. 623.

January 2, 1886. CAMERON, C. J.—The first point to be considered is, whether the defendants, assuming them to be lessees of the Midland Railway, are,—being a railway company under the legislative control of the Parliament

of Canada,—exempt from the operation of the Act of the Legislature of Ontario in question, imposing the obligation to pack the frogs, and giving a right of action to the person injured or his personal representative, by reason of injury resulting to him from the neglect to pack ?

The case of *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637, is an express authority that the defendants are not subject to the provisions of the Ontario Act where the omission to comply with that Act had relation to the railway proper of the defendants. The late Chief Justice of Ontario being of opinion. that, applied to the defendants, the Ontario Act was *ultra vires* of the local Legislature, while Mr. Justice Burton and Mr. Justice Patterson held that by section 2 of the Act these defendants were expressly exempted from its operation.

Mr. Justice Burton, at p. 641, said: "I agree in thinking that the Ontario Act was intended to apply to those railways only, which under sub-section 10 of section 92" (of the British North America Act) "are placed under their jurisdiction, viz.: those lying wholly within the Province, and not declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces." The learned Judge declined to express any opinion as to whether the Ontario Act was, if applicable, *ultra vires*.

Mr. Justice Patterson was equally careful to avoid expressing an opinion upon that point.

These defendants are the same defendants with regard to whom that judgment was pronounced; and it would be somewhat singular to hold them liable for a neglect on another railway which by law they had power to acquire the right to lease and work, for which they would not be liable on the lines within their charter.

But Mr. Blackstock urged, with much force, that the Midland Railway, when the Ontario Act was passed, was a railway incorporated by and within the jurisdiction of the Legislature of Ontario, and was therefore subject to the Act which provided in express terms, that all railways

and railway companies in respect of which the Legislature of Ontario has authority to enact such provisions, or any lessee, should be liable to the observance of the requirements of the Act, and responsible for injury resulting to a servant of any such company or such lessee if he, in other respects, came within the terms of the Act. The defendants then, with knowledge of this legislation and the obligation they were assuming, became lessees of the railway, and should be responsible.

To this Mr. Nesbitt, in effect, answers that might be so if this injury had happened before the passing of the Dominion Act, 46 Vic. ch. 24, by section 6 whereof certain named railways, and also "all branch lines or railways connecting with or crossing them or any of them" are declared to be "works for the general advantage of Canada," and among the railways so declared is the Grand Trunk Railway; and the Midland Railway crosses and connects with it. By reason whereof the latter railway, by the operation of the said 6th section before the injury to deceased, became a Dominion work removed from the legislative control of the Local Legislature of Ontario.

I think Mr. Nesbitt's contention gives the true effect of the said section. The words "each and every branch line or railway now or hereafter connecting with or crossing the said lines," cannot be read in the restricted sense claimed for them by Mr. Blackstock, confining their application to lines which are branches of or part of the designated principal lines.

It is true this liberal construction will put under Dominion control the whole, or nearly the whole, of the railway system of this Province. But it appears that was the intention of the enactment to be gathered directly from the language used. If this be so, the Midland Railway is removed from the jurisdiction of the Ontario Legislature and from the operations of past or prospective legislation in relation thereto by the Legislature.

Moreover, according to the decision in *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637, the defendant com-

pany is by the express language of section 2, placed outside of the operation of the Act. The legislation is not *ultra vires* but inapplicable by the effect of the Dominion legislation giving to a former provincial work the status of a Dominion work. I do not wish to be understood as concurring in or dissenting from the opinion that a local Act making the provision in question apply to Dominion railways would be *ultra vires*.

It is not necessary in this case, nor will it become necessary, as long as the judgment in *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637, remains unreversed and not overruled by a higher Court, to determine the question which that case as far as the Act under consideration is concerned, sets at rest.

Until it shall become necessary to determine it, I wish to keep myself untrammelled by the expression of any present opinion from considering in the future whether the question is not one relating to property and civil rights outside of matter relating to the defendants' charter, modifications, or amendments thereof, or the powers to be exercised thereunder, which are matters within the exclusive control of the Dominion Parliament.

I wish to be free to consider whether a corporation created by the Dominion Parliament must not, outside of its corporate powers and functions, be regarded as a simple entity which is, as far as the exercise of civil rights are concerned, not expressly provided for by the Act of incorporation, subject to the laws respecting such rights within the Province, in which it may carry on its authorized business or exercise its corporate powers; and whether in this respect a corporation can have any greater or higher rights than a natural person.

I am then, on the ground that the defendants are not liable to this action, of opinion the action must be dismissed.

But assuming that the plaintiff had brought the defendants within the operation of the Ontario Act, she failed to make out a case under the Act. She gave no evidence that the deceased had notified the defendants or

any person superior to himself in the service of the defendants, or that he was aware that the company or such superior already knew of the want of packing in the frog; and the evidence shewed from the nature of the employment of the deceased at the point where the frog was that he himself must have known of its condition.

I do not think the argument of Mr. Blackstock, that the action being after the death of the servant, the plaintiff is relieved from making out her case to the same extent it would have been necessary for the deceased himself to have done had he only been injured and was suing for compensation on account of the injury. I understood his contention to be, that under section 7 of the Act it was only necessary where death resulted from the injury for the plaintiff to shew the neglect complained of to be a neglect within the Act, and the death therefrom, and then the right of action was complete, and it would not signify that the servant himself, if he had survived, would have been unable to recover for the injury sustained.

This cannot be the true construction of the Act; for if it were the plaintiff would be entitled to succeed though the jury had found that it was the duty of deceased to have filled the frog and had himself neglected to do it. This is so manifestly unjust that it never could have been the intention of the Legislature to have enacted it. The whole Act must be read together, and so read I think it clear the action is not maintainable where death results, if it would not have been maintainable by the servant if death had not resulted.

There remains to be considered the question whether, apart from the statute, any liability attached to the defendants? I am of opinion there did not. It is true that the jury have found that the frog was in an unsafe condition. But there was no evidence whatever to support the finding, none to be left to them to so find.

The case of *Griffiths* v. *London and St. Katharine Docks Co.*, 12 Q. B. D. 493, affirmed in appeal, 13 Q. B. D 259, shews it to be essential to state in the statement of

claim, knowledge by the master and ignorance in the servant of the defective condition of the thing that produces injury to the servant. If then necessary to be averred it must be necessary to be proved.

In the present case, there is neither averment of knowledge in the statement of claim nor evidence to support knowledge on the part of the defendants of the condition of the frog, or want of knowledge on the part of the deceased.

The action then, apart from the Ontario Act, is without anything to support it.

The case is open also to the objection taken at the trial, and by the rule, that it did not appear in what capacity the defendants were working the railway; but as there is no reason to doubt that they were working it in a manner to make them responsible, if the case could be brought within the Act, if that were all that were in the plaintiff's way to disentitle her to recover, a new trial should be granted to give her the opportunity to support the evidence now lacking.

On the whole case the verdict of the jury must be set aside, and the action be dismissed, with costs.

ROSE, J.—I was much impressed with Mr. Blackstock's argument, that the words "but also all branch lines or railways connecting with or crossing them," did not include a railway, not being a branch line or railway, and did not include the Midland Railway, because in the same section other railways not so important, are named, while the Midland Railway is not named. It certainly seems strange that so important a railway should be included by implication when less important ones are named.

I would have yielded to the argument were it not that I think the word "branch" inapplicable to a "crossing" railway.

In the Consolidated Railway Act, 43 Vic. ch. 9, sec. 7, sub-secs. 17 and 18, (D.), power is given to construct branch railways "from any terminus or station," and no words are used which would include a crossing line.

The case of the *Taff Vale R. W. Co.* v. *Macnabb*, 42 L. J. N. S. Q. B. 153, may be referred to on the question as to what is a branch railway.

I am unable therefore to dissent from the opinion just expressed by the learned Chief Justice. It may be such general language should not be allowed to work so important a change in the status of the company, when the Legislature named specially other railways of not greater importance.

Had I taken a different view I think I might have been able to yield to Mr. Blackstock's argument, that the onus was on the defendants to shew that the deceased knew of the frog not having been filled in, and generally to establish the exception in their favour found in sec. 8 of 44 Vic. ch. 22 (O.)

The right to bring the action is given by sec. 7, and the exceptions are in sec. 8.

The rule of pleading is found in *Jones* v. *Axen*, 1 Ld. Raym., at p. 119, as laid down by Treby, C. J.: "That where the exception is incorporated in the body of the clause, he who pleads the clause, ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to shew the proviso." See also *Steel* v. *Smith*, 1 B. & Al. 94; *Regina* v. *Nunn*, 10 P. R. 395; *Chitty* on Pleading 7th Eng. and 16th Am. ed., vol. i., p. 246.

In this case the defendants have so pleaded as to raise some of the questions under sec. 8, but not in the terms of the Act. In my opinion the duty was on the defendants not only to plead but to prove the facts which would save them from liability under that section.

The case of *Griffiths* v. *London and St. Katharine Docks Co.*, 13 Q. B. D. 259, does not cover this question, as it did not proceed upon any statutory right of action. I followed that case in *Matthews* v. *Hamilton Powder Co.*, (unreported), and held a statement of claim demurrable in an action by the representatives of a deceased servant

against the employer, because it did not aver want of knowledge on the part of the deceased. I think the case however, quite distinguishable.

For the reasons I have given I am compelled to concur in the judgment of the learned Chief Justice.

GALT, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION.]

HARRIS v. THE WATERLOO MUTUAL FIRE INSURANCE COMPANY.

Insurance—Separate matters of insurance—False statement in proof of loss as to contents—Avoidance of claim—Statutory conditions 13, 15—R. S. O. ch. 162.

By the 13th statutory condition, "Any person entitled to make a claim under a policy is * * to deliver * * as particular account of the loss as the nature of the case permits," and is also to furnish therewith a statutory declaration declaring; (1) that the said account is just and true: and by the 15th condition: "Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim." The plaintiff by a policy of insurance against fire effected an insurance on buildings and contents, by separate amounts being placed on each, the amount on contents being $200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated in the statutory declaration furnished by her, that she had suffered loss on the contents to the amount of $1,665.50, whereas the contents were proved to be worth only $150.

Held, that the mistatement vitiated the whole claim, and not merely the claim in respect to the particular property as to which it was made.

THIS was an action on a policy of insurance against fire, made by the defendants, dated 21st June, 1882.

The policy in terms insured the plaintiff against loss or damage by fire to the amount of $1,000, for the term of three years, on property as follows: on frame dwelling, $700; on ordinary contents therein, $200; on frame stable, $100; situated at the corner of Gray and William Streets, London.

The plaintiff in the fifth paragraph of her statement of claim alleged that she had suffered damage and loss on the dwelling house, and the ordinary contents thereof respectively to the several amounts so insured thereon respectively, namely, $700 on the said dwelling house, and $200 on the ordinary contents thereof.

The defendants, among other statements of defence not necessary to be considered, alleged the policy was made after the passing of the Act, R. S. O. ch. 162, and of the 28th section of 44 Vic. ch. 20, (O.,) (the latter Act making the former applicable to Mutual Insurance Companies); and the conditions set forth in the schedule to the said former Act, were printed on the said policy: among them being conditions 13 and 15, which, so far as necessary to be referred to, were as follows: "13. Any person entitled to make a claim under this policy is to observe the following directions: * * (*b*) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits; (*c*) He is also to furnish therewith a statutory declaration declaring; (1) that the said account is just and true; (2) when and how the fire originated, so far as the declarant knows or believes; (3) that the fire was not caused through his wilful act or neglect, procurement, means or contrivance; and (4) the amount of other insurances." "15. Any fraud or false statement in a statutory declaration, in relation to any of the above particulars, shall vitiate the claim." And the defendants alleged that after the fire the plaintiffs delivered to the defendants a statutory declaration in relation to the particulars in the said thirteenth condition, and therein made a false and fraudulent statement in relation to the said loss, in this, that she had suffered loss on the insured contents of the said dwelling house to the amount of $1,665.50, with intent to induce the defendants to pay her the said insured amount of $200, whereas in truth and in fact the insured contents of the said dwelling house had not been destroyed by fire to the said amount of $1,650.50, as she well knew, whereby the claim

of the plaintiff, if any, under the said policy, became and was and is vitiated.

The cause was tried before Cameron, C. J., and a jury, at London at the Spring Assizes of 1885.

The jury found that the fire was not caused by the plaintiff nor by her procurement; but that she falsely and fraudulently declared that she had suffered loss on the insured contents of the dwelling house to the amount of $1,665.50, with intent to induce the defendants to pay her the insured amount of $200: that the actual value of the dwelling house at the time of the destruction thereof by fire was $750; and that the amount of property destroyed by fire other than the building was $150.

Upon these findings judgment was directed to be entered for the plaintiff for $547.62, in respect of the insurance and loss upon the dwelling house, with the costs of the issue relating to the defence charging the plaintiff with setting fire to the house; and judgment for the defendants, with costs in respect of the claim for loss on contents of the dwelling house.

The defendants' counsel objected that the finding of the jury entitled them to judgment on the whole case.

During Michaelmas sittings, *W. H. Bowlby* obtained an order *nisi* to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants.

During the same sittings, November 21, 1885, *Osler*, Q. C., and *W. H. Bowlby*, supported the motion. The jury have found that the plaintiff falsely and fraudulently stated the value of the contents of the dwelling house in the proofs of loss, and this, under the fifteenth condition of the statutory conditions, made applicable by sec. 28 of 44 Vic. ch. 20, (O.,) avoided the policy. There is a clear distinction between the 1st (*a*) and 15th conditions. Under the 1st

(*a*) The 1st statutory condition is: "If any person or persons insures his or their buildings or goods and causes the same to be described otherwise than they really are, to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made."

condition, the misrepresentation only vitiates the claim so far as regards the particular property misrepresented, while in the 15th condition there is no such limitation, and the false statement avoids the whole policy. The insurance contract is an entire contract, and the claim is one claim. The false statement was most material, as it was made to induce the directors when the claim came before them to pay the claim. They referred to *Sly* v. *Ottawa Agricultural Ins. Co.*, 29 C. P. 557; *Porter's* Law of Insurance, (1884), 156; *Cashman* v. *London and Liverpool Fire Ins. Co.*, 5 Allen N. B. 246; *Gore District Mutual Fire Ins. Co.* v. *Samo*, 2 S. C. R. 411, 421; *Harris* v. *Venables*, L. R. 7 Ex. 235, 240; *Chapman* v. *Pole*, 22 L. T. N. S. 306; *Weide* v. *Germania Ins. Co.*, 1 Dillon C. R. 441; *Mason* v. *Agricultural Mutual Assurance Association*, 18 C. P. 19.

Lash, Q. C. contra. The cases in which the policy has been held to be void, are cases where it was expressly stated that the policy itself was to be void. Under the 15th condition there is a very marked difference. That condition does not provide that the "policy" shall be void, but merely that the "claim" shall be. The policy is divisible, and there may be several claims, and the intention is that the claim, that is, the particular subject matter as to which the false statement is made, is to be vitiated. Where there are separate sums on distinct matters it is the same as if there were a separate policy on each matter. He referred to *Lindsay* v. *Lancashire Fire Ins. Co.*, 34 U. C. R. 440; *King* v. *Prince Edward County Mutual Ins. Co.*, 19 C. P. 134; *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 32 U. C. R. 610; *Wilby* v. *Standard Ins. Co.*, 3 O. R. 115.

January 2, 1886. CAMERON, C. J.—The question presented on this motion is: Did the making of a false declaration, wilfully, with the intent of inducing the defendants, to pay her claim—such false declaration relating only to

the chattel property insured—avoid the plaintiff's whole claim under the policy?

At the trial, having regard to the first statutory condition endorsed on the policy and the conditions thereunder, I was under the impression that the false declaration would only prejudicially affect the plaintiff's right to recover in respect of the property destroyed by fire for the loss on the property as to which the false declaration had been made; but a consideration of the authorities cited on the argument satisfies me that I was wrong. I thought the fifteenth condition might be restricted or limited in its operation: that the words, "any false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim," might be construed to mean "any false statement shall vitiate the claim in respect of which it is made."

It seems somewhat inconsistent to say that a misrepresentation, made before a policy has been effected insuring several different properties and on which the policy is granted, should only make the policy of no force in respect of the misrepresented subject, while a false statement wilfully made afterwards in relation to the loss on property forming a distinct subject of insurance of very little value compared with the other properties destroyed, and forming distinct subjects of insurance, also under the policy, should have the effect of destroying the whole claim in respect of all the insured properties destroyed.

The seeming inconsistency is not diminished, when in addition to the property destroyed, there is other property not destroyed covered by the policy, which remains in force, and in respect to which, if afterwards destroyed by fire within the term of the policy, a claim could be made, when the nice question would arise, did the previous false claim disentitle the insured to recover under the policy for a subsequent honest loss?

If the 15th statutory condition had been the false statement should vitiate the policy, there would, I presume, be no room for doubt; but claim and policy are not synony-

mous. A claim is made under the policy and in respect of it, and cannot therefore be read policy.

These considerations passed through my mind at the trial; and were the matter *res integra*, unaffected by authority, I should hesitate to say in the present case the whole claim under the policy was destroyed. But I think I am, by authority, precluded from doubting. The claim of the plaintiff was one in respect of two items arising from the same fire; and the statute seems to provide for making only one claim for one fire, though the policy may relate to several distinct properties upon which distinct and separate amounts are insured, and no greater sum could be recovered in respect of any one subject than the amount insured thereon, no matter how much the loss exceeded the sum insured.

In *Cashman* v. *London and Liverpool Fire Ins. Co.* 5 Allen N. B. 246, cited by Mr. Osler, the condition was among other things: "And if there appear to be any fraud, overcharge, or imposition, or any false swearing, the claimant shall forfeit all claim to payment under this policy." At the trial the defendants gave evidence that the plaintiff in his preliminary proofs had been guilty of false statements as to the quality and value of the goods destroyed. It was contended that under the above condition the whole policy became vitiated, though it covered buildings in respect of which no false statement had been made.

The judgment of the Court was delivered by Chief Justice Carter, who said, at p. 249: "It was contended that as the statements only referred to the goods, such false statements could only affect the claim for the amount insured upon the goods, and that the contract was divisible for this purpose. There is but one contract, and in that one contract the tenth condition is incorporated. No authority was cited on this point, and we think it cannot be supported. The import of this condition is, in specific terms, to do that, as to matters arising after the contract is completed, which the law does generally with respect to all contracts in their

formation; *i. e.*, that fraud vitiates the contract *ab initio* and *in toto*. If there were false statements wilfully made by the plaintiff, as to the amount and value of the goods, and he were to recover the amounts insured on the buildings, there would, in the words of the tenth condition, have appeared 'fraud and false declaration,' and yet the plaintiff would not have been excluded from all benefit under the policy, and would have derived benefit under it."

This decision was referred to by the present Chief Justice of the Supreme Court, Sir William Ritchie, in *Gore District Mutual Ins. Co.* v. *Samo*, 2 S. C. R. 411, at p. 423, without dissent.

There is no case that I am aware of in our Courts, either before or since the enactment now contained in R. S. O. ch. 162, in which the point in question has been directly raised and determined; but there are some in which the efficacy of the breach of such a condition to avoid the policy was not doubted.

Ramsay Cloth Manufacturing Co. v. *Mutual Fire Ins. Co. of District of Johnstown*, 11 U. C. R. 516, from analogy would seem to be a very strong authority in the defendants' favour, though there, as was pointed out by Mr. Lash, it was the policy that was declared void. The policy in question there contained a condition making it void in case of a double insurance upon the premises or property insured, and there was a double insurance only on a portion of the property insured.

In giving judgment Sir John Robinson, C. J., at p. 520, said: "The exception taken to this plea is one of substance only,—viz., that it is no answer to the whole action, but it is at most a defence in respect to such of the amount claimed as applies to the two portions of the property which were doubly insured; that is, the house and machinery within it; leaving the plaintiff's claim to recover for the stock, valued at $400, unanswered. The learned counsel for the plaintiffs could not cite any authority for giving so limited an effect to the breach of the condition; and I think, upon legal principles, and in

reason, the breach of the condition, when it occurs, avoids the whole policy. It is true that the words of this condition are, that in case of such double insurance *on the premises* or property insured, without notice, &c., the policy granted thereon by the company shall be void. It may seem that a strict grammatical construction would seem to compel us also to hold that to enable this condition to operate at all, the double insurance must be not merely on a part of the property, but on *the* property insured, that is, on the whole property. This could never have been meant; neither do I think could the construction contended for have been in contemplation of the Legislature."

The Legislature in adopting these statutory conditions may have been desirous of enforcing the observance of the utmost good faith between insurer and insured, and to prevent the making by the latter of unjust and dishonest claims, and so enacted that a wilfully false statement made with the dishonest purpose of obtaining more than the loss actually incurred, should avoid the whole claim, and not confine the effect of the dishonesty to the property in respect of which it is made.

I am of opinion the judgment entered by me was erroneous, and must be set aside, and judgment for the defendants be entered dismissing the plaintiff's action, with costs.

ROSE, J.—I agree that the judgment must be entered for the defendants.

I also agree to the observation of the learned Chief Justice as to the object of the Legislature in making fraud or a false statement in the declaration vitiate the whole claim. When a fire has occurred and it becomes difficult, sometimes almost impossible, to check the truth of the account given by the claimant, it does not seem too severe to say to him, "if you send in a statutory declaration made in fraud and founded on falsity you shall recover nothing."

It will be observed that the thirteenth condition sets out what ground the declaration shall cover,. The claimant

shall declare "(1) that the said account is just and true; (2) when and how the fire originated, so far as the declarant knows or believes; (3) that the fire was not caused through his wilful act or neglect, procurement, means or contrivance; and (4) the amount of other insurances."

The previous direction *(b)* "He is to deliver, as soon afterwards as practicable, as particular an account of the loss *as the nature of the case permits*," applied to the first (*a*) paragraph of the declaration, qualifies that paragraph so as to shew that what is required is a declaration that the claimant has delivered as particular an account of the loss as the nature of the case permits, and that said account contains nothing that is unjust or untrue. If the nature of the case does not permit a full statement as to any matter or item, then the claimant is only required to give such an account as he can; but it seems only just and reasonable that, so far as he can give an account, he should make it just and true.

It seems impossible to say that any fraud or false statement as to paragraphs (2) or (3) could be divided so as to free any part of the claim from the vice; and paragraph (4) is as to a matter concerning which absolute verity is surely requisite, and no hardship can be complained of if a false statement regarding it should vitiate the claim.

As to the question raised by the learned Chief Justice regarding a false claim upon a fire destroying or injuring only a portion of the property insured, and a subsequent fire destroying or injuring the residue, and in respect to which a *bonâ fide* claim is made, I venture to think, subject to further consideration if the point arise, that as the 15th condition only vitiates the claim and not the policy, the vitiating of the first claim could not affect the second, which had no reference to the first. Words of forfeiture would be construed strictly, and it seems to me the *bonâ fide* claim could be well made and supported.

Whatever may have been the reasons for the Legislature using different language in the 1st and 15th conditions, it seems to me that difference prevents any conclusion other than the one now arrived at.

A review of all the cases reported in our books would probably reveal the reasons for qualifying condition (1) as has been done.

GALT, J., concurred.

Order absolute.

[QUEEN'S BENCH DIVISION.]

REGINA V. ELI.

Canada Temperance Act, 1878—Conviction quashed, with costs.

Defendant was steward of a "social club" in Walkerton. The members were elected by ballot, and on paying an entrance fee of $1 and subscription of $25 per month, were entitled to use the club room and buy from the steward spirituous liquors. The members were not responsible for goods ordered or for any general expenses. An information was laid against defendant on 10th September, 1885, for an offence against the second part of the Canada Temperance Act, 1878, and on the 21st September, 1885, he was, about 4 p.m., served with a summons to appear at 8.30 a.m., next day, before two magistrates. On the 22nd day of September informations were, in two other cases, laid against him for similar offences, and he was, in each, at 8.15 a.m., served with a summons to appear before the magistrates at 9 a.m., that day. When the magistrates' Court met the first case was partially gone into, and before it was closed the prosecution asked the magistrates to take up the second and third cases. The defendant stated that he had not understood what the summonses meant, and by advice of counsel he refused to plead. The magistrates entered a plea in each case of not guilty, and went on with both cases. The evidence in both shewed that the offences charged in each case occurred on dates different from those laid in the informations. The magistrates amended the dates in the informations. The defendant and his counsel were in Court all the time awaiting completion of the evidence in the first, but refused in any way to plead or take part in the second and third cases, or to ask adjournment thereof. The magistrates, after taking all the evidence therein, at request of defendant, adjourned the first case and in the second and third cases convicted the defendant of the offences as charged in the amended informations. It was shewn by affidavits that the magistrates were willing in these cases, had defendant pleaded, to adjourn after taking the evidence of the witnesses present. There were also affidavits shewing that the magistrates had been before the "Scott Act" interested in promoting prohibition.

Held, that the proceedings were contrary to natural justice, as the summonses were served almost immediately before the sittings of the Court which defendant was called to attend. The convictions were therefore quashed, with costs against the complainant.

Regina v. *Klemp*, 10 O. R. 143, followed as to the charge of interest or bias on the part of the magistrates.

THE facts involved in these cases were briefly as follow: The defendant was the manager of a club house, called "The Walkerton Social Club," at Walkerton, in the county of Bruce.

On the 10th of September, 1885, an information was laid before two Justices of the Peace, charging that the defendant did at Walkerton within three months before, to wit, on or about the 15th of August, 1885, sell intoxicating liquors, contrary to the second part of the "Temperance Act of 1878," then being in force in the county of Bruce, and thereon a summons was forthwith issued.

On the same day, upon an affidavit of the informant that he had reasonable cause to suspect, and did suspect, that intoxicating liquors, in respect of which an offence against the second part of the Act had been committed, were concealed in the defendant's shop and premises, a warrant was issued to search the premises. The summons required the defendant's attendance on 22nd of September, 1885, at half-past eight o'clock in the forenoon, at the town hall, Walkerton, to be dealt with according to law. A copy of this summons was served on the defendant on 21st September at about four o'clock in the afternoon. In the meantime his premises had been searched by the complainant under the search warrant, and spirituous liquors found in an appropriate part of the premises; not concealed, but kept, as is usually the case, in such places for use and sale.

On 22nd September, the day of the return of the summons issued on the 10th, (and evidently early in the morning of that day), a second information by the same informant was laid before the same Justices of the Peace, charging the defendant with having on or about the 29th of August, 1885, committed a like offence at the same place; and at the same time a third information was laid, charging a like offence, alleged to have been committed on 22nd of same month. Summonses were forthwith issued severally on these last two informations, requiring the defendant's attendance in each case at 9 o'clock of that same morning at the place before mentioned, to be dealt with

according to law. Copies of these two summonses were served on the defendant at a quarter past eight o'clock that same morning; that is to say, he was served at 8:15 a. m., and summoned to appear at 9 o'clock, just half an hour after the return of the first summons, (that of the 10th of September). The defendant stated in an affidavit that the last copies of summonses were served on him just when he was leaving home to attend at the town hall in obedience to the summons of the 10th September, and that he put them in his pocket without reading them, as the complainant who served the papers informed him that it was about the same matter that he had served a summons on the previous day.

The magistrates proceeded with the first case—on the summons of the 10th September. One Tegler was examined as a witness for the prosecution, and at a certain stage of his examination the County Attorney, conducting the prosecution, asked that the witness should be sworn on the second complaint, whereupon the counsel for the defendant asked, what complaint? stating that they never heard of any but the one then in course of trial.

Then, for the first time, the defendant said he learned that the papers served on him about an hour before were summonses.

The defendant then swore, and he was corroborated by the oaths of both his counsel and by another person, that his counsel protested that the defendant should not be called upon to answer the last two summonses, but that those cases, at all events, should be adjourned; but the justices refused to grant any adjournment, and therefore the defendant, upon the advice of his counsel, refused to plead to these summonses, stating to the Court that he was unprepared to proceed, and the justices proceeded and took the evidence of the witness Tegler in these cases before the evidence of the complainant was closed in the first case. A witness was then called in the third case, when the defendant objected and refused to plead, as he had protested and refused in the second case; but the justices proceeded,

and the three trials proceeded contemporaneously, evidence being taken in one or other of the cases as counsel for the prosecution called them; but neither the defendant nor his counsel cross-examined the witnesses or otherwise interfered further in the second or third cases, although they necessarily remained to attend to the first case, on the complaint and summons of the 10th September.

The defendant further stated, and was in the same way corroborated, that the justices, at the close of the evidence of the three cases, adjourned the said first case to the 26th day of September, and that nothing was said as to what the justices would do in the matter of the second and third cases; and that on the 23rd of September he was served with a notice of conviction in the second and third complaints, which notice was annexed to his affidavit.

He further said in his affidavit that the justices amended the second and third complaints without his, the defendant's, consent, after they had commenced taking the evidence thereon; amended the second by striking out "29th day of August" and interlining the words "amended to 18th day of September," as the day on which the offence charged was committed. The third was amended by striking out the words "22nd day of August," and interlining in lieu thereof the "14th of September" as the day of the alleged offence.

Convictions were made in the three cases without further evidence or hearing.

The first case was appealed to the General Sessions of the Peace, and in the other two cases Rose, J., granted orders for writs of *certiorari*, pursuant to which the convictions were brought into this Court, and affidavits having been filed by the parties on both sides, and an order *nisi* to quash in each case having been granted by the same learned Judge they were argued on the return thereof before O'Connor, J., on 19th February, 1886, by *H. J. Scott*, Q. C., for the applicants, and *A. Cassels*, contra.

The grounds taken in the orders *nisi* were as follow:

1. That the summons served upon the defendant upon

the information on which the said conviction was made was not served a sufficient time before the return of the same.

2. That the magistrates should have granted the enlargement asked for by the defendant at the said return, and should not have proceeded to try the said information.

3. That the magistrates amended the information by changing the date of the alleged offence, after the defendant had refused to appear or plead to the information, said amendment making a completely different case from that in the original information.

4. There was no evidence to show any offence.

5. The magistrates who made the said conviction were disqualified from trying the said matter by reason of prejudice and interest.

The defendant's principal grounds of defence, so far as disclosed, were, that he sold no spirituous or other prohibited liquors but, as manager of the Club house, to members of the club, pursuant to the constitution and rules of the club: that before selling any "liquors," after the Act came into force in the county, he took the advice of Mr. Barrett, a barrister at Walkerton, as to the right to continue to sell "liquors" to members of the club in the club house, pursuant to the constitution and rules of the club, and that he was advised that he had the right to so continue to sell: that when he was served with the summons in the first case, on the 21st of September, he found Mr. Barrett was from home, not to return for a couple of days, and he then retained Mr. H. P. O'Connor and Mr. Robertson to appear for and with him next day in the case, and instructed them to ask an adjournment for two days, so that Mr. Barrett, who had advised him from the outset, might be present and take charge of his defence: that at the commencement of the trial such an adjournment was asked and refused, and when the other two cases were called, the request for such an adjournment was repeated with regard to them, and refused as stated. The shortness of the time between the service of the copies of the sum-

mons that morning, and the time fixed for the defendant's appearance to answer was specially and strongly pressed as a ground of adjournment. Affidavits filed on behalf of the complainant partly denied and partly qualified some of the facts as stated; but the material facts were substantially admitted.

March 2, 1886. O'CONNOR, J.—To say that these cases were tried is simply preposterous. The proceedings of the morning of the 22nd of September, the taking of the information, and the issuing of the summonses, apparently before breakfast, and the service on the defendant immediately after that meal, the short time allowed for appearance thereon at the town hall, allowing neither time for digestion nor reflection, and the sham trial which followed so soon, appear dramatic, and irresistibly suggest the notion of a farce.

Three cases tried concurrently—a witness in one, a witness in another, and still a witness in the third case, sworn and examined alternately or concurrently, as suited the prosecuting counsel, while the defendant, defending in the first case, is compelled to listen to evidence in the other cases in which he, after objecting, had refused to plead or take any part, although only fifteen minutes had elapsed between the service on him that morning and the time for appearing at the town hall to answer the first summons, and no time had been allowed him to prepare his defence in these last two cases—was actually a display of injustice, and a wanton mockery of justice not to be expected in a civilized country. I trust that such exhibitions are of rare occurrance in this country.

The defendant had a substantial and apparently a *bonâ fide* defence to offer, a defence which, however, required a reasonable time to formulate it, and which would present grave matters of law for consideration—matters of law which ought not to be, and which cannot be, treated in Dogberry's style. In the first place he produced the constitution of the club. He denies some of the facts alleged

against him, explains others, and denies that he is guilty. He has a right to a full hearing and a fair trial. In these two cases he has had no trial. To allow the convictions to stand would under the circumstances be contrary to natural justice, and to the principles of our laws; and practically the cases fall within the principle of *Re Holland*, 37 U. C. R. 214.

The orders *nisi* will be made absolute with costs against the complainant, upon the grounds stated in the orders, having reference to the material facts above stated.

Another ground stated in the orders *nisi* is, that the magistrates were disqualified from trying the matters of these cases by reason of prejudice and interest, and several of the affidavits filed shew that the magistrates are what are now called "Scott Act men," and that both in some instances, and one of them in many cases, have travelled away from home considerable distances to try such cases in other places in the county under the Act since it was put in force, although other magistrates were and are residing in those places. One of them especially, it is alleged, has spent the greater part of his time travelling throughout the country, holding a sort of perambulating Court for the trial of such cases. I do not consider this circumstance a ground for quashing a conviction. Still, in face of the undoubted fact that prohibition has become a serious political question, which has already divided the country into two formidable hostile political camps, it behooves all persons to whom the administration of justice, or a part therein, has been entrusted, to preserve themselves as much as possible from the taint of the prejudices and ill feelings engendered by the conflict. Under such circumstances Justices of the Peace, who are usually mixed up with the people, and compelled by their environments, or are naturally inclined, to take a part with their neighbors on one side or the other in the agitation, ought to proceed with the utmost circumspection when called upon to try cases under the Act where it is in force. Natural justice should be kept in view, and the forms of law scrupulously observed.

Justices of the Peace who are opposed to the principle of prohibition ought not on that account to decline to try cases under the Act where in force, any more than other cases for breaches of the law of the land. They are bound to administer the law as it is, and in its integrity. The law and the accused should have a fair and impartial trial, for in the execution of the laws, and the administration of justice, neither partisanship nor favoritism ought to influence a Judge, and Justices of the Peace are Judges.

On the other hand, Justices of the Peace, who are in favor of the principle of prohibition, ought not to be too anxious and ready to travel from their own neighborhood to distant places in the county where there are resident justices to try such cases. If they do so they may expect that their motives will be, as they are in this case, impugned, and the Act itself will be considered an instrument of irritation, annoyance and oppression.

Any Justice of the Peace who cannot, and does not, make up his mind to do even-handed justice, give fair play, and administer the Act according to the forms of law in such cases, had better for his own sake, and that of the Act, refrain from acting.

Convictions quashed.

REGINA V. GRAVELLE.

Municipal Corporations—By-law—46 Vic., ch. 18; sec. 503, sub-sec. 6 (O.)—One penalty on conviction covering distinct offences—Conviction quashed.

Held, that a by-law passed pursuant to sub-section 6 of section 503 of the "Consolidated Municipal Act, 1883," for granting licenses and regulating the sale of fresh meat in quantities less than by the quarter carcase, and the conviction thereunder, were not bad because the by-law did not embody or refer to the exceptional proviso as to time mentioned in sec. 500; for that sec. 500 did not refer to the subject of sub-sec. 6 of sec. 503; and that, apart from that, sec. 500 was expressly limited to municipalities wherein no market fees were imposed or charged, whereas here a by-law was in existence imposing such fees and charges.

Held, also, that the by-law was not *ultra vires*, express power being given by sec. 503 to pass a by-law respecting the matters mentioned in sub-sec. 6; and that as the reasonable or unreasonable exercise of the power could only be considered on a motion to quash the by-law, the objection was not open on this motion, which was to quash the conviction.

But, *Held*, that the conviction was bad, because, while covering two several and distinct offences under the same by-law, it imposed only one penalty.

THIS was a motion to quash a conviction under by-law of the council of the City of Ottawa, passed pursuant to sub-sec. 6 of sec. 503, of "The Consolidated Municipal Act, 1883," for granting licenses for and regulating the sale of fresh meat in quantities less than by the quarter carcase.

The by-law was objected to on the ground that it did not embody or refer to the exceptional proviso as to time, mentioned in section 500 of the Act, although the power is given the council expressly, "subject to the restrictions and exceptions contained in the six next preceding sections," to pass such a by-law; and also that the by-law was *ultra vires*, and was otherwise illegal and void.

W. H. P. Clement for the motion.
James Maclennan, Q.C., contra.

March 2, 1886. O'CONNOR, J.—I doubt that sec. 500 has reference to the subject of sub-sec. 6 of sec. 503. I am inclined to think it has not; but aside from that, sec 500 is expressly limited to municipalities "wherein no market fees are imposed or charged." But amongst the papers before me is a certified copy of a by-law passed

by the council of the City of Ottawa in 1884, whereby "market fees are imposed or charged." The restriction of sec. 503 does not, therefore, apply; and, although I am of opinion that a well-drafted by-law would shew that fact on its face, yet I do not think the by-law is invalid for want of that statement. Neither the by-law nor the conviction, then, is bad on that ground. But, it is argued, the by-law is *ultra vires*, or, at all events, illegal, because it unreasonably limits the sale of such fresh meat to certain places, which, considering the extent of the city and the number of its inhabitants, are too few in number, and are so situated as to afford much more and unequal accommodation to the northern part than to the southern part of the city: and *Re Nash and McCracken*, 33 U. C. R. 181; *Regina* v. *Johnston*, 38 U. C. R. 549; *Re Snell and Belleville*, 30 U. C. R. 81; *Kelly and City of Toronto*, 23 U.C.R. 425; *Fennell and The Corporation of Guelph*, 24 U. C. R. 238; *Dillon* on Corporations (3rd ed.), paragraphs 327, 328, 323, 319, and 362, and note, were cited by Mr. Clement in support of this contention. I think the rule to be deduced from these and other authorities is, that where a council pass a by-law respecting a subject matter over or in respect of which the Municipal Act confers no control—no power to pass a by-law—or if the council exceeds the power given, such by-law is void, and a conviction made under it is objectionable and may be quashed; but I think it is otherwise where the council have the power by the Act to pass a by-law respecting the particular subject matter. The question of the reasonableness or unreasonableness of the exercise of the power conferred on the council respecting the matter over which they have that power is ground for consideration only on a motion to quash the by-law.

In this instance express power and authority are given the council, by section 503, to pass a by-law respecting the matters mentioned in sub-section 6 thereof.

The conviction, then, is not objectionable on that ground, on this motion.

But the conviction itself is objected to, on the ground

that the defendant—the applicant here—is convicted of two several and distinct offences under the by-law, while only one penalty is inflicted, and in that respect the conviction follows the information and evidence.

It seems to me that the objection is fatal to the conviction. The by-law provides (1) that every butcher or other person who sells fresh meat by its authority shall obtain a license, for the issue of which it provides; (2) that the butcher or other person so licensed may sell in certain specified places, and not elsewhere; (3) that he shall sell nowhere in the city without such license; and (4) that any butcher or person guilty of an infraction of the by-law, or of non-compliance with its provisions, shall upon conviction be liable, &c.

It is clear, therefore, any butcher or other person who sells fresh meat, in quantities less than a quarter carcase, any where in the city without having obtained a license, is guilty of an infraction of the by-law, is liable to be convicted and punished as provided; and it is equally clear that any butcher or person, having obtained a license pursuant to the by-law, who sells or exposes for sale such fresh meat in any place other than any of those specified in the by-law, is also guilty of an infraction thereof, and liable, upon conviction, to be punished. These are, then, several and distinct offences. The defendant is convicted here of both such offences, and only one fine is inflicted. For which offence is the fine inflicted? If for both, should it not at least have been distributed? And I say this without meaning or implying that it could legally be distributed, for I desire to express, and do express, no opinion on this subject: *Regina* v. *Bennett*, 1 O. R. 445.

If the defendant were prosecuted again on either of these charges separately, could he plead this conviction in answer? Would it not be replied that the conviction was ambiguous, uncertain, and not available for his purpose?

The conviction must be quashed, but according to *Regina* v. *Johnston*, 38 U. C. R. 549, at p. 556, without costs.

Conviction quashed, without costs.

[CHANCERY DIVISION.]

CHARTERIS V. CHARTERIS ET AL.

Will—Construction—Trust—Discretion—Failure of trust by death of trustee—Reference to Master to work out a scheme.

A testator having disposed of one-third of the residue of his estate, real and personal, devised and bequeathed the remainder to J. C., to hold to him, his heirs, executors, administrators, or assigns for ever in trust for the benefit of the testator's two sisters, and with all reasonable expedition to convert the same into money, and apply the same, or the proceeds thereof for the benefit of the said two sisters as he should consider just. And he directed that his other trustees should not enquire into or interfere with such distribution as J. C. might choose to make among the said two sisters, except when their concurrence should be necessary for conformity.

J. C. predeceased the testator.

Held, that the above was in substance an imperative declaration of a trust of the whole remainder for the equal benefit of the two sisters with a discretionary power reposed in the trustee as to its mode of execution; and the Court would undertake to discharge vicariously what could not otherwise be done, owing to J. C. predeceasing the testator, by referring it to the Master to ascertain the proper mode of carrying out the directions of the will.

Re Charteris, 25 Gr. 376, commented on.

Order made referring it to the Master to work out a scheme for the application and distribution of the fund.

THIS was an action for the construction of the will of Alexander Charteris, deceased, and for the administration of his estate, and the final winding up of the same.

The plaintiff in the action was one of the two sisters of the testator, and the defendants were the beneficiaries and trustees under the will, the curator appointed in Scotland of the testator's other sister, who was of unsound mind, the next of kin, and the infant children of a deceased brother of the testator.

In his will after devising a certain house and lands to his wife Helen, and also bequeathing to her certain personal property, the testator proceeded as follows:

Fourthly. In addition to the real and personal estate hereinbefore devised to my wife Helen, I further will, devise, and bequeath to her a portion equal to one-third of the residue of my real and personal estate wherein I may be interested in Canada at the time of my decease, to be apportioned by my executors, or the person or persons acting hereafter under this my last will and testament, to have and to hold such one-third of such residue to my said wife Helen, her heirs, executors, administrators and assigns forever.

Fifthly. As to the remainder of my real and personal estate in Canada aforesaid, not hereinbefore devised, and being a portion equal to two-thirds of the residue in Canada above mentioned, together with all other real and personal estate out of Canada aforesaid, wherein I may be interested at the time of my decease, and whether in possession or expectancy, and wheresoever the same out of said Province of Canada may be situate, I will, devise, and bequeath the same to my brother, the Reverend James Charteris, minister of the Parish of Newlands, in Peebleshire, in Scotland, to have and to hold the same to him, his heirs, executors, administrators, or assigns, forever, in trust, nevertheless, for the benefit of my sisters in Scotland, and with all reasonable expedition after my decease, and with a view of realising the largest possible sum therefrom to convert the same or any part or parts thereof into money, as may be deemed advisable, and apply the same or the proceeds thereof for the benefit of my said sisters, or otherwise distribute the same equally among my said sisters, as he, my said brother, as my said trustee may consider just. And it is my further will and desire that I, having full faith in my said brother James, my other executors and executrix hereinafter named shall not, nor shall any of them enquire or interfere or be held or considered to have or possess the right to enquire or interfere into or in such distribution as he may choose to make among my said sisters, except whenever the concurrence of my said executors and executrix or the person or persons acting under this my last will and testament other than my said brother James shall or may be deemed advisable to confirm such distribution among my said sisters, which confirmation, whenever the same may become necessary, at the request of my said brother James, his executors, administrators, and assigns, I hereby authorize and require my said executors and executrix and other person or persons acting under this my last will and testament to make and grant.

The testator nominated the said Rev. James Charteris and two others as executors and his wife Helen executrix, of whom the said Rev. James Charteris predeceased him.

On January 22nd, 1872, the testator died. The widow Helen and the two surviving executors took out probate of the will.

On April 12th, 1876, on the application of the testator's said two sisters in Scotland, Edward Robinson and William Smith Ireland were appointed as new trustees of the will by the then Court of Chancery for Ontario, in the place of the Rev. James Charteris, and the lands devised by the said will to the Rev. James Charteris were thereby vested in Edward Robinson and William Smith Ireland, their heirs assigns, upon the trusts declared respecting the same in the said will of Alexander Charteris, or such of them as

were then subsisting and capable of taking effect, for all the estate, right, title, and interest which the said Alexander Charteris, the testator in the said petition mentioned, had therein and thereto at the time of his death.

The statement of claim set out that in the year 1876 there was allotted and conveyed to Helen Charteris a one third share of the residue of the estate in Canada: that Robinson and Ireland held the remaining two-thirds of such residue for the use and benefit of the persons entitled under the will: that at the time of his death the testator owned land nowhere else than in Canada: that the said two sisters of the testator, one being the plaintiff, and the other, one of the defendants to this action, claimed to be entitled to such remaining two-thirds of corpus and income in equal portions: that the portion of the estate so remaining in the hands of Robinson and Ireland comprised real and personal property of great value, part of such personal estate being corpus and part income derived from such corpus, and that they had sold the greater portion of such real and personal property, and invested the moneys received by such sales on mortgage and other security, and had received large sums as interest and income from the corpus of the property thus left in their hands; but that though the plaintiff had repeatedly applied to them for payment to her of one half of the corpus and of the income remaining in their hands, they had paid over no portion of the corpus and only a small part of the income, but had lately paid into Court about $17,000 on account of such income: that they said they were uncertain whether, under the terms of the will, the plaintiff and her sister were entitled to any portion of the corpus, and declined to pay any portion thereof without the order of the Court, and the plaintiff contended that she and her sister were entitled to a one-half share of the said corpus and income respectively.

In their joint statement of defence, Robinson and Ireland stated that they were uncertain as to the interest and rights and powers which they took and had under the will and

the order of April 12th, 1876; and as to the interest (if any) in the corpus of the said estate to which the plaintiff was entitled, and submitted to the directions of the Court.

The action came on for trial at Chatham on November 13th, 1885, before Boyd, C., when it was adjourned to Toronto, for the purpose of argument on the construction of the will.

The matter came up for argument on December 14th, 1885, at Toronto.

S. H. Blake, Q.C., for the plaintiff. The defendants allege that there is an intestacy as to the corpus of the fund, and and also as to the income because of the death of the trustee before the testator, but we say that no such discretion is vested in the trustee as to cause the bequest to fail by his death.

C. R. Atkinson, Q. C., for the curator of the testator's other sister, referred to *Yarrow* v. *Knightly*, 8 Ch. D. 736; *Re Charteris*, 25 Gr. 376; *Re Elias*, 3 Mac. & G. 234.

J. Maclennan, Q.C., for the infant defendants. We contend that there was a total intestacy as to the two-thirds of the residue, or at all events as to the corpus. The property is given by the will to James on a discretionary trust, and it is essential that he should survive the testator. The trustee not having, in his discretion, given the corpus to the sisters, the law will dispose of it to the heirs of the testator: *Lyon* v. *Radenhurst*, 5 Gr. 544; *Tripp* v. *Martin*, 9 Gr. 20; *Ridout* v. *Howland*, 10 Gr. 547; *Down* v. *Worrell*, 1 M. & K. 561; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Ackroyd* v. *Smithson*, 1 W. & T. L. C. 949.

Clement, for the adult defendants other than the trustees, referred to *Lewin* on Trusts, 8th ed., pp. 613, 883; *Re Eddowes*, 1 Dr. & S. 395.

Wilson, for the trustees.

Blake, Q.C., in reply. All was intended to go to the trustee, and to be in trust for the sisters. There is not here a mere power in the trustee, but a trust, and there can be no

failure of a trust because of the failure of a trustee: *Lewin* on Trusts, 6th ed., p. 678; *Gower* v. *Mainwaring*, 2 Ves. 52, 87; *Doyley* v. *Attorney General*, 2 Eq. Cas. Abr. 195; *Salusbury* v. *Denton*, 3 K. & J. 529; *Tempest* v. *Lord Camoys*, 21 Ch. D. 571.

December 23rd, 1885. BOYD, C.—By the fifth section of his will the testator disposes of the remainder of his real and personal estate therein defined to his brother to hold to him, his heirs, executors, administrators, and assigns, in trust for the benefit of the two sisters of the testator in Scotland. As I construe this clause of the will it is in substance an imperative declaration of a trust of the whole for the equal benefit of the two sisters, with a discretionary power reposed in the trustee as to its mode of execution. The beneficial interest was vested in the two sisters, but the Court will undertake to discharge vicariously what cannot otherwise be done owing to the trustee predeceasing the testator, by referring it to the Master to ascertain the proper mode of carrying out the directions of the will, as was done in *Travers* v. *Gustin*, 20 Gr. 113.

As my reading of this will is at variance with the inclination of my learned predecessor's opinion as expressed in *Re Charteris*, 25 Gr. 376, I will state why I come to this conclusion. The will is to be read so as to carry out the testator's manifest intention of giving the largest measure of benefit to his sisters, and to avoid any quasi-intestacy which would arise, if part of this fund was to devolve upon the heirs-at-law or next of kin of the testator: *Re Harrison*, 30 Ch. D. 390. And it is to be read so as to give as far as possible the same construction to the same words which are found in it. Now it appears that the residue of his real and personal estate is devised in trust for the benefit of his sisters. That imports *primâ facie* a trust of the whole residue. He proceeds: I will, devise, and bequeath *the same* to my brother, to hold *the same* in trust, with all expedition to convert *the same* (or any part or parts thereof) into money, and apply *the same* (or the proceeds

thereof) for the benefit of my sisters or otherwise distribute *the same* equally among my sisters as my trustee may consider just. It then provides that the other executors are to facilitate him in such distribution as he may choose to to make among his sisters. Now I think the words "the same" are used throughout with their first meaning of "the residue of my property." The term "proceeds" does not here apply to income, but is correctly used as denoting the money which arises from the conversion of land or other property. I would, therefore, thus interpret the clause in question: "I bequeath the residue to my brother, to hold the residue in trust to convert the residue or any part or parts of the residue into money, and to apply the residue or the proceeds (*i. e.*. the money derived from the sale) of the residue for the benefit of my sisters, or to otherwise distribute the residue equally among my sisters as he may think fit." The equal distribution in this last clause is evidently of the whole, and it is the alternative of and equiponderant with the other disposition suggested, which is applying the whole or its proceeds for the benefit of the sisters. Both modes of disposition are embraced, I think, in the testator's injunction to the other executors to aid the trustee in such distribution as he may choose to make among (*i. e.*, between) the sisters. This refers not to the proportion each is to receive, but to the shape in which it is to be applied or allotted for her benefit.

I refer to *Rippon* v. *Norton*, 2 Beav. 63, and *Brown* v. *Higgs*, 4 Ves. 707*a*, in which the trust was much more uncertain than here. That case was affirmed on re-hearing in 5 Ves., and afterwards by Eldon, L. C., in 8 Ves., and is of the highest authority. There is another very strong case, going as I conceive beyond *Brown* v. *Higgs*, in *Cole* v. *Wade*, 16 Ves. 27. This decision was affirmed as to all its substantial findings by the Lord Chancellor in an appeal as to the real estate involved in *Walter* v. *Maunde*, 19 Ves. 423, and the language there used by Lord Eldon is very pertinent to the arguments before me. He says at p. 425: "The opinion of the Master of the Rolls * *

in which opinion I agree, was, that attending to the words of the will, the testator intended a personal discretion to be vested in those persons whom he names as the trustees for distribution, and that discretion could not be transmitted to representatives." He then proceeds to declare his agreement with the Master of the Rolls that the non-existence of that discretion did not amount to an intestacy as to the real or personal estate, but that discretion having failed, that the whole fund went over equally to the beneficiaries, according to the usual course of the Court in the distribution of such property.

The matter will as desired be referred to the Master to work out a scheme for the application and distribution of the fund.

A. H. F. L.

[COMMON PLEAS DIVISION.]

RYAN V. THE CANADA SOUTHERN RAILWAY COMPANY.

Railways — Accident — Contributory negligence — Withdrawing case from jury.

On the disputed facts disclosed in the plaintiff's case it appeared that there was a switch-stand erected in the defendants' yard close to the track, the deceased, who was a brakesman in the defendants' employment, being aware of its position and proximity to the track. On the day in question the deceased was engaged as a brakesman on a train passing through the yard. His position as brakesman should have been on top of the car, but for some reason which did not appear, he was on the side of the car, holding on to the ladder, by which brakesmen mount to the top of the car, and his attention being drawn towards the end of the train he did not see the switch-stand, when he was struck by it and thrown under the wheels of the car and killed.

Held, that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and the case was therefore properly withdrawn from the jury.

THIS action was brought by the plaintiff, as administrator of Philip Ryan, deceased, to recover damages for the death of the said Philip Ryan, alleging that the death of the said Philip Ryan was caused by a switch being constructed and erected in so negligent and careless a manner as not to leave sufficient room for a brakesman to pass between the said switch and cars passing on the track, as required to do in the performance of his duty as brakesman.

The cause was tried before Cameron, C. J., and a jury, at Sandwich, at the Fall Assizes of 1885.

It was proved at the trial that the deceased had been in the employment of the defendants for some months as "brakesman." The "switch stand," (for this was what caused the accident, and not the "switch," as stated), had been erected in the yard prior to the deceased's employment, and had been in the same state from the first, so that the deceased was aware of its position and of its proximity to the track.

On the day when the accident happened the deceased was engaged as brakesman on a train passing through the

yard. His position as brakesman should have been on the top of the car; but for some reason or other, of which there was no evidence, he was on the side of the car holding on to the steps of a ladder, and as his attention was directed towards the end of the train, he was struck by what is called a "target," affixed to the "switch stand," and thrown under the wheels of the car, and was killed.

There was no dispute on the evidence; the only ground on which it was attempted to attach blame to the defendants was that the switch stand and target were too near to the line of railway.

The learned Chief Justice bearing in mind the length of time the switch stand had been erected, the knowledge which the deceased possessed of the position of the stand, and the fact that the deceased was not in his proper place on the car when the accident happened, held, there was no case to go to the jury, and dismissed the action.

In Michaelmas sittings, *Falconbridge*, Q. C., obtained a rule calling on the defendants to show cause why there should not be a new trial, on the ground that there was evidence to go to the jury in support of the plaintiff's claim; and on the ground of surprise; and other grounds set forth in the affidavit of Francis Ryan.

During the same sittings, December 4, 1885, *Falconbridge*, Q. C., supported the order *nisi*. The evidence shows that the switch stand was erected so close to the track that a person could not pass between it and the track. The plaintiff in the course of his employment was on the side of the car, and while in that position struck against the switch stand and was killed. It constituted negligence on the defendants in erecting the stand where they did. There was no contributory negligence on the part of the deceased. There is no evidence to shew that by the failure of the exercise of any want of care on the part of the deceased he contributed to the accident. There was no evidence to shew that the deceased was aware of the dangerous character of the place. There was

clearly evidence of negligence to go to the jury, and therefore the learned Judge should not have withdrawn the case from them. The question of contributory negligence is for the jury. He referred to *Chicago and Iowa R. W. Co.* v. *Russell*, 91 Ill. 298; *Hall* v. *Union Pacific R. W. Co.*, 16 Fed. R. 744; *Wood's* Railway Law, vol. iii., p. 1452 *et seq.*, 1479-84; *Atchison, &c., R. W. Co.* v. *Retford*, 18 Kansas 245; *Clarke* v. *Holmes*, 7 H. & N. 937, 942; *Edgar* v. *Northern R. W. Co.* 4 O. R. 201, 11 A. R. 452; *Bridges* v. *North London R. W. Co.*, L. R. 7 H. L. 213; *Holts'* Canadian Railway Law, 25 *et seq.* Upon the affidavits the plaintiff is entitled to a new trial on the ground of surprise.

Nicol Kingsmill, contra. There was no evidence of negligence on the part of the defendants. The erection of the switch stand at the place at which it was erected, did not constitute any evidence of negligence. There was, however, contributory negligence on the part of the deceased. The deceased was an old employee of the railway company, and was well acquainted with the character of the place. His place was on the top of the car, and not on the side of it. If the evidence of contributory negligence is conflicting then the case must be submitted to the jury; but where it appears on the plaintiff's own case, there is nothing to be submitted, and the learned Judge acted properly in withdrawing the case from them. He referred to *Lord Bailiffs, &c., of Romney Marsh* v. *Corporation of Trinity House*, 39 L. J. N. S. Ex. 163; *Slattery* v. *Dublin, Wicklow, and Wexford R. W. Co.*, 3 App. Cas. 1155; *Edgar* v. *Northern R. W. Co.*, 11 A. R. 452; *Davey* v. *London and South Western R. W. Co.*, 11 Q. B. D. 213, 12 Q. B. D. 70; *Wright* v. *Midland R. W. Co.*, 51 L. T. N. S. 539; *Lax* v. *Corporation of Darlington*, 5 Ex. D. 29, 33; *McQuilkin* v. *Central Pacific R. W. Co.*, 16 Am. & Eng. R. W. Cas. 353; *Dun* v. *Seabord, &c., R. W. Co.*, 16 Am. & Eng. R. W. Cas. 363; *Koontz* v. *Chicago, &c., R. W. Co.*, 18 Am. & Eng. R. W. Cas, 84; *Riley* v. *Con-*

necticut River R. W. Co., 135 Mass. 292; *Pittsburgh and Connellsville R. W. Co.* v. *Sentmeyer*, 92 Penn. 276; *Dynen* v. *Leach*, 26 L. J. N. S. Ex. 221; *Atchison, &c., R. W. Co.* v. *Flinn*, 1 Am. & Eng. R. W. Cas. 241, 243; *Randall* v. *Baltimore and Ohio R. W. Co.*, 109 U. S. Sup. Ct. 478; *Griffiths* v. *London and St. Katharine Docks Co.*, 13 Q. B. D. 259. The affidavits filed on behalf of the plaintiff do not in any way assist him; and in any event they are fully answered.

January 2, 1886. GALT, J.—I have read the affidavit of Francis Ryan, and of those filed in reply, and there really is nothing in them bearing on the case. As respects the evidence at the trial, it was all to the same effect; there was no conflict of testimony on which it was necessary to take the opinion of the jury; and on that evidence the learned Chief Justice was of opinion the plaintiff had failed.

This brings up again the much litigated question as to the duty of a Judge under such circumstances: whether he is bound to submit the case to the jury simply because the plaintiff alleges negligence as the cause of action; or whether he ought not to take the case into his own hands when he is satisfied there is no case which should in fairness to the defendants be submitted to the jury.

In *Skipp* v. *Eastern Counties R. W. Co.*, 9 Ex. 223, which was an action brought to recover damages for an injury sustained by a servant of the defendants, the alleged negligence being that they did not employ a sufficient number of workmen, the learned Judge at the trial had nonsuited the plaintiff, the Court discharged the rule, and Martin, B., in agreeing with the rest of the Court, said:

"I think that if the case had gone to the jury they must have found a verdict for the defendants. But as I entertained a very strong opinion upon the matter, I thought it clearly to be my duty not to leave the case to them upon the chance of their finding a verdict for the plaintiff from motives of commiseration. The plaintiff brought the acci-

dent upon himself, for if he found he could not do the work which was set him, he ought to have declined it in the first instance. He, however, carried it on for several months, and never made the least complaint upon the matter."

The last case which I have seen on this subject was one referred to by Mr. Kingsmill, viz., *Wright* v. *Midland R. W. Co.*, 51 L. T. N. S. 539, which, I regret to say, is not, as far as I can find, reported elsewhere. It is a most elaborate review on this branch of the law.

Field, J., after viewing all the authorities respecting the duty of a Judge in actions against railway companies for accidents, sums up as follows, at p. 543:

"Now, when may I take the case into my own hands? I say I may take it into my own hands when no reasonable jury acting fairly and impartially between the plaintiff and the defendant, ought to draw, or would draw, any but one conclusion, and that conclusion is conclusive against the plaintiff; then I must take the case into my own hands That is what I think to be the principle laid down in, and to be deduced from the various cases, and that principle is also laid down strongly in the passage I read from Lord Cairns' judgment in *Slattery's Case*, 3 App. Cas. 1155, and even more strongly still by Lord Blackburn and Lord Hatherly and those Judges who dissented from the verdict in that case. It is in harmony with all the authorities, and in conflict with none; and I think, therefore, it is the proper view. It is, of course, strongly marked now by the decision of the Court of Appeal in the case of *Davey* v. *London and South-Western R. W. Co.*, 11 Q. B. D. 213, 12 Q. B. D. 70. * * I find the principle laid down there and I think I must act on it. That principle I understand to be that if upon the facts of the case, the facts appearing on the plaintiff's case, and on the plaintiff's cross-examination of the defendant's witnesses, or, as admitted, if the Judge can see that the accident was clearly due, not to the negligence of the company but to the deceased's own rashness and want of care, then it is his duty to take the matter into his own hands and nonsuit."

It appears to me there is a misprint in the above judgment, and that what the learned Judge said was, "the facts appearing on the defendant's cross-examination of the plaintiff's witnesses." Because if there is any conflict of evidence it is manifest from the reasoning in that case, and in the numerous authorities therein referred to that it must be submitted to the jury.

In the head note (referring to what took place at the trial) it is stated "the learned Judge holding that there was evidence of negligence on the part of the defendants in not having a porter at the crossing to warn passengers, and in not giving notice of the approach of the train, left the whole question to the jury, who found a verdict for the plaintiff for £100. *Held*, that the Judge ought to have withdrawn the case from the jury and directed a nonsuit, on the ground that the case, at the end of the plaintiff's evidence, disclosed such a want of care on the part of the deceased, and showed that he had so far conduced, by his negligence, to his own death as to disentitle the plaintiff to recover."

It is plain from the above that the learned reporter in reporting the case did not think that any thing in the judgment turned on the examination of witnesses for the defence.

CAMERON, C. J.—I concur in the opinion of my learned brother Galt, and think the motion in this case should be dismissed.

My reasons are briefly these: The switch stand was in its character a permanent structure; it was part of the works of the railway when the plaintiff entered into the defendants' employment, and he took the risk of that employment. The stand was not dangerous *per se*. It was a passive force in causing the injury to the deceased, an injury that could not have happened if the deceased had not placed himself in the position to be injured thereby.

It was not made to appear at that time or place it was his duty to be on the side of the car. And I do not see

that because there was a ladder against the side of the car by which the brakesmen mount to the top of the car to enable them to work the brakes, the deceased would have any more claim for injury sustained while mounting the car, than he would if he had been standing on the ground between the stand and the moving train, inadvertently overlooking the danger of his position. It was the deceased's own want of care that placed him in the position of danger.

The risk a person assumes in entering a dangerous employment in which there is an apparent source of danger, is put by Erle, J., in *Symons* v. *Sladdox*, 16 Q. B. 332, thus:

"A person must make his own choice whether he will accept employment on premises in this condition, and if he do accept such employment he must also make his own choice whether he will pass along the floor in the dark or carry a light."

In that case the defendant was possessed of a theatre and of a stage therein, in which dramatic entertainments were given, and there was a hole cut in a floor underneath the stage, along which floor the performers passed from the dressing room to the stage. The plaintiff was hired by the defendant to sing. The hole in the floor was neither fenced nor lighted, and the plaintiff in passing along the floor fell into the hole and was injured.

In *Bolch* v. *Smith*, 7 H. & N. 736, a case of injury resulting from insecurely fenced machinery, Channell, B., said, at p. 744: "But it is argued that, supposing the defendant was under no obligation to fence the shaft, yet inasmuch as he had done so, and had put up an insufficient fence he was liable. There might have been some force in that argument if the insufficiency of the fencing was unseen, but on the contrary it was apparent. If the defect had not been visible the case would be within the observations of Willes, J., in *Corby* v. *Hill*, 4 C. B. N. S. 556."

To the same effect is the recent case of *Griffiths* v. *London and St. Katharine Docks Co.*, in appeal, 13 Q. B. D. 259.

To have left this case to the jury, I think it would have to be assumed that the company in erecting the switch stand must have been aware that in the performance of their duties the servants of the company would require to be in the position in which the deceased was when killed at the place where the stand was erected, and so make it negligence in the company to have constructed it in that place. There was nothing whatever to establish such knowledge, and I do not think it the duty of the Court to allow a case to go to the jury to draw an inference of negligence or breach of duty where there is nothing reasonable shewn from which a neglect or breach of duty could fairly be inferred, "upon the chance," as Baron Martin put it in *Skipp* v. *Eastern Counties R. W. Co.*, 9 Ex 226, "of their finding a verdict for the plaintiff from motives of commiseration."

The American decisions referred to on the argument I do not think are so uniform in result as to make them of great weight in the present case. The observations of Hattell, J., in *Hall* v *Union Pacific R. W. Co.*, 16 Federal R. 744, shew the diversity of opinion existing in the United States on the subject. He said: "The negligence alleged against the company is in allowing the pole" (telegraph) "to remain in that position so near to the road. Upon the question there are conflicting authorities, as is usual in a case of this kind. In some cases precisely the same—one at least, as to the nature of the obstruction, except that the pole was a little further away from the track than this one—the company was held liable for allowing the obstructions to remain there."

In other cases in point it is held that such an obstruction being a visible and obvious danger the servant must take care of himself.

ROSE, J.—I concur in the result arrived at.

I am anxious to avoid anything like an attempt to formulate a rule to guide or govern Judges in determining motions for nonsuit. So far as I am aware every attempt

of the kind has provoked much criticism. It seems to me far better to determine each case as it arises until some settled opinion obtains. It appears difficult, if not impossible, to frame a rule that will apply to many cases. Most rules shew the impress of the particular facts of the case in which they appear.

It does not seem difficult to understand that where there is no evidence, or only a mere *scintilla* of evidence, the case should not be left to the jury, but where it is attempted to extend the formula, as in *Wright* v. *Midland R. W. Co.*, 51 L. T. N. S., 539, referred to by my brother Galt, the difficulties at once appear.

In that case the facts were admitted, and the inferences disputed. Field, J., discusses where a Judge may and may not withdraw a case from a jury. He says: "If there is a conflict of fact there is clearly a question for the jury, and the Judge has to leave it to them immediately; but if the conflict is only as to the inferences to be drawn from the facts, he should do so if the inferences sought to be put upon the facts 'are such as an intelligent man, nay a stupid man, on the jury might draw.'" He adds: "I cannot put myself in the place of a better man and say: 'I am a better man than you are.'" He then comes to consider where a Judge should not leave such inferences to the jury; and says, as is quoted by my brother Galt: "I say I may take it into my own hands when no reasonable jury, acting fairly and impartially between the plaintiff and the defendant, ought to draw, or would draw, any but one conclusion, and that conclusion is conclusive against the plaintiff; then I must take the case into my own hands."

Now a stupid man is one who is "very dull," "wanting in understanding." It seems difficult to say what *reasonable inference* a man wanting in understanding or very dull would draw. Then what constitutes a reasonable jury? One man's reasoning powers are not the same as another's. The stupid man from dullness may not apprehend the premises, and may therefore be unable to draw

the inference. The rapidity with which evidence is given may utterly prevent some jurors from reasoning upon the facts with any force or clearness. After all, may not the above rule come to this, that if to the reason of the Judge the inference seems one that cannot be reasonably drawn, he should not submit the case to the jury? Then is the reason of the Judge to be substituted for that of the jury? If the inference is a possible one are not the parties entitled to have the jury say whether it is a reasonable one? Speaking for myself, I think it much safer in most cases to leave the jury to draw the inferences if any can be suggested that seem at all possible. It may be that in that words "seem at all possible" the element of reasonableness is found, and that so it comes round that the reason of the Judge is first to be convinced, and then that of the jury.

In *Peart* v. *Grand Trunk R. W. Co.*, 10 A. R. 191, the Chief Justice of Ontario, referring to the case of *Slattery* v. *Dublin, Wicklow, and Wexford R. W. Co.*, 3 App. Cas. 1155, says, at p. 199: "If this case stands unchallenged it will probably revive the controversy which lasted so long, as to the respective functions of Judge and jury;" and adds "we have seen a note of a case, *Wright* v. *Midland R. W. Co.*, L. Times, 12th July, 1884, p. 195, which will increase the materials for discussion."

In the present case it was not made to appear that the deceased in the performance of his duty was required to be where he was when he was struck, or that he did not know of the danger. See *Griffiths* v. *London and St. Katharine Docks Co.*, 12 Q. B. D. 493, and in Appeal 13 Q. B. D. 259.

If a doorway leading into a barn were too narrow to allow a waggon to pass with the driver walking along side, and a servant driving a team drawing the waggon should in a moment of forgetfulness attempt to remain beside the waggon when it was passing through and be injured, would he have a right of action against his employer?

If a bridge on a railway were constructed with raised sides, affording so little space that a train could barely pass through, and a brakesman whose place of duty was on the platform or top, should thoughtlessly place himself between the train and the sides of the bridge and be injured, would an action lie?

If instead of the standard, a wall of a building had been erected so close to the line, that there was no more space than here, would it appear reasonable to hold the employer liable for damages from a similar accident?

The company was not guilty of any wrong in putting the standard in its position. For all that appeared it was in the best interest of the company to have it exactly where it was. It was not a source of danger to any employee in the discharge of his duty while in his usual place, *i. e.*, to the brakesman while attending to the brakes to the switchman while switching; or to any other named employee. Then in what did the breach of duty consist? Unless it clearly appeared that the company required the deceased to be where he was at the time the accident occurred, and negligently exposed him to a danger of which he was not aware, but which was known to them, the company, in my opinion, should not be held liable. No such facts appeared here; and I therefore think the learned Chief Justice was right in withdrawing the case from the consideration of the jury.

In *Peart* v. *Grand Trunk R. W. Co.*, *supra*, I had the opportunity of considering the cases of *Davey* v. *London and South-Western R. W. Co.*, 11 Q. B. D. 213, 12 Q. B. D 70; *Bridges* v. *North London R. W. Co.*, L. R. 7, H. L. 213 and *Wright* v. *Midland R. W. Co.*, 51 L. T. N. S. 539, in consultation with the eminent Judges then presiding, and in view of the differences of opinion existing on the question of what evidence is and what is not sufficient to entitle the parties to have the case submitted to a jury, I am desirous of saying no more than that on the particular facts here appearing I think no case was made for the jury.

Order nisi discharged, with costs.

[COMMON PLEAS DIVISION.]

FRIENDLY v. THE CANADA TRANSIT COMPANY.

Consignor and consignee—Property passing—Right to maintain action—R. S. O. ch. 116, sec. 5—Dangers of navigation.

Three cases of goods, exceeding $40 in value, were verbally ordered by L. at M. from plaintiff at T. through plaintiff's traveller, and were shipped, consigned to L.. and carried by railway and then by defendant's steamer to M. Two of the cases were received by L., one of which was in a damaged condition. The third case remained on board the vessel, as the purser refused to deliver it up until the freight on these cases, as well as on a variety of other goods consigned to L., was paid, which L. refused to do until he had first an opportunity of checking over the goods. Before the dispute was settled the vessel left, and was subsequently wrecked and this case lost. An arrangement was made between plaintiff and L. whereby plaintiff allowed L. 25 per cent. on the value of the two cases received by L. The plaintiff then brought an action against the defendants to recover the 25 per cent. so allowed, and the value of the case lost.

Held, [GALT, J., dissenting], that there was an acceptance and receipt of the goods by L. so as to pass the property therein to him; and therefore the action should, under the Mercantile Amendment Act, R. S. O. ch. 116, sec. 5, sub-sec. 1, have been maintained by him and not by plaintiff.

Per GALT, J. The action was properly brought by plaintiff, as the property in the goods had not passed from him; and he was entitled to recover the 25 per cent. so allowed by him, as also the price of the case lost; for although the loss thereof was occasioned by the dangers of navigation, the defendants were not protected under 37 Vic. ch. 25, (D.), the evidence shewing that the loss was by the fault or neglect of the defendants.

THIS was an action brought to recover damages from the defendants for the loss of certain goods shipped by the plaintiff, and for injury done to other goods in landing from the defendants' steamboat.

The cause was tried before Armour J., without a jury, at Toronto, at the Summer Assizes of 1885.

The facts of the case were, that one Lowry, in the month of November, 1884, gave a verbal order to an agent of the plaintiff for certain goods exceeding in amount the sum of forty dollars. The goods were shipped by a vessel of the defendants in three cases consigned to Lowry at Michipicoten River. The steamer arrived in safety, and proceeded to discharge her cargo. There being no wharf at which

she could land the goods a sort of gangway was constructed, and the cargo was discharged by trucks along it. By accident one of the cases slipped from the gangway and fell into the water; another of the cases was landed in safety, and the third remained on board as the purser refused to deliver it until the freight, not only on these cases but on a variety of other goods conveyed to Lowry, was paid. Lowry refused to do so until he had an opportunity of checking over the list of his goods. The steamer left before this dispute was settled, and was lost a few days afterwards; and the case of goods was lost.

This action was brought to recover damages for the injury done to the case that slipped off the gangway, and for the value of the goods that were lost,

The goods were, as already stated, consigned to Lowry at Michipicoten River, by the plaintiff; they were insured by him; but the loss, if any, was payable not to Lowry, but to the plaintiff.

At the close of the case, the learned Judge reserved judgment; and subsequently dismissed the action, on the ground, that the action should have been brought by the consignee, and not by the consignor, as the property in the goods was by the consignment vested in him.

In Michaelmas sittings, *D. E. Thomson* moved on notice to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

During the same sittings, November 23, 1885, *D. E. Thomson* supported the motion, and referred to *Sewell* v. *Burdick*, 10 App. Cas. 74; *Coates* v. *Chaplin*, 2 Gale & Dav. 552; *Coombs* v. *Bristol and Exeter R. W. Co.*, 3 H. & N. 510; *Dunlop* v. *Lambert*, 6 Cl. & F. 600; *Hutchinson* on Carriers, secs. 340, 357-9, and cases there cited.

Tilt, Q. C., contra, referred to *Benjamin* on Sales, 4th Am. ed., sec. 150, *et seq.*; R. S. O. ch. 116, sec. 5. sub-sec. 1; *Angell* on Carriers, 4th ed., sec. 373; 37 Vic. ch. 25, (D.); *Close* v. *Beatty*, 28 C. P. 470; *Sewell* v. *Burdick*, 10 App. Cas. 74.

The arguments sufficiently appear from the judgments.

December 19, 1885. GALT, J.—There are three questions to be considered. The first and most important is, whether the plaintiff has any cause of action? The second is, whether, if entitled to sue, he can recover damages for the injury done to the goods that were injured; and third, whether the defendants are responsible for the case that was totally lost?

As to the first question: the purchase made by Lowry was one that was not binding on him under the Statute of Frauds; and consequently at the time when the vessel arrived at Michipicoten River the property in the goods had not vested in him.

I cannot distinguish this case from *Coombs* v. *Bristol and Exeter R. W. Co.*, 3 H. & N. 510, in which it was expressly held that, under similar circumstances, the consignee had no property in the goods, and therefore could not maintain an action for their loss. The only difference between that case and the present is, that the subject matter there was totally lost, whereas here two cases of the goods were delivered to Lowry, but they were not accepted by him in part fulfilment of the verbal contract.

According to his evidence he received the two cases, but in consequence of the damage done to one of them he could not dispose of the goods therein contained; and as respects the other, the articles therein formed part of the same set of clothing as those in the first, and therefore he put them both aside until he saw the agent of the plaintiff to whom he had given the verbal order originally, when an arrangement was come to between them by which a deduction of 25 per cent. was made from the price of the goods in both cases. As respects this, I refer rather to the evidence of the agent than to that of Lowry as he can have no interest in the matter.

In his evidence, he states that he went to Michipicoten after the navigation closed, which must have been after the first of December. "Q. Up to the time you were there

Mr. Lowry had not made use of these goods? A. No, they were all there just as I checked them and marked down on this paper. Q. What took place between you and Lowry with reference to these goods? A. He said he would keep these goods and pay for them, if we allowed him twenty-five per cent. from the full amount of the invoices. Q. Was that twenty-five per cent. to refer to the damaged only? A. No; to all the goods that he had received."

On this arrangement the agent and Lowry settled, and the amount was paid.

It appears to me that until this was done there had been no acceptance of any of the goods by Lowry, and that no property in the goods had vested in him; consequently he was not in a position to maintain an action for the damage done to them. If there had been an agreement binding on Lowry then, in my opinion, he would have been the proper party to bring the action, because the property had passed to him; and by the Mercantile Amendment Act, R. S. O. ch. 116, sec. 5, sub-sec. 1, "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such *consignment* or *endorsement*, shall have transferred to, and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made to himself." I have already stated that, in my opinion, the property in these goods had not vested in the consignee; and consequently the right of suit remained in the consignor.

Pollock, C.B., in his judgment in *Coombs* v. *Bristol and Exeter R. W. Co.*, at p. 515, says: "This is an action by the consignee against a carrier to recover the value of goods lost in the course of conveyance. The question is, whether the property passed to the vendee? If it passed, the plaintiff, the vendee, is the proper person to sue; if not, the vendor should have sued."

In my opinion this action was properly brought by the plaintiff.

The next question is, is the plaintiff entitled to recover the 25 per cent. damages? In my opinion he is. The goods were in the possession of the defendants as common carriers, and so long as such possession continues they are liable for the goods, in fact they are insurers; it is their duty to carry the goods to the place of their destination and to land them, and either deliver them to the consignee or notify him of their arrival. So long as they remain in the possession and under the control of the carrier he is responsible. To hold otherwise would tend to encourage gross carelessness on the part of the carrier. See *Hyde* v. *Trent Navigation Co.*, 5 T. R. 389.

The third point, viz., whether the defendants are responsible for the lost case, remains to be considered?

Mr. Tilt contended that, as this loss was occasioned by the dangers of the navigation, the defendants were protected under the provisions of 37 Vic. ch. 25, (D.) "An Act respecting carriers by water," which enacts, sec. 1; "that they shall not be liable to any extent whatever to make good any loss or damage happening without their actual fault or privity, or the fault or neglect of their agents, servants, * * to any goods on board any such vessel * * by reason of fire or the dangers of navigation."

There is no doubt the goods were lost by the dangers of the navigation. The question is, did the loss happen through the fault or neglect of the servants of defendants? After a number of articles belonging to Lowry had been landed, a conversation between the purser and Lowry took place. The former in his evidence stated as follows: "Why did you detain this case? To secure payment of the freight upon the whole cargo." (I presume he meant Lowry's cargo.) In reply to the learned Judge he said: "It," (the case) "was at the gangway, and could have been got off at any moment. I told Lowry I wished he would take it away, and give me the money. He said he would not do it until he looked over his cargo. I said I would give him an opportunity of doing it when we came back from Michipicoten. It was in consequence of his refusing to pay the freight that we kept it."

Lowry, in his evidence, states in answer to the question, "Was there anything left on board besides this case that he kept"? "There was a lot of stuff down in the hold; and I told Ridout" (the purser), "when he asked me to pay the freight, I told him I would not pay till it was there. He said he did not know my circumstances as to whether I was able to pay the freight or not; I told him if he would put the goods on the deck where I could check them off, I would pay him there and then. This Ridout refused; the vessel left, and the case was lost."

I am of the opinion that under the circumstances the purser was in fault; and consequently as the goods were subsequently lost it was by the "fault" of the servant of the defendants the loss occurred, and they are not protected by the provisions of the statute.

I think the motion should be absolute to enter judgment for the plaintiff for the sum of $118.40 damages to goods, and $198 loss of case, in all $306 less freight $7.44, making in all $298.56, with costs.

CAMERON, C.J.—The point involved in this motion was, is the action properly brought in the name of the plaintiff as seller and consignor of three cases of goods shipped by him on the defendants' steamer City of Owen Sound, consigned to one R. Lowry, the purchaser, at Michipicoten River, one of which cases fell into the water at Michipicoten in course of delivery from the steamer, and another was carried away by the steamer under a claim of lien by the defendants for freight on these and other goods carried by them to Michipicoten, consigned to the said Lowry, freight payable by him, and after being so carried away was lost by the wrecking of the steamer?

There would be no doubt that the action would be properly brought if the property in the goods had not passed to the consignee. The goods exceeded forty dollars in value, and were ordered by Lowry from the plaintiff by verbal order given to a traveller for the plaintiff, and were shipped in accordance with the order consigned to Lowry, and were

carried by the Northern Railway to Collingwood, and thence by the defendants to Michipicoten. After the goods reached Michipicoten two of the cases were received into the possession of Lowry, on the 12th November, 1884, one in a damaged condition; and on the 1st of December, 1884, he notified the defendants' agents Smith & Keighley by letter, that he had a claim against the defendants for loss and damage of goods on the City of Owen Sound. In the letter he stated the goods could have been delivered in good order at Michipicoten before the vessel started for Michipicoten Island, only for the "contrariousness," as he expressed it, of the purser. Then followed particulars of the claim: one case underclothing, invoice price $222.00, loss $166.50; case of pants, overalls, and shirts, invoice price $287.50, being thrown off the boat into the water damages 25 per cent., $72.37. Lowry did not dispute that the goods were for him; but he refused to pay freight on any of the goods till he had an opportunity of checking them over to see if all were there the purser claimed freight on. He afterwards, having received the goods of two cases into his possession, had a settlement with the plaintiff, who allowed him twenty-five per cent. off the invoice prices of the goods; and the plaintiff brought this action to recover the loss of twenty-five per cent., and the value of the case of goods totally lost.

The case was tried before Armour, J., without a jury, who found as a fact, that it was the intention of both buyer and seller that the property should pass to the latter; and that being so, he was of opinion all rights of suit in respect of the carriage of the goods were transferred to the consignee Lowry; and he directed judgment to be entered for the defendants dismissing the plaintiff's action with costs.

If nothing but the verbal bargain for the sale of the goods, and their delivery to the carriers consigned to Lowry, had appeared, the case of *Coombs* v. *Bristol and Exeter R. W. Co.*, 3 H. & N. 510, would be a clear authority in favor of the plaintiff's right to maintain the action; but the the actual receipt of the goods by Lowry and his subsequent

claim against the defendants for the loss and injury thereto, amounted to evidence from which a jury would have been justified in finding that the property in the goods passed to Lowry; and if they so found, the action could not under the Mercantile Amendment Act or otherwise be brought by the consignor under the shipping bill in question. What took place when the goods arrived at Michipicoten put the goods in the same position as they would have been in, in respect of the ownership thereof, if they had been ordered in writing so as to satisfy the requirement of the Statute of Frauds.

The goods were only received in respect of the previous oral contract, and their receipt was in effect the same as a memorandum in writing, and vested the property in the goods in the consignee from the delivery of them by the consignor to the carrier.

The plaintiff might have sued Lowry as for goods sold and delivered.

In *Kibble* v. *Gough*, 38 L. T. N. S. 204, (*a*) it was held that a sale of barley, by sample, by oral bargain, vested the barley in the purchaser where a person who received a portion of the barley when delivered signed a receipt therefor, in which he stated the barley was not according to sample, and the purchaser subsequently refused to accept the barley, on the ground it was not in accordance with the sample and a compliance with the contract.

Brett, L.J., in his judgment said, at p. 206: "The defence here seems to me the same as if the malster" purchaser "had been there at the time, and had said, 'I will reserve my right of inspection until to-morrow.' The question for us here is, Is such an acceptance sufficient to make a contract within the Statute of Frauds? There must be an acceptance and an actual receipt; no absolute acceptance, but an acceptance which could not have been made except on an admission of the contract and the goods sent under it. I am of opinion that there was a sufficient acceptance under the Statute of Frauds, although there is a power of rejection."

(*a*) See *Page* v. *Morgan*, 15 Q. B. D. 228.

Here it was not disputed by Lowry that the goods were goods such as he had ordered; and his receipt of them could only have reference to the parol agreement. Therefore there was an acceptance within the Statute of Frauds that vested the property in him, and with the property the right of action also went to him.

To the like effect is *Currie* v. *Anderson*, 2 E. & E. 592, where Crompton, J., at p. 600, said: "Before the case of *Morton* v. *Tibbett*, 15 Q. B. 428, a general notion prevailed that there could be no acceptance and receipt of goods such as to satisfy the Statute of Frauds, until the vendee had put himself in such a position as to be able to object to the quantity or quality of the goods. That notion was overthrown by the decision of *Morton* v. *Tibbett*, which must, in this Court, be considered to be the law of the land; and the discussion to-day has more than ever satisfied me of its correctness."

In *Re Freedom*, L. R. 3 P. C. 594, Sir Joseph Napier in giving the judgment of the Judicial Committee of the Privy Council, at p. 599, in reference to the Imperial Act 18 & 19 Vic. ch. 111, an Act in *pari materiâ* with our Mercantile Amendment Act in relation to bills of lading, said: "Their Lordships are satisfied, that it was intended by the Act that the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified."

If then, as I have already suggested, the contract between the plaintiff and Lowry had been a contract sufficient, within section 17 of the Statute of Frauds, the moment the goods in question had been delivered to the carriers the property vested in Lowry, and he alone could have maintained an action for damage to the goods, and would have been liable for the price though they never reached him. A receipt or dealing with the goods sufficient to take the contract out of the operation of the Statute of Frauds, placed the parties, in respect to the goods, exactly in the same position as they would have been if the contract had originally been binding and operative.

I am not in a position to say that my learned brother, on the evidence, came to an erroneous conclusion upon the facts; and if he is right as to the facts there is, I think, no reasonable doubt about the law. I am quite sure if a jury had found the fact as he has done, the Court would not disturb the finding; and while I concede that the Court must now decide the facts according to its own view of the sufficiency of the evidence to support the judgment my learned brother gave, I am clear, unless I can say it is a conclusion that my own mind would not have reached or could not reasonably have reached, I ought to uphold it. Being satisfied that Lowry did receive the goods under the contract with the plaintiff, and it was not contemplated by him to repudiate that contract when the goods reached him, I am bound to come to the same conclusion that the learned Judge at the trial did.

This motion therefore must be dismissed, with costs.

The question, which may be a very nice one, as to whether the defendants performed their contract by putting the goods over the vessel's side, I have not considered; and do not therefore express any opinion thereupon; nor as to the right of defendants to retain for freight any portion of the goods under the circumstances of this case.

ROSE, J.—The cases of *Coombs* v. *Bristol and Exeter R. W. Co.*, 3 H. & N. 510, and *Sewell* v. *Burdick*, 10 App. Cas. 74, shew that where there is no writing to satisfy the Statute of Frauds, merely consigning the goods and delivering them to the carrier do not give the consignee the right of action for their value, they being lost in transit, there having been no acceptance and receipt.

The case of *Kibble* v. *Gough*, decided in the Court of Appeal 38 L.T.N.S. 204; *Benjamin* on Sales, 4th Am., (from 3rd Eng. ed.,) sec. 155, shews that where the goods have actually reached the hands of the consignee, although he might reject them on the ground of their being not equal to sample, if his acceptance was one which would not have been made except in an admission of the contract, and that

the goods were sent under it, then there would be an acceptance and actual receipt within the statute. In that case, in the defendant's absence, his foreman received the barley, which was delivered in several instalments, examined it and gave a receipt for each instalment with the words, "not equal to sample." The defendant afterwards personally examined the barley, and rejected it, on the ground that it was not properly dressed and not equal to sample. In an action for goods sold and delivered the jury found an acceptance; and it was held there was evidence to sustain the finding.

The learned Judge in this case has found an acceptance on evidence referred to in his judgment; and I am of the opinion that the evidence sustains his finding.

The property having passed to the consignee, it is clear the right to bring the action was in him under The Mercantile Amendment Act, R. S. O. ch. 116, sec. 5, and the judgment of the learned Judge was right.

In my opinion the motion must be dismissed, with costs.

Motion dismissed.

[COMMON PLEAS DIVISION.]

IN RE DENNE AND THE CORPORATION OF THE TOWN OF PETERBOROUGH.

Municipal law—Manufactories—Exemption—Public policy—Municipal Act 1883, sec. 368, 47 Vic. ch. 32, sec. 8 (O.)

The Municipal Act of 1883, sec. 368, as amended by 47 Vic. ch. 32, sec. 8, (O.), authorizes a municipal council to exempt "any manufacturing establishment, in whole or in part, from taxation for any period not longer than ten years."

A by-law of the town of P. recited that a company had acquired several water privileges on the river O., and intended developing same by erecting thereon factories of different descriptions; and it was advisable in the interests of the town that the privileges, immunities and exemptions thereinafter mentioned should be granted. It further recited that the total assessment of the said water privileges and the lands in connection therewith amounted to $50,000. The by-law then enacted that the aggregate assessment of the said properties should be and remain for ten years at the sum of $50,000; and the assessors from time to time were required to assess the same at said sum, notwithstanding the erection of any buildings thereon.

Held, not a by-law within the said section as amended; and also that it was opposed to public policy and morality in directing the assessors from time to time to limit their assessment.

On November 13th, 1885, *Shepley* obtained an order *nisi* to quash by-law No. 495 of the town of Peterborough, on the following grounds:

1. The said by-law was passed by the Municipal Council of the corporation assuming to act under the power conferred by sec. 368 of the Municipal Act of 1883, as amended by sec. 8 of 47 Vic. ch. 32, (O.); and the said by-law is in excess of the power and authority thereby conferred.

2. The said section only enables Municipal Councils to pass by-laws for exempting any manufacturing establishments, &c., in whole or in part from taxation for any period not longer than ten years, while the by-law in question does not profess to so exempt, nor does it in fact so exempt, any manufacturing establishment; but if any exemption is in fact so contemplated by the by-law it is the exemption of certain property not built upon, used or occupied as a manufacturing establishment or manufacturing establishments.

3. The provisions of the by-law amount to a fixing of the figure at which certain property shall for the ensuing ten years be assessed, which is not within the powers conferred by the section.

4. The by-law assumes to impose upon the municipal assessors duties directly in conflict with those imposed upon them by the Assessment Act, which the council has not power to do.

5. The whole scope of the by-law shows that it was passed under the assumption that assessment and taxation are convertible terms, which they are not; and that under the section in question the council had certain powers with regard to the assessment rolls which the Municipal Act nowhere confers upon them.

6. While the by-law assumes to interfere with the the exercise by the assessors of their statutory duties it does not lay down any principle upon which they are to act in distributing the fixed assessment among the owners or persons who may become the occupants of the manufacturing establishments on the said property, but leaves such distribution entirely to the discretion of the said assessors, who are only bound by the said by-law to see that the total aggregate assessment of the said property shall never exceed the sum fixed by the by-law.

7. The by-law provides for a benefit to the property in question by a fixed assessment thereof whether the same shall be built on, used and occupied as a manufacturing establishment or manufacturing establishments or not, so long as the same are not otherwise used or occupied, which is a benefit not authorized by the said section.

On December 15th, 1884, *Moore*, (of Peterborough) and *Shepley*, supported the order.

Robinson, Q. C., and *Edwards*, (of Peterborough) contra.

December 30, 1885. O'CONNOR, J.—I think the by-law must be quashed. I shall advert only to the two principal objections raised by the order *nisi*.

The Municipal Institutions Act of 1883, as amended by the Act, 47 Vic. ch. 32, sec. 8, (O.) gives "Every municipal council * * by a two-thirds vote of the members thereof, * * the power of exempting any manufacturing establishment, * * in whole or in part, from taxation for any period not longer than ten years." &c.

The by-law in question recites that the Dickson Company of Peterborough "have acquired the several water privileges on the river Otonabee,"—of which a general local description is given, "and intend to develope the said water privileges by erecting thereon factories of different descriptions; and it is advisable in the interests of the town that the privileges, immunities, and exemptions hereinafter mentioned, should be granted to the said company."

It further recites that the total assessment of the several water privileges, so acquired by the said company, and the lands in connection therewith, amounted to the sum of $50,000.

The by-law then enacts: 1. "The aggregate assessment of the said several properties of the said company shall be and remain during the period of ten years from the first day of January next, the sum of $50,000; and the assessor or assessors from time to time of the said town, is, and are hereby authorized and required to assess the said several properties at such sums respectively, so that the aggregate of the several amounts thereof shall not exceed $50,000, notwithstanding the erection thereon of any buildings or the placing in any of the buildings erected, or that may hereafter be erected thereon, of any machinery; provided however that the immunities hereby granted shall not apply to any part of the said property which shall be used for any purpose other than that of manufacturing during the time it is being used for such other purpose."

This is certainly not a by-law to exempt "any manufacturing establishment * * in whole or in part from taxation;" and, in my opinion, it is in no proper sense a by-law under section 368 of the Act referred to.

It does not purport to deal with "manufacturing establishments" at all; nor does it directly exempt any property from taxation in whole or in part. It completely confounds assessment with taxation, if exemption from taxation in whole or in part is what was intended, which is by no means clear.

The expressed aim of the by-law is to grant certain immunities and exemptions in respect of the water privileges mentioned in the recital, by directing and requiring the assessor or assessors to assess these privileges at $50,000, so that they may be rated at that sum for ten years, however they may be improved. But no manufacturing establishment is thereon now, nor is the company bound in any way to erect or place any thereon, yet the property is to remain so assessed during the ten years, though it may greatly increase in value.

Besides, how extremely easy it would be to evade the ostensible purpose of the by-law by erecting a small manufacturing establishment on the property, and then use the whole or parts of it for other purposes ostensibly in connection with the manufacturing establishment.

It is unnecessary, however, to stray into considerations of this kind. The by-law is, too palpably, not a by-law under the 368th section, or under any other section of the municipal law of Ontario.

But there is a still more serious objection to this by-law, an objection founded on public policy and morality.

The council, by this by-law, undertake to direct and control the assessor or assessors for a period of ten years, and to require—in fact to compel them—to assess the several properties of which the whole property of the Dickson Company is composed, or of which it may hereafter be composed, "so that the aggregate of the several amounts shall not exceed $50,000, notwithstanding the erection thereon of any buildings, or the placing in any building erected, or that may be hereafter erected thereon, of any machinery."

Now what does this provision imply—necessarily imply?

The assessors are appointed annually; and before they enter on the duties of their office each of them is required by section 273 of the Municipal Institutions Act, to make and subscribe the *solemn* declaration given by that section, that he "will truly, faithfully and impartially, to the best of" his "knowledge and ability, execute the office of" assessor, to which he has been appointed.

The Assessment Act, R. S. O. ch. 180, sec. 23, directs in imperative terms, that "real and personal property shall be estimated at their cash value, as they would be appraised in payment of a just debt from a solvent debtor."

By section 42 the assessor is required to complete his roll at a time there stated; and he is commanded to "attach thereto a certificate signed by him, and verified upon oath or affirmation" in the form given: that he has set down in that assessment roll all the real property liable to taxation situate in the municipality, and "the true actual value thereof in each case, according to the best of" his "information and judgment."

Then any person assessed may complain that his property is assessed too high, as compared with other property; and that other property is assessed too low.

Thereupon he appeals, and the Court of Revision has to decide; and every member of that Court—all members of the Council—in addition to his oath of office, solemnly swears (or affirms in cases where by law affirmation is allowed) that he will to the best of his judgment and ability, and without fear, favour, or partiality, honestly decide the appeal.

The duties of assessors and of the members of the Court of Revision are statutory duties, to be performed pursuant to the instructions given by the statute, and no other instructions. They are presumed and required to act in the discharge of their several duties independently of the Council and of all others; and unless they act in that way they violate their several oaths of office and betray their trust. They are, in fact, officers of justice, clothed with the important and delicate judicial function

of causing equality of taxation, as between the ratepayers of the municipality, according to the true value of property. To this end, and to it alone, they are bound to discharge their several duties conscientiously, and upon their several personal responsibilities.

It need hardly be said, therefore, that such officers are bound, not only not to accept and act upon instructions of the Council, whether given by by-law or otherwise, which are contrary to the directions of the statute law, but to reject and disregard such instructions.

This by-law then purports to do that which, indeed, it cannot do, but which is highly immoral for a public body like a Council even to propose or pretend to do; and although it is bad on its face and invalid, public policy demands that even the semblance of a by-law of the kind should not be permitted to remain unstigmatized amongst the by-laws of the municipality. It must be quashed with costs.

Order absoluta.

[CHANCERY DIVISION.]

DUFRESNE v. DUFRESNE ET AL.

Sale at undervalue—Purchaser for value without notice—Advance by wife to husband without any contract for repayment.

L. F. D. being the owner of certain valuable property, mortgaged it for $700, became of unsound mind and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and the property was sold for $900 to E. R., sister of M. A. D. Two years after E. R. sold the property to M. E. B. for $5,000, and a mortgage for $4,000 unpaid purchase money was taken to M. A. D.

In an action by L. F. D., by L. D., his next friend, to set aside the sale or for an account, it was

Held, on the evidence, that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D., but that as M. E. B. was a purchaser for value without notice, the sale must stand, but an account of the proceeds was ordered against M. A. D.

During the trial M. A. D. obtained leave to amend, and claimed to be allowed a sum of $1,500, which she alleged she had given to her husband, the plaintiff, as a loan, and which was employed in the purchase of the property and building thereon.

Held, that as no contract for repayment was shewn, no security being taken and no attempt having been made to collect the amount, although many years had passed, the transaction could not be treated as a loan, and the wife could not recover or be allowed the amount so claimed.

THIS was an action brought by Louis Flairen Dufresne, by Laura Dufresne his next friend, against Mary Ann Dufresne, Marie E. Benoit, Alphone Benoit, Eliza Ross and La Société de Construction Canadienne d'Ottawa, to set aside the sale of some property of the plaintiff or for an account of the proceeds.

The statement of claim set out that the plaintiff was a person of unsound mind confined in the Beauport Asylum, in the Province of Quebec; that Laura Dufresne, his next friend, was his lawful daughter and only child by his first wife, who was dead; that the defendant, Mary Ann Dufresne, was his second wife; that in the year 1874 the plaintiff was the owner of certain property (setting it out) which he then mortgaged to one Robert Oliver to secure $700; that by assignments for value the defendants, the Société, became the holders of the said mortgage; that in 1878 the said Mary Ann Dufresne disagreeing with her husband, the plaintiff, instituted an action and obtained a

decree for alimony against him; that in the year 1876 the plaintiff became of unsound mind, and afterwards was confined, at the instance of the said Mary Ann Dufresne, in the Beauport Asylum; that the said Mary Ann Dufresne allowed the interest to fall in arrear, although she had sufficient funds to pay it from the proceeds of the plaintiff's personal estate which she had sold, and entered into a scheme with the defendants Ross and the Société by which the Société sold and conveyed, in the year 1880, the said property to the defendant Ross for the sum of $900, although it was worth $7,000; that the said defendant Ross, in the year 1882, sold and conveyed the said property to the defendant Mary E. Benoit for $5,000 and the mortgage for the unpaid purchase money was made to the defendant Mary Ann Dufresne; and asked to have the sale set aside and for an account.

The joint statement of Mary Ann Dufresne and Eliza Ross set up a claim for $697.82 alimony; that when the plaintiff first became of unsound mind and was admitted into the asylum the said Mary Ann Dufresne was then duly appointed his lawful Curator or Guardian, according to the law of the Province of Quebec, and was liable as such to account for his estate only to the proper authority in the Province of Quebec; that she supported her children by the plaintiff, as well as his child by his first marriage; that by her marriage settlement she would be entitled to $2,000 of her husband's estate in the event of her surviving him; that she had paid debts of the plaintiff's; that she had a lien on the property for her alimony, and what she and the defendant Ross did was for the purpose of protecting and securing the benefit of said lien; and denied all fraud.

The defendants, the Benoits and the Société, joined in a statement of defence in which the latter denied entering into any scheme for a pretended sale, and set up a proper sale under the power of sale in the mortgage, and the defendants the Benoits set up a purchase for value, viz: $5,000 and no notice.

The action was tried at Ottawa, at the Fall sittings, on the 26th and 27th of October, 1885, before Ferguson, J.

At the trial the defendant Mary Ann Dufresne, by amendment, claimed to be allowed a sum of $1,500, which she alleged she had given to her husband as a loan.

W. H. Barry and *Sinclair* for the plaintiff. The evidence shows collusion, and a sale at a gross undervalue ; and even if the sale is not set aside, the defendant Mary Ann Dufresne should be ordered to account for the proceeds: *Davey* v. *Durrant*, 1 De G. & J., 535 ; *Marriot* v. *The Anchor Reversionary Co.*, 7 Jur., N. S., 155 ; *Orme* v. *Wright*, 3 Jur. 19 ; *Toms* v. *Wilson*, 11 W. R. 117 ; *Fisher* on Mortgages, 4th ed., 454 ; *Vail* v. *Jacobs*, 62 Mo. 130. The property being situated in Ontario the Court here has exclusive jurisdiction, and Mrs. Dufresne is bound to account for it. The personal property having been brought here, the Court has jurisdiction over it: *Carr* v. *Living*, 28 Beav. 644. If the sale by the Société is bad, but the sale to Mrs. Benoit good, then Mrs. Dufresne should account as a trustee.

Lees, Q. C., for the defendants Dufresne and Ross.—If the acts of Mrs. Ross were not the acts of Mrs. Dufresne, then she is a stranger and the sale must stand good. The evidence does not show that she purchased for Mrs. Dufresne, but only at her request. No fraud has been proved. No trust has been proved. The defendant should be allowed the $1,500 lent her husband.

Olivier, for the defendants the Benoits.—My clients have been charged with fraud, and none has been proved ; and as the sale to Mrs. Benoit stands good both are entitled to their costs.

O'Gara, Q. C., for the Société, took the same line of argument as Mr. Olivier.

Sinclair, in reply.—The order shows there was a scheme, and that the Société put the property up for sale before

any interest was due: *Latch* v. *Furlong*, 12 Gr. 303; *National Bank of Australasia* v. *United, &c., Co.*, 4 App. Cas. 402; *Heath* v. *Crealock*, L. R. 10 Ch. 22; *Richmond* v. *Evans*, 8 Gr. 508. The defendant is not entitled to the $1,500.

December 8, 1885. FERGUSON, J.—[The learned Judge, after stating the facts as found upon the evidence, proceeded, as follows:] This action is brought to set aside the sale and conveyance of the lands by the Société on the grounds of collusion, fraud, gross undervalue, &c., for an account of the rents and profits, an account of the proceeds of the sale of the personal property, &c., &c.

Much evidence was given for the purpose of showing collusion between the officers of the Société, Mrs. Ross and Mrs. Dufresne in regard to the sale that was sought to be impeached. On the argument, however, counsel conceded that Mrs. Benoit was a *bonâ fide* purchaser from Mrs. Ross without any notice of the collusion or fraud, if any, of which the plaintiff complained, and that her (Mrs. Benoit's) purchase must be upheld; and that as a consequence the conveyance from the Société to Mrs. Ross must be upheld. There is, I think, no doubt that Mrs. Ross simply acted in the matter as the agent of Mrs. Dufresne, and that the acts of the one were really the acts of the other throughout.

Plaintiff's counsel then asked for an account of the purchase money on the sale to Mrs. Benoit, of the rents and profits of the lands in the meantime, as upon a trust, and to have it declared that Mrs. Dufresne was and is a trustee of the same for the plaintiff. He also asked an account of the moneys of the superannuation salary or pension of the plaintiff that had been received by Mrs. Dufresne, saying that the plaintiff would be entitled to set these off against arrears of alimony. Nothing was asked against the Société or against Mrs. Ross.

For the defendant Mrs. Dufresene it was contended, amongst other things, that she was liable to account only

to the court in the Province of Quebec by which she had been appointed curatrix, and professional evidence was given for the purpose of showing that such was the effect of the order made by that court. This evidence failed, I think, to show what was proposed; and I have no hesitation in saying that I think this contention failed.

On behalf of this defendant it was further contended that in any case she should be allowed the sum of $1,500 which she says she had of her own at the time of her marriage and which she says she had lent to her husband, the plaintiff for the purpose of acquiring the property in question and erecting the house upon it, and which she says was so employed. The evidence is that the marriage took place in January, 1867. There was a marriage contract and a bond, which were produced and put in evidence. They provide simply that the plaintiff should, in the event of his wife surviving him, leave her by his will the sum of $2,000 for her own proper use and benefit absolutely.

The claim made for this $1,500 is by an amendment of the pleading, and it is claimed as *money lent* by the wife to the husband for the purposes of the purchase of the land and building thereon, and that it was so employed. The only evidence regarding it, so far as I at present recollect or see by my notes, is that of Mrs. Dufresne herself. She says: "I had money of my own when I was married; I lent it to my husband for the purpose of acquiring this property. The sum was $1,500. It was employed in the purchase of the lot and the building of the house." The Statute of Limitations is not pleaded to this claim.

In *Hopkins* v. *Hopkins*, 7 O. R. 224, a wife had sued her husband for money lent, I there referred to the language of Lord Westbury in *Woodward* v. *Woodward*, 9 Jur., N, S., 882, where he said: "I do not go so far as to say, that in the bare case of sum of money, part of the income of the separate estate of the wife, being handed over by her to the husband, the Court would of necessity raise an assumpsit for the repayment; but it is quite clear and well settled that, if money, part of the income of her separate

estate, be handed over by the wife to the husband upon a contract of loan, she may sue her husband in respect of the contract." I then thought, and I still think, that a contract for repayment must be shown. This is, of course, involved in the contract of loan. The difficulty is, that it is so easy when subsequent events happen, to conceive and say that money that at the time was simply handed over, was "lent."

In *Hopkins* v. *Hopkins*, *supra*, I thought there was no evidence of a loan at all. In the present case no contract for the repayment of the money is shown beyond what may be involved in the word "lent" which is used by this defendant. No security appears to have been taken upon the property or otherwise. Many years have passed away, and although there have been unhappy differences between the husband and wife, I am not shown that any attempt has ever been made to collect the money from him. Without desiring at all to impugn the testimony of Mrs. Dufresne on the subject, I cannot avoid being of the opinion that the money was just handed over to her husband without any contract for repayment, and that she now honestly enough looks upon it as a loan, when in the eye of the law it was not, and I am of the opinion that she cannot recover or be allowed this sum of $1,500.

In regard to the alleged sale of the furniture, &c., by Mrs. Dufresne the evidence is somewhat entangled, and it is conflicting, and I am of the opinion that the plaintiff does not make out a case in this respect sufficiently strong to warrant a decision that Mrs. Dufresne should account for the proceeds of the sale of it.

I am of the opinion that if there had not been the subsequent sale of the house and lot to Mrs. Benoit, the sale by the Société could not be permitted to stand. It is not necessary for me to say what would have been the rights of the plaintiff, had he been in a position to place Mrs Benoit in *statu quo* in case of the transaction being set aside. This his counsel said he was quite unable to do, when he made the concession that I have before referred

to. The sale by the Société was at such a gross undervalue that I think it was in violation of their duties towards their mortgagor, although it may well be that the actual intention of the officers of the Société (when all the circumstances of the plaintiff's family, as they no doubt appeared to them, are taken into account) was pure and perhaps laudable.

I am of the opinion that there should be a declaration that the defendant Mrs. Dufresne is liable to account to the plaintiff for the purchase money of the house and lot, and the rents and profits of the same, she being allowed, of course, the portion of it employed in payment of the mortgage to the Société and all other just allowances, and for the monies that she has received being part of the plaintiff's superannuation salary or allowance. From what may be found against her upon the taking of these accounts, she is, I think, entitled to deduct all arrears of her alimony, and all sums that she may have paid for or towards the support and maintenance of the plaintiff.

G. A. B.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME,

BEING DECISIONS IN THE

QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ABATEMENT.

Of action.]—*See* SEDUCTION.

ACCIDENT.

See RAILWAYS, 4, 5.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

AFFIDAVIT.

See CRIMINAL LAW, 3.

ANNUITY.

Interest on as against assignee in insolvency—R. S. O. ch. 50, ss. 266.] —J. S. by his will gave his wife E. S. an annuity of $2,000 a year, and charged it on his estate. After his death E. S. the annuitant, C. E. S. and M. A. S. two daughters, and W. A. S. and G. E. S. two sons, entered into an agreement whereby the annuity was charged on certain real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J.S. to the said sons, subject to the said charge. Subsequently all parties joined in borrowing $16,000 on mortgage of part of the property for the purpose of reconstructing the buildings, the annuity being postponed to the mortgages. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died having made a will by which

Repairs—Covenant to keep houses suitable for tenants.]

she devised all her estate to C. E. S. and M. A. S., who brought an action against B. to have a lien declared on the property for the amount of the arrears of the annuity. On a reference to the Master he found that they had the right to maintain the action, and settled the amount of the annuity due, and allowed interest for the six years preceding action brought. On an appeal from the Master's report, it was

Held, that R. S. O. ch. 50 secs. 266 and 267, under which the interest was allowed, is not applicable to cases where a recovery is sought not against a defendant personally, but against his estate, and following *Booth* v. *Coulton*, 2 Giff. 520, that except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity. In this case, under any circumstances, the award of interest could not be upheld as against the assignee in insolvency.

Held, also that the expense of some flooring, lathing, and plastering, was properly charged against the defendants, as W. A. S. and G. E. S. had covenanted to keep the houses tenantable, and these repairs were made because the tenant threatened to leave.

Held, also, on the evidence in this case that the Master was right in disallowing a large set-off brought in by the defendant over and above the sum of $16,000 allowed for reconstructing the buildings. *Snarr et al.* v. *Badenach*, 131.

AGREEMENT.

See CONTRACT.

ALTERATION.

Plan.] — *See* ASSESSMENT AND TAXES, 1.

AMENDMENT.

See MALICIOUS PROSECUTION, 2.

APPEAL.

To County Court Judge from Court of Revision — Time.]— *See* ASSESSMENT AND TAXES, 1.

ARBITRATION AND AWARD.

Compensation for land taken by railway company — Issue—Pleadings—Fixing day for making award —42 Vic. ch. 9, sec. 9, sub-sec. 21, (D.)]—D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the Court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that therefore the sum of $400 offered by the railway company before proceedings taken had become the amount of the compensation.

The learned Judge found on the evidence that no time had been fixed by the arbitrators for making the award.

Held, that as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff, the sum of $400 offered had not become the compensation to be paid, and a reference back was ordered. *Demorest* v. *Grand Trunk R. W. Co. et al.*, 515.

ASSESSMENT AND TAXES.

1. *Court of Revision—Appeal to County Court Judge—Time—Mandamus — Farm land — Plans — Alteration.*]—Where an assessment roll was returned to the County Clerk's office on 1st May, but the certificate was neither signed nor sworn to till 4th May, and additions were made to the roll between the 1st and 4th May, and notice to the parties assessed (signed) informed them that they must give notice of appeal within fourteen days from the latter date, *Held*, that a notice of appeal given on 18th of May was in time, because the roll was not "delivered to the clerk completed and added up with the certificates and affidavits" before 4th May; and that the County Judge should not therefore have dismissed an appeal to him on the ground that the notice was not served within fourteen days from 1st May, as well as because that was not the ground taken before the Court of Revision.

Held, also, had the Court of Revision proceeded on that ground their decision would have been binding on the County Judge.

A *mandamus* was therefore directed to the County Judge to try the said appeal.

Quære, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he find he cannot dispose of them as such, or for any other reason, replace his land as it was before.

Semble, the county council having extended the time for the return of the roll to the 15th of June, although that date was disregarded by all parties to this application, the applicant had of right the power to appeal within fourteen days from such date. *Re Allan*, 110.

2. *Municipal corporations — Exemption from taxation—"Consolidated Municipal Act*, 1883*"—Municipal Amendment Act*, 1884*" — By-law not submitted to ratepayers —Purchase of exemption—Invalidity of by-law.*]—An exemption from taxation under the "Consolidated Municipal Act, 1883," sec. 368, and "The Municipal Amendment Act, 1884," sec. 8, cannot be granted arbitrarily: there must be a sufficient public benefit to the taxpayers of the locality, actual or anticipated, to sustain a by-law, which exempts any such establishment, company, or works from taxation; and there must be a good and valid consideration to support the exemption or grant which should be in some way connected with the business of the manufacturing establishment.

The municipality of a town agreed with T. to exempt from taxation for a series of years two of T.'s manufacturing establishments already in operation, in consideration of his assuming their place in an arrangement made by them with a railway company, by which they were bound to pay the latter $1,800, and also to find the railway company the right of way free upon the company constructing a switch from the latter's station into the town.

Held, not a case within section 368 of the "Consol. Municipal Act, 1883," as amended by the "Municipal Amendment Act, 1884,"—that there was not a proper public consideration from T. for granting the exemption, and that the arrangement was in effect a purchase by T. and a sale to him of an exemption from taxation; and a by-law passed by the municipality for the purpose, but not submitted to the ratepayers, was therefore quashed with costs. *Re Scott and Corporation of Tilsonburg*, 119.

3. *Tax sale — Assessment — Sale for more than is due—Mistake in carrying forward amount—"Error or miscalculation"—R. S. O. ch.* 180, *sec.* 150.]—On an appeal to the Divisional Court the judgment of PROUDFOOT, J. (reported *ante* 9 O. R. 451) was reversed.

Per BOYD, C.—In *Yokham* v. *Hall*, 15 Gr. 335, the excess of statute labor tax was clearly illegal, and its imposition being unjustifiable vitiated the sale. There was no illegal excess of tax originally imposed upon the land in this case, and the owner must be regarded as being notified by the advertisement of sale of the error in carrying forward the amount, and having taken no steps to have it remedied, pending the period allowed for payment or redemption, he cannot afterwards invoke its aid to annul the tax sale.

Per FERGUSON, J.—The difference of twenty cents and the calculation of interest and commission upon it must fall within the meaning of the words "error or miscalculation" mentioned in sec. 150 of R. S. O. ch. 180, and if so the provision is that the tax deed shall not be invalid.

Yokham v. *Hall*, 15 Gr. 335, considered and distinguished. *Claxton* v. *Shibley*, 295.

4. *Tax deed—Time within which it can be questioned—R. S. O. ch.* 180, *sec.* 156.] — *Held*, following *Hutchinson* v. *Collier*, 27 C. P. 254, that the two years given by sec. 156 of R. S. O. ch. 180, within which a tax deed can be questioned, is to be computed from the giving of the deed, and not from the time of the sale.

The Court, though not satisfied with the decision as arrived at in that case, considered they were bound by it. *Lyttle* v. *Broddy*, 550.

Exemption.]—*See* MUNICIPAL LAW, 5, 7.

ASSIGNMENT.

For creditors.]—*See* BANKRUPTCY AND INSOLVENCY, 1, 3.

Forfeiture of term and rent due.]—*See* LANDLORD AND TENANT, 1.

AWARD.

See ARBITRATION AND AWARD.

BAILEES.

See SALE OF GOODS, 1.

BANKRUPTCY AND INSOLVENCY.

1. *Assignment—Proof of claims — Collateral securities — Giving credit for amounts received on col-*

laterals—"Line of credit"—Position of commercial paper discounted under—Time for fixing the state of accounts.]—F. agreed with the Bank of Montreal for a line of credit to be secured by the discount of certain bills and notes which he had himself discounted, and which he indorsed and delivered to the bank. He also arranged with the Merchants' Bank to discount his own notes to be secured by the deposit of his customers, notes as collateral. F. then failed, being largely indebted to both banks, and made an assignment for the general benefit of his creditors. In proving their claims on his estate before the assignee, the banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action by another creditor, entitled to share under the assignment, against the banks and the assignee. It was

Held, following *Rhodes* v. *Moxhay*, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole without prejudice to his rights against securities he may hold, subject to the qualification that he must not ultimately receive more than 20s. on the £. The state of the accounts, at the time the claim is put in, is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee, as at that date. Any moneys received prior to that from collaterals are to be credited; those received afterwards from such sources need not to be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cts. on the $.

That substantially both banks were in the same position as to the securities in their hands.

That there was a distinct contract for a line of credit to the debtor by the Bank of Montreal, and as long as that line was not exceeded, the bank could prove on the footing of that contract as the original debt, and hold the customer's notes discounted in pursuance of it as securities. *Eastman* v. *Bank of Montreal et al.*, 79.

2. *Fraudulent preference—Intent to defraud necessary on both sides—Evidence of such intent.*]—The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor under R. S. O. c. 118, there must be a concurrence of intent so to do on the part of both debtor and creditor: and the rule of the court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion.

Ivey v. *Knox*, 8 O. R. 648, not followed. *Burns et al.* v. *Mackay et al.*, 167.

3. *Assignment for benefit of creditors—Disputing assignment—Right to recover dividend.*]—In an action by a creditor of an insolvent against the assignee under an assignment for the benefit of creditors to recover the amount of the dividend declared upon his claim, the defendant pleaded as a defence that the plaintiff disputing the validity of said assignment had, as an execution creditor of the insolvent, caused the goods assigned to be seized, and on the trial of an interpleader issue directed had endeavored to impeach the said assignment, and that having

thus repudiated the assignment he could not now claim the benefit of it.

Held, [O'CONNOR, J., dissenting], a good defence, and that the plaintiffs were not entitled to recover.

It was contended for the plaintiffs that the said action not having been tried upon the merits, the court having held that the plaintiffs being assenting parties to the assignment were estopped from afterwards impeaching it, this defence formed no bar to the plaintiff's right to rank as a creditor upon the estate of the insolvent.

Held, that the mere bringing of the action was a sufficient repudiation to disentitle the plaintiffs from recovering.

Per O'CONNOR, J., that by the judgment of the court the plaintiffs were relegated to their position and status under the assignment, and therefore to the benefit of it. *Kloepfer* v. *Gardner*, 415.

See ANNUITY.

BANKS AND BANKING.

See BANKRUPTCY AND INSOLVENCY, 1.—WAREHOUSEMEN.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BILLS OF SALE AND CHATTEL MORTGAGES—FRAUD AND MISREPRESENTATION.

BILLS OF SALE AND CHATTEL MORTGAGES.

Chattel mortgage—Validity of—Fraud.]—C., a retail trader, being indebted to H. & Co., wholesale merchants, gave them a chattel mortgage to secure such indebtedness, and also a further sum of about the same amount, advanced to him by H. & Co. at the time of the giving of the mortgage, which C. represented was sufficient to pay off in full all his other creditors. C.'s indebtedness to H. & Co. was covered by his promissory notes, which at the time of the execution of the mortgage were on discount with H. & Co.'s bankers. During the currency of the mortgage, C. having allowed his property to be seized for rent, H. & Co. took possession under their mortgage. C. being unable to pay his creditors, the plaintiffs, who were creditors, but had not recovered judgment or execution, took action to set aside the chattel mortgage.

Held, affirming the judgment of ARMOUR, J., that under the evidence, set out in the case, there was no fraud.

Held, also, following *Hepburn* v. *Park*, 6 O. R. 472, that the fact of the promissory notes in question being held by H. & Co.'s bankers on discount did not invalidate the mortgage.

Held, also, following *Parkes* v. *St. George*, 10 A. R. 496, that the plaintiffs, not being execution creditors, could not maintain an action to set aside the mortgage, on the ground that the debt was incorrectly stated therein. *Hyman* v. *Cuthbertson*, 443.

BILLS OF LADING.

See SALE OF GOODS, 3.

BONUS.

See RAILWAY AND RAILWAY COMPANIES, 2.

BROKERS.

See STOCKS AND STOCKHOLDERS.

BY-LAW.

Illegality—Matters not appearing on face of by-law.]—*See* MUNICIPAL LAW, 1.

See ASSESSMENT AND TAXES, 2.—MUNICIPAL LAW, 6—RAILWAYS, 2—WAYS.

CANADA TEMPERANCE ACT, 1878.

1. *"The Liquor License Act, 1883," and amendment of 1884—Information before a single magistrate—Conviction—Penalty—Bias or interest in magistrates.*]—An information under the "Scott Act" can be laid before one Justice, although two must try the case.

Section 91 of the "Liquor License Act, 1883," 46 Vic. ch. 30 (D.), amended by 47 Vic. ch. 32, sec. 16 (D.), applies only to localities in which the Canada Temperance Act is not in force.

In this case the information was for selling liquor, and the conviction was for "selling intoxicating liquor and having hotel appliances in the bar-room and premises":

Held, that even if a double offence had been charged in the information the magistrate had power to drop one and proceed on the other; but that in this case a second offence under sec. 118 of the Canada Temperance Act was not embraced in the words used.

Held, also, that the conviction not having been made by a stipendiary magistrate, &c., under sec. 111 Canada Temperance Act, 1878, was appealable or removable by *certiorari*.

Semble, that notwithstanding *Fitzgerald* v. *McKinlay*, 21 C. L. J. 299, the informer may be entitled to half of the fine.

It was alleged that the prosecutions for offences against the Act were taken before the magistrates in this case because it "was notorious they were thorough-going Scott Act men," and that they had said that in no case of conviction would they inflict a less fine than $50. It was also alleged that one of the justices was a member of a local committee for prosecuting offences against the Act, but it appeared he had resigned from the committee before the Act came into force in the county.

Held, that there was no disqualifying interest in the magistrates, nor any real or substantial bias attributable to them, nor any reason why they should not lawfully adjudicate in the case.

The cases relating to disqualification by reason of favour or interest in a judge or magistrate discussed. *Regina* v. *Klemp*, 143.

2. *32 & 33 Vic. ch. 31 (D.)—Summons—Non-personal service—Proceeding ex parte—Quashing conviction—Improper conduct of defendant—Costs.*]—For the offence of selling liquor contrary to the provisions of the "Canada Temperance Act of 1878," a summons was issued under 32 & 33 Vic. ch. 31 (D.), made applicable to prosecutions for such an offence, but which was not personally served on the defendant, being merely left at his place of abode. The defendant did not appear before the magistrate at the time and place mentioned in the summons, whereupon the magistrate proceeded *ex parte* and convicted him.

Held, that the conviction must be quashed; and, as it appeared that the defendant had attempted to tamper with the informant, without costs. *Regina* v. *Ryan*, 254.

3. *Conviction under "Canada Temperance Act, 1878"—Sufficiency of evidence of commission of offence—Statement of previous conviction in information—Proof of prior conviction—Imposition of increased penalties—Costs against prosecutor.*]—The defendant was charged with selling liquor contrary to the provisions of the second part of the "Canada Temperance Act, 1878." The information charged a previous conviction for an offence under the said Act, as follows: "The informant says that the said James Kennedy was previously convicted of an offence against the said Act."

A certificate by the convicting magistrate of a prior conviction was put in at the trial under sec. 122, sub-sec. 2, of the Act, for the purpose of proving such previous conviction.

Held, that proof of the fact, set out in the case, constituted no evidence of any offence, and that the Police Magistrate had therefore no jurisdiction, and the right to *certiorari* was therefore not taken away by sec. 111 of the Act.

Held, also, that the conviction could not stand, inasmuch as it did not appear by the information on which it was founded what the nature of the previous offence was, or where it was committed, or that it was of a similar nature to the fresh offence charged by the information.

Held, also, that section 122, sub-sec. 2, does not dispense with strict proof by production of the original record or otherwise of previous convictions where it is sought to impose the increased penalty under sec. 100, and that the certificate mentioned in the section can only be admitted as proof of the number of such convictions.

Costs of the application to quash a conviction will be adjudged against a private prosecutor where he lays an information without having reasonable ground for believing that the charge will be sustained by proper evidence. *Regina* v. *Kennedy*, 396.

4. *Conviction quashed, with costs.*]—Defendant was steward of a "social club" in Walkerton. The members were elected by ballot, and on paying an entrance fee of $1 and subscription of $25 per month, were entitled to use the club room and buy from the steward spirituous liquors. The members were not responsible for goods ordered or for any general expenses. An information was laid against defendant on 10th September, 1885, for an offence against the second part of the Canada Temperance Act, 1878, and on the 21st September, 1885, he was, about 4 p.m., served with a summons to appear at 8.30 a.m., next day, before two magistrates. On the 22nd day of September informations were, in two other cases, laid against him for similar offences, and he was in each, at 8.15 a.m., served with a summons to appear before the magistrates at 9 a.m., that day. When the magistrates' Court met the first case was partially gone into, and the second and third cases. The defendant stated that he had not understood what the summonses meant, and by advice of counsel he refused to plead. The magistrates entered a plea in each case of not guilty, and went on with both cases. The evidence in both shewed that the offences charged in each case

occurred on dates different from those laid in the informations. The magistrates amended the dates in the informations. The defendant and his counsel were in Court all the time awaiting completion of the evidence in the first, but refused in any way to plead or take part in the second or third cases, or to ask adjournment thereof. The magistrates, after taking all the evidence therein, at request of defendant, adjourned the first case, and in the second and third cases convicted the defendant of the offences charged in the amended informations. It was shewn by affidavits that the magistrates were willing in these cases, had defendant pleaded, to adjourn after taking the evidence of the witnesses present. There were also affidavits shewing that the magistrates had been, before the "Scott Act," interested in promoting prohibition.

Held, that the proceedings were contrary to natural justice, as the summonses were served almost immediately before the sittings of the Court which defendant was called to attend. The convictions were therefore quashed, with costs against the complainant.

Regina v. *Klemp*, 10 O. R. 143, followed as to the charge of interest or bias on the part of the magistrates. *Regina* v. *Eli*, 727.

CASES.

Booth v. *Coulton*, 2 Giff. 520, followed.]—*See* ANNUITY.

Browne v. *Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

Burrows v. *Watts*, 5 DeG. M. & G. 233, distinguished.]—*See* EXECUTORS AND ADMIMINISTRATORS, 1.

Calvert v. *Godfrey*, 5 Beav. 97.]—*See* VENDORS AND PURCHASERS, 1.

Re Charteris, 25 Gr. 376, commented on.]—*See* WILL, 5.

Collins v. *Locke*, 6 App. Cas. 674, distinguished.]—*See* CONTRACT.

Cowell v. *Gatcombe*, 27 Beav. 568, distinguished.]—*See* EXECUTORS AND ADMINISTRATORS, 1.

Daines v. *Hartley*, 3 Ex. 200, followed.]—*See* DEFAMATION, 1.

Eden v. *Wilson*, 4 H. L. C. 257.]—*See* WILL, 4.

Fitzgerald v. *McKinlay*, 21 C. L. J. 299, commented on.]—*See* CANADA TEMPERANCE ACT, 1878, 1.

Gibert v. *Gonard*, 33 W. R. 302, distinguished.]—*See* FRAUD AND MISREPRESENTATION.

Giblett v. *Hobson*, 3 My. & K. 517.]—*See* WILL, 1.

Greenwood v. *Verdon*, 1 K. & J. 74.]—*See* WILL, 4.

Hepburn v. *Park*, 6 O. R. 472, followed.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

Hornby v. *Close*, L. R. 2 Q. B. 153, distinguished.]—*See* CONTRACT.

Hutchinson v. *Collier*, 27 C. P. 254, followed, but *dubitante*.]—*See* ASSESSMENT AND TAXES, 3.

Inglis v. *Beaty*, 2 A. R. 453, commented on.]—*See* EXECUTORS AND ADMINISTRATORS, 2.

Ivey v. *Knox*, 8 O. R. 648.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

Kelly v. *Ottawa Street R. W. Co.*, 3 A. R. 616.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

McCallum v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

McCarter v. *McCarter*, 7 O. R. 743, distinguished.] — *See* EXECUTORS AND ADMINISTRATORS, 1.

Parkes v. *St. George*, 10 A. R. 496, followed.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

Regina v. *Klemp*, 10 O. R. 143, followed.] — *See* CANADA TEMPERANCE ACT, 1878, 4.

Rhodes v. *Moxhay*, 10 W. R. 103, followed.] — *See* BANKRUPTCY AND INSOLVENCY, 1.

Rodbard v. *Cooke*, 25 W. R. 556, distinguished.]—*See* EXECUTORS AND ADMINISTRATORS, 1.

Warin v. *London, &c. Loan and Agency Co.*, 7 O. R. 706, distinguished.]—*See* WATERS AND WATERCOURSES.

Wood v. *Silcock*, 50 L. T. N. S. 251, distinguished.] — *See* SPECIFIC PERFORMANCE.

Yokham v. *Hall*, 10 Gr. 335, considered and distinguished.]—*See* ASSESSMENT AND TAXES, 3.

CENSUS.

See MUNICIPAL LAW, 1.

CERTIORARI.

See CANADA TEMPERANCE ACT, 1878, 1, 3.

CHARITABLE INSTITUTIONS

Statutes of Mortmain.] — *See* WILL, 1.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHATTELS.

Letting for hire.]—*See* NEGLIGENCE.

CLAIMS.

Proof of.]—*See* BANKRUPTCY AND INSOLVENCY, 1.

COLLATERAL SECURITIES.

See BANKRUPTCY AND INSOLVENCY, 1.

COMMISSION.

Allowable to executors.]—*See* EXECUTORS AND ADMINISTRATORS, 2.

See TRUSTS AND TRUSTEES.

COMPANY.

1. *Winding-up proceedings—Contributories—Stockholders by subscrip-*

tion or allotment—R. S. O. c. 150.]—In the winding-up proceedings of the Q. C. R. Co., the Master placed the subscribers to the stock book upon the list of contributories. The contributories appealed upon the ground that although they were subscribers for stock still no stock had been allotted to them by the directors.

Held, that the Master was right, that the contract signed was an unqualified taking of shares and that the Act R. S. O. c. 150, contemplates two modes of acquiring stock, one by subscription and the other by allotment. *Re Queen City Refining Co. of Toronto (Limited)*, 264.

2. *Directors—Issue of debentures to directors at a discount—Locus standi of other creditors—Master's office—Reference.*]—The judgment in an action by the Bank of Toronto against the C. Railway Company, directed a reference as to who, other than the plaintiffs, were the holders of bonds of the defendant company of the same class, and an account of what was due to such bondholders, and it appeared before the Master that the managing director of the company had issued a great number of debentures of the same class as the plaintiffs to J. H. S., G. J. S., and J. B., who were themselves directors to the company at a discount of 25 per cent., in satisfaction of their claims against the company. The plaintiffs thereupon who had obtained their debentures subsequently, contended that these parties could only claim the amount actually advanced by them, and that they could not, as directors, sell the debentures to themselves at a discount.

Held, affirming the decision of the Master-in-Ordinary, that inasmuch as the company did not complain of the transaction or any shareholder, and inasmuch as the transaction was not *ultra vires*, it was not competent for the holders of the debentures of the same class, such as the plaintiffs were, to impugn the position of J. H. S., G. J. S., and J. B.

If the directors abused their position so as to get an advantage at the expense of the company, it was for the corporation or its corporators to complain. To permit the plaintiffs to attack them on this ground would be to recognize the validity of the transfer of a right of action to complain of a fraud, actual or constructive. *Bank of Toronto* v. *Cobourg, Peterborough, and Marmora R. W. Co. et al.* 376.

3. *Dominion Winding-up Act—Application thereof—Notice—Liquidator—Appointment of—35 Vic. ch. 23 (D.)—47 Vic. ch. 39 (D.)*]—*Held*, that 47 Vic. ch. 39, sec. 2, is not limited in its application to companies being wound up at the date of 45 Vic. ch. 23, it applies also to companies in liquidation, *i.e.*, insolvent though not technically being wound up, and against which proceedings are being taken to realize their assets and pay their debts.

In proceedings for a winding-up order under the above statutes, notice need be given only to the company, and perhaps also to creditors, who have brought action against the company, which would be stayed by the winding-up order.

When proceeding under 45 Vic. ch. 23 sec. 24 (D.) as amended by 47 Vic. ch. 39, sec. 4 (D.) the Court has power to refer the appointment of a liquidator to the Master. *Re Clark and Union Fire Ins. Co.* 489.

4. *Directors—Company—Power to compromise—Liability of subscribers of stock—Contributories.*]—C. subscribed for 160 shares in the H. company, the subscription list being headed: "We subscribe for and agree to take the number of shares of the capital stock of the H. company set opposite our signatures, and to pay on account thereof 50 per cent. to the secretary-treasurer of the company in quarterly payments of 12½ per cent. each of the amount subscribed for by us respectively, the first of such payments to be made on February 1st, 1882." C. was at the first shareholders' meeting elected a director, and remained so until the final winding-up of the comp any. One of the by-laws of the company provided for the calling up of the second 50 per cent. of the stock subscribed at any time after November 1st, 1882, on thirty days notice. In August, 1883, the president of the company arranged with C. that he should sign for 80 shares on the terms of a new stock book which had been opened, and that C.'s original stock was to be treated as cancelled. C. accordingly signed the new book. This arrangement with C. was never communicated to the shareholders of the company. In January 1884, a winding-up order was made, and C. was subsequently declared a contributory to the amount of 160 shares. C. now appealed, claiming to be a contributory only to the amount of 80 shares, on the ground that the arrangement of August, 1883, was a valid compromise, entered into with him because he subscribed originally on the understanding, (1st) that the company was not to go into operation before all the stock was subscribed for: and (2nd) that only 50 per cent. of his subscription would have to be paid.

Held, that, whether directors have inherent power to compromise with shareholders or not, there was nothing to support the compromise here set up. As to (1st,) C.'s actions as director, were totally at variance with his contention; and as to (2nd) the subscription was unconditional, and though expressly providing for payment of 50 per cent. it was not inconsistent with the balance being paid when required. Moreover the by-laws, at the adoption of which C. was present, recognized the right to call up the whole stock, and C. appeared to have made no dissent. *Fuches et al.* v. *Hamilton Tribune Printing & Publishing Co.—Copp's Case*, 497.

5. *Election of directors—Special meeting — Quorum — Detention of books, &c.. by secretary.*] — The plaintiffs were a company incorporated under The Canada Joint Stock Companies Act, 40 Vic. ch. 43. By sec. 29 the directors were to be elected by the shareholders in general meeting assembled, at such times as the by-laws of the company should prescribe; and by sec. 30, in default of other express provisions therefor in the letters patent or by-laws, such election should take place yearly, upon notice: that at all general meetings each shareholder, who had paid all calls, should be entitled to vote on each share held by him; and that all questions should be determined by the majority of votes. By sec. 31 the failure to elect directors at the proper time should not dissolve the company; but such election should take place at any general meeting of the company duly called for the purpose, the retiring directors to continue in office until the election of their successors. By sec. 32 power is given to the directors to pass by-

laws for, among other things, the time, &c., of the holding of the annual meeting of the company, the calling of meetings, regular and special, of the directors and of the company, the quorum at such meetings; but every such by-law, unless confirmed at a general meeting of the company, should only be in force until the next annual meeting thereof; one-fourth in value of the shareholders could at all times call a special meeting for the transaction of such business as might be specified in the notice given therefor. By a by-law passed by the directors the last Tuesday in September was fixed as the date of the annual general meeting, and the quorum for such meeting was to consist of five members; but at a special meeting they were required in addition to represent one-third of the capital stock. In 1884 there was no election of directors at the appointed time owing to the office where the meeting therefor was to have been held, being locked up and the defendant refusing to attend the meeting or give up the books, &c.; and in October a special general meeting of the shareholders was held, called on notice, stating the object thereof, on a requisition by one-fourth in value of the shareholders, and directors were elected, who appointed a new secretary. At the meeting there were present three-fourths of the qualified vote and one-third of the subscribed capital, but considerably less than that amount of the nominal capital. In an action by the company against defendant for the non-delivery of the books, &c., to the new secretary, the defendant set up a defence that he was still secretary, because, as he alleged, the directors who appointed the new secretary were were not duly elected and that there was not a quorum at the meeting to transact business.

Held, under the circumstances, there was authority to call the special general meeting for the election of directors; and that it was duly called by the proper number of shareholders.

Held, also, that the directors could by by-law determine the quorum and all other formal proceedings for the control and conduct of the meetings of the board and shareholders; that there was a proper quorum present at the meeting under the by-law; and if the by-law had required such one-third to be of the whole capital stock it would have been *ultra vires* as opposed to sec. 32.

Per ROSE, J. The words of sec. 31, "any general meeting of the company duly called for the purpose," properly describe a special meeting, which may be called as provided by sec. 32.

Held, also that on the evidence the defendant must be deemed to have unlawfully detained the books, &c.: that there was an election of directors *de facto*, and a suit in the company's name; and an officer of the company could not be permitted to withhold what belonged to the company. In any event the defence set up was not the proper way of testing the election of directors, which should have been by motion to stay or set aside the proceedings. *Austin Mining Co. (Limited)* v. *Gemmel*, 696.

COMPENSATION.

Payment into court.]—*See* MUNICIPAL LAW, 2.

For lands taken.]—*See* RAILWAYS, 3.

For services.]—*See* TRUSTS AND TRUSTEES.

See RAILWAYS, 3.

COMPUTATION OF TIME.

See ASSESSMENT AND TAXES, 1, 4.

CONSIDERATION.

See CONTRACT.—MORTGAGE, 3.

CONSIGNORS AND CONSIGNEES.

See SALE OF GOODS, 3.

CONSTITUTIONAL LAW.

See INDIANS.—MALICIOUS PROSECUTION, 1.

CONTRACT.

Public policy—Restraint of trade—Restriction against employing union men—Liquidated damages—Penalty—Consideration.]—On May 27th, 1885, certain individuals forming a Cigar Manufacturers Association, amongst whom was the defendant, considering themselves aggrieved by the members of the cigar makers union, who refused to lower the price of making a particular kind of cigar, entered into an agreement in writing between themselves of the first part and S. of the second part, as follows: "Whereas for the mutual advantage and protection of the parties hereto * * it has been agreed that the parties of the first part shall become severally bound to S. in the sum of $500, liquidated damages in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked * * with the labels of the cigar makers' union, or shall use * * in connection with the manufacture of cigars by him any cigar makers union label * * or shall permit * * any cigar makers' union, or any union or set of men to compel him to hire or employ union men only, or to dismiss any employee. Now, therefore, * * the parties hereto of the first part severally covenant with S. each for himself that he will, in case he shall at any time hereafter violate any of the foregoing stipulations [setting them out] immediately pay to S. the sum of $500: the intention being that in case of a violation of all or any of the stipulations * * aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to S. the full sum of $500, * * because of his so offending, as liquidated and ascertained damages, (and not as a penalty) to be by S. applied, &c. * * The intention, also, being that the entire sum of $500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever, of any of the stipulations * * aforesaid on the part of any one of the parties of the first part.

The defendant having broken the above agreement in all respects, S. brought this action against him to recover $500 as liquidated damages.

Held, that the mutual obligations imposed by the contract constituted a sufficient consideration for it.

Held, also, that the agreement was not invalid, on grounds of public policy, and as in undue restraint of trade.

Collins v. *Locke*, 6 App. Cas. 674, and *Hornby* v. *Close*, L. R. 2 Q. B. 153, distinguished.

Held, also, that the sum of $500 was liquidated damages and not a penalty. Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is, that the sum named is not to be treated as a penalty, but as liquidated damages.

Moreover the stipulations resolved themselves into one—viz., that the defendant would not submit to the dictation of the cigar makers in carrying on his business. It was impossible to calculate the damage to the other members of the manufacturers' association by non-compliance with the agreement. The case would therefore seem to come within the rule that when the agreement is for the performance of one act, and there is no adequate means of ascertaining the damages from a violation, and the parties agreed upon a sum as liquidated damages, it will not be treated as a penalty. *Schrader* v. *Lillis*, 358.

Parol.]—*See* MORTGAGE, 3.

Statute of Frauds.]—*See* SALE OF GOODS, 1, 2.

See RAILWAYS, 2—SPECIFIC PERFORMANCE.

CONTRIBUTORIES.

See COMPANY, 1, 4.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT.—RAILWAYS, 4, 5.

CONVICTION.

By two magistrates.—Information before one.]—*See* CANADA TEMPERANCE ACT, 1878, 1.

See CANADA TEMPERANCE ACT 1878, 2, 3.—CRIMINAL LAW, 3.—MUNICIPAL LAW, 6.

CORROBORATIVE EVIDENCE

See DEED, 1.—WAREHOUSEMEN.

COSTS.

1. *Solicitor and client—One city solicitor doing work for another on agency terms—Lost voucher—Secondary evidence.*]—In a certain suit D. acted generally as solicitor for H., who had been appointed administrator *pendente lite*. In certain matters, however, in connection with the proceedings, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect to these matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges of which he rendered D. an account. D. made up one bill of costs and rendered it to H. which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill with these charges to D.

Held, that the Master, on taking H.'s accounts with respect to the

estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction.

On the above reference H. sought to use a certain bill of costs as a voucher of moneys properly expended by him in legal proceedings, and it was shewn that the said bill had been properly brought into the Master's office on a former reference and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office.

Held, that the Master should have admitted secondary evidence of its contents, and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it. *Beatty* v. *Haldan*, 278.

2. *Malicious prosecution—County Courts Act, R. S. O. ch.* 43, *sec.* 18, *subsec.* 5—*Division Courts Act, R. S. O. ch.* 47, *sec.* 53, *sub-sec.* 7.]—In an action for malicious prosecution where the plaintiff recovered $25 damages, the plaintiff was allowed the costs of the motion to the Divisional Court as costs in the cause, but no order was made as to the scale of costs, which were to be taxed according to such scale and with such rights as to set-off as the statute and rules of Court may direct.

Reference was had to the County Courts Act, R. S. O. ch. 43, sec. 18, sub-sec. 5, and to the Division Courts Act, R. S. O. ch. 47, sec. 53, sub-sec. 7, excluding from the jurisdiction of these Courts actions against a Justice of the Peace for anything done by him in the execution of his office, "*if he objects thereto.*" *Ireland* v. *Pitcher et al.*, 631.

See CANADA TEMPERANCE ACT, 1878, 2, 3, 4—EXECUTORS AND ADMINISTRATORS, 2. —— TRUSTS AND TRUSTEES.

COUNTY COURT JUDGE.

See ASSESSMENT AND TAXES, 1.

COURT.

Payment of compensation into.]—*See* MUNICIPAL LAW, 2.

COURT OF REVISION.

See ASSESSMENT AND TAXES, 1.

COVENANT.

See SPECIFIC PERFORMANCE.

CRIMINAL LAW.

1. *Separate indictments for similar offences—On trial of one of the indictments evidence received relative to charge on the other one—Admissibility.*]—Two indictments were preferred against the defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. The defendants were put on their trial on the charge of destroying M.'s trees; and evidence relat-

ing to the offence charged in the other indictment, was admitted as showing that the offences had been committed by the same person.

Held, that the evidence was properly received. *Regina* v. *McDonald et al.*, 553.

2. *Forgery — Uttering — Guilty knowledge--Evidence—Admissibility.*]—The prisoner was indicted along with W.; the first count charging W. with forging a circular note of the National Bank of Scotland; and the second with uttering it knowing it to be forged. The prisoner was charged as an accessory before the fact. Evidence was admitted showing that two persons named F. and H. had been tried and convicted in Montreal of uttering similar forged circular notes printed from the same plate as those uttered by W.: that the prisoner was in Montreal with F., they having arrived and registered their names together at the same hotel, and occupied adjoining rooms: that after F. and H. had been convicted on one charge, they admitted their guilt on several others; and that a number of these circular notes were found on F. and H., which were produced at the trial of the prisoner. Before the evidence was tendered, it was proved that the prisoner was in company with W., who was proved to have uttered similar notes. Evidence was also admitted shewing that a large number of the notes were found concealed at a place near where the prisoner had been seen, and were concealed, as alleged by him, after W. had been arrested.

Held, that the evidence was properly received in proof of the guilty knowledge of the prisoner. *Regina* v. *Bent*, 557.

3. *Larceny under the "Indian Act, 1880," 43 Vic. ch. 28, sec. 66, (D.)— Conviction.*] — The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vic. ch. 28 sec. 66, (D.) and was convicted: *Held*, WILSON, J., dissenting, that he ought not to have been convicted because, *per* ARMOUR, J., the wood, the subject of the alleged larceny, was not in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act; and because, *per* O'CONNOR, J., the affidavit required by sec. 64, had not been made, and was a condition precedent to a seizure.

Per WILSON, C. J.—Section 64, cannot apply to trees found by the officer of the department in the act of being removed from the lot on which they have been wrongfully cut or where there can be no doubt they have been unlawfully cut, for such an application would make it impossible to effect a seizure in such cases. *Regina* v. *Fearman*, 660.

CROWN.

See TIMBER LICENCE.

CROWN GRANT.

Reservation in.]—*See* WATERS AND WATERCOURSES.

CULTIVATION

Of land.]—*See* LANDLORD AND TENANT, 1.

CUSTOM.

See DEFAMATION.

DAMAGES.

Liquidated.]—*See* CONTRACT.

Nominal—New trial refused.]—*See* DEFAMATION, 2.

Action for non-issue of debentures.]—*See* RAILWAYS, 2.

See SALE OF GOODS, 2.

DEATH.

Abatement of action.]—*See* SEDUCTION.

DEBENTURES.

See COMPANY, 1—RAILWAYS, 2.

DECEIT.

Action for.]—*See* SALE OF GOODS, 2.

DEED.

Rectifying deed—Mutual mistake—Parol evidence — Corroborative evidence—Parties—Registry law—Uncertified plan—R. S. O. ch. 111, sec. 82, subs. 2.]—A. F., sen., in January, 1877, conveyed to A. F., jun., a part of lot 7, and A. F., jun., in 1879, conveyed the same to H. B. In October, 1877, A. F., sen., executed a deed purporting to convey to J. S. all lot 7, without excepting any portion, J. S. giving a mortgage back to secure the purchase money. In 1878 A. F., sen., died, having devised to M. F. all his lands not previously conveyed by him. In 1882 M. F. conveyed all lands so devised to him to the plaintiff. In April, 1881, J. S. failing to pay the mortgage debt, the executors of A. F., sen., sold the property comprised in the mortgage deed to T. G., and in 1884 T. G. conveyed the same to the defendant.

It appeared that in the original conveyance to J. S., and in all the subsequent transactions depending thereupon, without deceit or fraud on either side, but from accident and ignorance, there had been the same mutuality of mistake between the parties dealing with each other, not as to what piece of land was sold and purchased, nor as to what was intended to be conveyed, but in designating the land as the whole of lot 7 instead of only the part thereof intended to be conveyed and dealt with.

Held, that there should be a declaration that the defendant was entitled to that portion of lot 7 only which was intended to be conveyed and dealt with, and no more; and that the plaintiff was entitled to the residue of the said lot excepting that part conveyed to H. B.

Held, also, that it was not necessary or right that the executors of A. F. sen. should be parties to the action, which was brought for the rectification of the deeds to J. S. and the subsequent deeds depending thereon.

Held, also, that though a plan not certified as required by the registry law, R. S. O. ch. 111, sec. 82, subs. 2, had, although deposited in the registry office, no effect under the registry law, yet in a deed reference

might be made to it, as it might to any other document in the registry office or elsewhere, for the description or designation of a lot.

Held, also, that the rule that the court will not interfere to rectify an instrument upon parol evidence, on the ground of mutual mistake, when the defendant denies that there was such mutual mistake, only applies where the defendant so denying was a party to the instrument in question. *Ferguson* v. *Winsor*, 13.

2. *Deed of land—"Excepting and reserving a right of way or road allowance"—Trespass.*—In an action of trespass *q. c. f.* the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title and in which the description of property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot."

Held, that this was only a reservation of a right of way to the grantor and not an exception of the soil. *Wright* v. *Jackson et al.*, 470.

For taxes.]—*See* ASSESSMENT AND TAXES, 3, 4.—MORTGAGE, 2, 3.

DEFAMATION.

1. *Libel—Innuendo—Admissibility of evidence of defamatory meaning—Nonsuit.*]—A draft drawn on the plaintiff being presented for acceptance at his place of business by a clerk in an agency of a bank, answer was returned that the drawee (plaintiff) was away from home, in the Western States, and the clerk so noted the answer on the back of the draft. The defendant, the manager of the bank agency, added in his own handwriting to what the clerk had written the words, "or San Francisco, or the Rocky Mountains," and the draft was thereupon returned to another bank, which it had been sent for presentation, and by which after its return it was handed to the bankers of the drawers. *Innuendo*, "that the defendant meant to impute that the plaintiff had left for parts unknown, not intending to return to Ontario, and with intent to defraud" his creditors.

Held, that the words were capable of the libellous meaning alleged, and a nonsuit was therefore set aside and a new trial directed, in order to submit to the jury the question whether the words did in fact bear that meaning.

Held, also, on the facts set out in the case that there was evidence to go to the jury in support of the *innuendo*.

At the trial the bank manager to whom the draft was returned was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the Judge ruled that in the absence of evidence (which it was admitted could not be given), that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put.

Held, that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, but (following *Daines* v. *Hartley*, 3 Ex. 200) that nevertheless a proper foundation had not been laid for the question: that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other

than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the Judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered. *Huber* v. *Crookall*, 475.

2. *Libel—Privileged communication—Nominal damages—New trial refused.*]—The defendant published of and concerning the plaintiff, a business man, in a written circular, called "Legal Record Co., Renfrew," a statement meaning that plaintiff had given a chattel mortgage on his property, whereas he had only assigned one held by him against another.

Held, libellous, and not privileged. The jury having found no damages, an order *nisi* for a new trial was discharged, without costs. *Lemay* v. *Chamberlain*, 638.

See MALICIOUS PROSECUTION, 2.

DELAY.

See TRUSTS AND TRUSTEES.

DEMISE.

See MORTGAGE, 4.

DEMURRER.

See TIMBER LICENSE.

DEVISE.

See WILL.

DESCRIPTION.

See DEED, 2.

DISTRESS.

See LANDLORD AND TENANT, 1—MORTGAGE, 4.

DIRECTORS.

Issue of debentures to at discount.]—*See* COMPANY, 2.

Power to compromise with shareholders.]—*See* COMPANY, 4.

Election of.]—*See* COMPANY, 5.

DIVIDEND.

See BANKRUPTCY AND INSOLVENCY, 3.

EQUITY OF REDEMPTION.

See MORTGAGE, 1.

ESTATE TAIL.

See WILL, 4.

ESTOPPEL.

See BANKRUPTCY AND INSOLVENCY, 3.—MUNICIPAL LAW, 1.—WAREHOUSEMEN.

EVIDENCE.

Sufficiency of.]—*See* CANADA TEMPERANCE ACT, 1878, 3.

Secondary.]—*See* COSTS, 1.

Admissibility.] — *See* CRIMINAL LAW, 1, 2—DEFAMATION, 1.

Parol, corroborative.]—*See* DEED —STATUTE OF FRAUDS, 1, 2.

Production of original indictment.] —*See* MALICIOUS PROSECUTION, 2.

Witness — Competency of.]—See SEDUCTION.

See MORTGAGE, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Executors and trustees—Misappropriation — Acting trustee — Liability of co-trustee—Interest.*]—By his will, P. S. C. empowered his executors, if required, to sell a parcel of his lands to pay off "debts or encumbrances" against his estate. The land was sold by the executors, all of whom in some degree acted in their executorial capacity or as trustees, but by tacit consent, one of them took the actual management of the estate and received the moneys arising from it, including the proceeds of the said sale, which he misappropriated. H. A. C., an executrix, joined in the conveyance to the purchaser for the sake of conformity, but did not receive any of the purchase money, nor was there any evidence that she knew a balance remained in the hands of her co-trustee after satisfying the "debts or encumbrances," or that he was misapplying it.

Held, that under these circumstances, H. A. C. was not responsible to the estate for the misappropriation by her co-trustee.

Held, also, that even if she had been liable for the principal money so misappropriated, she would not have been for the interest, inasmuch as the principal never came into her hands.

McCarter v. *McCarter*, 7 O. R. 743; *Burrows* v. *Watts*, 5 DeG. M. & G. 233; *Rodbard* v. *Cooke*, 26 W. R. 556, and *Cowell* v. *Gatcombe*, 27 Beav. 568, distinguished.] *Re Crowther*, *Crowther* v. *Hinman*, 159.

2. *Interest chargeable against executors — Gradation according to conduct—Commission—Costs — Allowance on moneys received pendente lite.*]—The English Rules regulating the award of interest against executors and trustees may be approximated in this Province (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate, at the statutory rate of 6 per cent: (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) By charging him who makes gain out of his trust by embarking the money in speculative or trading adventures with the profits or with compound interest, as the case may be.

The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during that period was; but the notes and mortgages held by the executors bore interest for the most part at 6 per cent. The Master charged the executors with interest

at 6 per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the Master, it was

Held, that the interest should be charged at 6 per cent., but that the awarding of compound interest was opposed to the spirit of the decision in *Inglis* v. *Beaty*, 2 A. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors.

Held, also, that the executors were entitled to their costs, because the action was not occasioned by their misconduct; but they were disallowed the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate.

The taking of administration proceedings does not deprive executors of their functions or even suspend them, and a reasonable allowance should be made for moneys received *pendente lite*. *Re Honsberger*, *Honsberger* v. *Kratz*, 521.

See INSURANCE, 2.—TRUSTS AND TRUSTEES.—WAREHOUSEMEN.

EXEMPTION.

From taxation—Manufactories.]—*See* ASSESSMENT AND TAXES, 2—MUNICIPAL LAW, 7.

FAMILY ARRANGEMENT.

See MORTGAGE, 2.

FALSE REPRESENTATION.

See SALE OF GOODS, 2.

FARM LAND.

See ASSESSMENT AND TAXES, 1.

FEE SIMPLE.

Estate in.]—*See* WILL, 4.

FENCES.

See LANDLORD AND TENANT, 1

FIRE INSURANCE.

See INSURANCE.

FORGERY.

See CRIMINAL LAW.

FRAUD AND MISREPRESENTATION.

Debtor and creditor — Following moneys fraudulently obtained — Mortgagor and mortgagee—Mortgage to secure note—Innocent receiver of moneys fraudulently obtained—Payment of mortgage out of moneys fraudulently obtained by a third party.—W. J., a cattle dealer, gave a mortgage to D. J. to secure him against liability on a certain promissory note. Subsequently by falsely representing to M. that he had purchased certain sheep for him, W. J. obtained from M. $4,000.

W. J. sent to D. J. $1,000 of this money to meet the note, D. J. being ignorant of the source from which it came. D. J. paid the note to the bank where it was under discount, and it was given up to him. Afterwards M. becoming aware of the fraud, and that D. J. had received $1,000 of the money, sued D. J. to recover the same, and the action was compromised by D. J. paying to M. $750, giving D. J. a bond conditioned to repay the same if D. J. failed to recover it in proceedings on the mortgage.

D. J. accordingly now brought this action on the mortgage for payment or foreclosure against W. J. Certain execution creditors of W. J. intervening by petition and claiming that nothing remained due on the mortgage, and M. also intervening by petition and claiming that he was entitled to the benefit of the mortgage to the amount of $750 and interest:

Held, that as against D. J. and the mortgaged land the note must be considered satisfied, and therefore the mortgage had been discharged so as to give priority to the execution creditors.

There was no theft of the money. It was given to W. J. with intent to change the possession and the property so far as M. was concerned. The relation which arose between W. J. and M. was not higher than that of debtor and creditor. So long as the money remained with W. J. unapplied it might have been traced and recalled, but when it passed from his hands to those of D. J. who received it for value and without notice of any fraud, all claim or equity of of M. to follow the money ceased.

Gibert v. *Gonard*, 33 W. R. 302, distinguished. *Jack* v. *Jack*, *Morgan's Case*, 1.

[Affirmed on appeal, 12 A.R. 476.]

See BANKRUPTCY AND INSOLVENCY, 2.—BILLS OF SALE AND CHATTEL MORTGAGES— COMPANY, 2— INSURANCE, 1, 3—SALE OF GOODS, 2.

FRAUDS, STATUTE OF.

See SALE OF GOODS, 1.

FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 2.

GENERAL CHANCERY ORDERS.

Order 291.]—*See* SEQUESTRATION.

GOODS, SALE OF.

See SALE OF GOODS.

HIRE CONTRACT.

See SALE OF GOODS.

HOSPITAL.

Small-pox—Erection in adjoining municipality — Injunction.] — *See* MUNICIPAL LAW, 4.

HUSBAND AND WIFE.

See INSURANCE, 2—VENDORS AND PURCHASERS, 2.

ILLEGITIMACY.

See WILL, 2.

INCUMBRANCE.

See INSURANCE, 1.

INDIANS.

Indian lands—Indian reserves—Title to Indian lands—Public lands—Constitutional law—B. N. A. Act, sec. 91, item 24, secs. 6, 92, item 5, secs. 109, 117.]—The plaintiff sought to restrain the defendants cutting timber on certain lands within the territorial limits of Ontario. The defendants justified under a license from the Dominion Government, alleging that the district in question was until recently claimed by tribes of Indians: that such Indian claims were paramount to the claim of the Province of Ontario; and that the Dominion had by purchase acquired the said Indian title, and that by reason thereof as well as by inherent right the Dominion, and not the Province, was alone entitled to deal with the said timber limits.

Held, that the Indian title to the lands in question was extinguished by the Dominion treaty in 1873, known as the North-West Angle Treaty No. 3, and the extinction of title procured by and for the Dominion enured to the benefit of the Province as constitutional proprietor by title paramount, and it is not possible for the Dominion to preserve that title or transfer it in such wise as to oust the vested right of the Province in the land, as part of the public domain of Ontario.

The territorial jurisdiction of the Dominion extends only to lands *reserved* for Indians.

Before the appropriation of "reserves," the Indians have no proprietary right to the soil, but have merely a right of occupancy in their tribal character, and have no claim except on the bounty and benevolence of the Crown. After the appropriation they become invested with a legally recognized tenure of defined lands in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians, which form the subject of legislation in the British North America Act, *i. e.*, lands upon which or by means of the proceeds of which after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. Lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the Public Lands, and are held as before Confederation by that Province under various sections of the British North America Act.

History of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to Provincial legislative control briefly sketched.

The Canadian policy upon Indian questions both before and after Confederation, discussed *Regina* v. *St. Catharines Milling and Lumber Co.*, 196.

See CRIMINAL LAW, 3.

INDICTMENT.

Production of—Sufficiency.]—*See* MALICIOUS PROSECUTION, 2.

INFANTS.

See VENDORS AND PURCHASERS, 1.

INFORMATION.

Before single magistrate.]—*See* CANADA TEMPERANCE ACT, 1878, 1.

Sufficiency of.]—*See* CANADA TEMPERANCE ACT, 1878, 2.

INJUNCTION.

See MUNICIPAL LAW, 4.

INSURANCE.

1. *Title and incumbrances—Misrepresentation—Materiality—Statutory conditions*, 1, 13, 15.]—The plaintiff effected an insurance on buildings and the chattels therein, specific amounts being placed on each. By the application in answer to questions to that effect, the plaintiff stated that the premises were held in fee simple and were unencumbered; and at the end thereof there was a provision that where property was heavily incumbered, or the value of buildings as compared with the amount insured on ordinary contents was small, the manager, &c., was authorized to insert the two-third's clause. The application was made part of the policy, which contained the statement that the premises were represented in the application as being held in fee simple and unencumbered. It was also so stated in the proofs of loss. By the 1st statutory condition, if the insured misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be of no force as respects the property misrepresented, &c. The property herein had been conveyed to the plaintiff by his father in consideration of natural love and affection, but subject to a charge to support the father and a brother and to other charges, and on default the plaintiff was to stand seized to the use of the father of the land, which should immediately revest in him as before.

Held, that under the 1st statutory condition, in order to cause the misrepresentation as to the property to avoid the policy, it must be material, which was a question for the jury to decide; and that the misrepresentation only applied to the buildings, and not to the chattels.

Held, also, that the fifteenth statutory condition which provides that "all fraud or false swearing in relation to any of the above particulars, shall vitiate the claim," did not apply to the statements as to title or incumbrances, for it referred to the particulars contained in the 13th statutory condition, items (*a*) to (*e*) which had no relation whatever to such statements.

The learned Judge at the trial having entered a verdict for the defendants, on the ground that the misrepresentation itself avoided the policy, a new trial was directed. *Goring* v. *London Mutual Fire Ins. Co.*, 236.

2. *Life insurance for benefit of wives and children—Death of beneficiary in lifetime of insured—Estate of insured entitled.*]—A. M. M. insured his life under 29 Vic. ch. 17, for the benefit of his daughter H. M.

M., in the year 1868. H. M. M. married the plaintiff in 1879, and died during her father's lifetime in 1882, leaving a daughter for whose benefit she, by her will, devised all her interest in the said insurance to the plaintiff. A. M. M.'s first wife, having died, he married the defendant M. A. M. in 1877, and died intestate in 1884, leaving the defendant his widow and one child by his second marriage him surviving, and without having made any other disposition of the said insurance policy, or the moneys secured thereby.

In an action by the executor of H. M. M., the beneficiary against M. A. M., the second wife, as administratrix of A. M. M., to have it declared who was entitled to the insurance money. It was

Held, that H. M. M. having died in the lifetime of the insured, sec. 14 of R. S. O. ch. 129, applied, and the policy devolved upon the administratrix of A. M. M., and judgment was given in her favour. *Wicksteed* v. *Munro*, 283.

3. *Separate matters of insurance —False statement in proof of loss as to contents—Avoidance of claim—Statutory conditions 13, 15—R. S. O. ch. 162.*]—By the 13th statutory condition, "Any person entitled to make a claim under a policy is * * to deliver * * as particular account of the loss as the nature of the case permits," and is also to furnish therewith a statutory declaration declaring; (1) that the said account is just and true: and by the 15th condition: "Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim." The plaintiff by a policy of insurance against fire effected an insurance on buildings and contents, by separate amounts being placed on each, the amount on contents being $200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated in the statutory declaration furnished by her, that she had suffered loss on the contents to the amount of $1,665.50, whereas the contents were proved to be worth only $150.

Held, that the mis-statement vitiated the whole claim, and not merely the claim in respect to the particular property as to which it was made. *Harris* v. *Waterloo Mutual Fire Ins. Co.*, 718.

INTEREST.

Chargeable with— Misappropriation.]—*See* EXECUTORS AND ADMINISTRATORS, 1, 2.

JUDGMENT.

See SEQUESTRATION.

JURY.

Nonsuit—Motion to set aside—Practice.]—*See* STOCK AND STOCKHOLDERS.

JUSTICES OF THE PEACE.

See COSTS, 2.

LACHES.

See MUNICIPAL LAW, 1.—TIMBER LICENSE.

LANDLORD AND TENANT.

1. *Forfeiture of term and rent due on assignment—Distress.*]—The defendant made a lease under seal to R., dated the 8th November, 1884, for five years from the 12th November, at the rent of $400 payable half yearly in advance on the 12th November, and May in each year. The lease contained a covenant that "if the lessee shall make any assignment for the benefit of creditors * * the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable." R. paid the first half year's rent. On the 5th May, 1885, R. made an assignment for the benefit of creditors; and on the 8th May, the defendant, claiming to do so under the above covenant, distrained for the half year's rent, which, in the regular course of time, would have been payable in advance on the 12th May.

Held, that the distress was valid; for that under the above covenant it might be held that the money reserved as rent accrued due at the same instant as the lease terminated, and not thereafter; but, even if that construction could not be given to it, the distress would nevertheless be valid, although made for money claimed for rent falling due after the expiration of the term, by reason of the lessee's express personal covenant declaring and constituting the sum as rent; and the covenant which was binding on the tenant was equally binding on the plaintiff as his assignee. *Graham* v. *Lang*, 248.

2. *Covenants—Bringing new land into cultivation—Fencing.*—A lessee covenanted that during the term he "will cultivate, till, manure, and employ such part of the demised premises as is now, or shall hereafter be brought under cultivation in a good, husband-like, and proper manner, and shall not nor will during the said term cut any standing timber upon the said lands except for rails or buildings on the said demised premises, and also shall and will sufficiently repair and keep repaired the erections and buildings, fences, and gates erected or to be erected upon the said premises: the said lessor finding or allowing on the premises all rough timber for the same, or allowing the said lessee to cut and fell so many timber trees upon the said premises as shall be requisite." The lessor having brought an action on the above covenant claiming damages against the lessee on the ground that he had converted certain pasture into arable land, which, however, the jury found was an act of proper husbandry, whereupon judgment was entered for the defendant. On motion for a new trial,

Held, that the lessee was at liberty under the lease to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent, if it was a reasonable and proper thing to do in the course of good and judicious husbandry, and there was nothing to indicate that the landlord was to control the use of the timber so as that he might limit it to the buildings, fences, and erections existing at the date of the lease. *Cook* v. *Edwards*, 341.

3. *Tenant holding over after expiration of term—Rent payable therefor.*]—Where a party who has held for a term at certain rent continues to occupy after the expiration of his term, it is presumed, if there is no

evidence to the contrary, that he holds at the former rent.

In this case the evidence shewed that the plaintiff allowed the defendants to remain in occupation for two months after the expiration of their term, and made no demand for an increased rental; but they had notice that if they desired to remain on longer they must pay an increased rental.

Held, that the plaintiff must be deemed to have agreed to allow the defendants to remain for the two months on the terms of paying the rent reserved by the lease; but there after only on paying the increased rent. *Hilliard* v. *Gemmell et al.*, 504.

See ANNUITY.—MORTGAGE, 4.

LANDS,.

Indian.]—*See* INDIANS.

Expropriation of.]—*See* MUNICIPAL LAW, 2.

Compensation.]—*See* RAILWAYS, 3.—SALE OF LAND.

LARCENY.

Under Indian Act.]—*See* CRIMINAL LAW, 3.

LEGACY.

Lapse of.]—*See* WILL, 2.

LETTERS PATENT.

Patent law—Infringment—Mechanical equivalent — Combination.]—Where in an action to restrain infringement of a patent, brought against C., and H. who had been employed as a workman by C., it appeared that the only portion of the defendants' combination, which was not identical with the plaintiff's patented machine was a mere variation in arrangement, or a mechanical equivalent of a corresponding portion of the plaintiff's machine—a device containing no element of invention, but effecting the same purpose by a slightly different method.

Held, that the plaintiff was entitled to judgment for an injunction against both defendants, but to a reference as to damages only as against C.

Quære, whether it is correct to say that there can be no infringement of a combination unless the whole be pirated. *Woodward* v. *Clement et al.*, 348.

LIBEL.

See DEFAMATION.

LIEN.

See ANNUITY.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTION.

See RAILWAYS, 1.

LIMITATIONS, STATUTE OF.

See RAILWAYS, 3.

LIQUIDATED DAMAGES.

See CONTRACT.

LIQUIDATOR.

Appointment of.]—*See* COMPANY, 3.

MAGISTRATE.

Interest of.]—*See* CANADA TEMPERANCE ACT, 1878, 1.

See COSTS, 2.—MALICIOUS PROSECUTION, 3.

MALICIOUS PROSECUTION.

1. *Appointment of Police Magistrates—R.S.O. ch. 72—Constitutional law.*]—In an action for falsely and maliciously charging the plaintiff with obtaining money from the defendant by false pretences, and for arresting and prosecuting him therefor before the Police Magistrate of Belleville, appointed by the Government of the Province of Ontario, and who, it was alleged, had no jurisdiction to act, it being contended that such appointment properly lay with the Dominion Government.

Held, that a person could not be considered a trespasser merely by laying an information before a Police Magistrate so appointed, charging another with a crime, and praying therein that a warrant might be issued for his arrest.

Per WILSON, C. J., that the power to appoint Police Magistrates rests with the Ontario Government. *Richardson* v. *Ransom*, 387.

2. *Termination of criminal proceedings—Production of original indictment — Sufficiency — Slander — Evidence of—Privileged communication—Amendment.*]— Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the Quarter Sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill."

Held, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced.

Held, also, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected as was done here.

There was no evidence to sustain the slander laid; but an amendment was allowed, to comply, as was alleged, with the evidence. The only objection made at the trial by the defendant was that he should be allowed to examine witnesses on the new count, which was done. An objection to the amendment in term was therefore not allowed.

The evidence in support of the amended count consisted not of statements made voluntarily by the defendant, but of answers to questions put to him, after he had laid a charge against the plaintiff, as to the nature of it.

Held, that this was not sufficient

to sustain an action of slander; and that words so spoken were privileged. *McCann* v. *Preneveau*, 573.

See COSTS, 2.

MANDAMUS.

See ASSESSMENT AND TAXES, 1.

MANUFACTORIES.

Exemption.]—*See* MUNICIPAL LAW, 5, 7.

MASTER AND SERVANT.

Negligence—Injury to servant—Contributory negligence—Non-liability of master.]—*Held*, in an action by a servant against his master for an injury he had sustained, in consequence of the guard being out of place in working a circular saw which he had to attend, that it was not sufficient to shew that the master knew the saw was not guarded; but it must also appear that the servant was ignorant of that fact, and as the servant was skilled in the use of the saw, and did not look to see whether the guard was on or off, as it was his duty to have done, he could not, therefore, make his master responsible to him for the consequences of his own neglect of duty. *Miller* v. *Reid*, 419.

MASTERS OFFICE.

See COMPANY.

MEDICAL HEALTH OFFICER.

See MUNICIPAL LAW, 3.

MEDICAL PRACTITIONER.

Negligence—Addendum to verdict.]—In an action against the defendant as a surgeon, for negligence, the jury found for the plaintiff, but added to their verdict the following: "We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention."

Held, a mere expression of opinion, and that it did not nullify or affect the verdict. *Sheridan* v. *Pigeon*, 632.

MEETING.

Special.]—*See* COMPANY, 5.

MISAPPROPRIATION.

See EXECUTORS AND ADMINISTRATORS, 1.

MISTAKE.

See ASSESSMENT AND TAXES, 3.—DEED, 1.

MORTGAGE.

1. *Mortgagor and mortgagee—Equity of redemption obtained by mortgagee—Sale thereof by him—Liability to account for proceeds.*]—In 1856 R. mortgaged certain lands to J. D. C. to secure £550, payable

on 1st January, 1863. In 1857 J. D. C. died, having appointed the defendant and another his executors, who duly proved the will. In 1864, after the death of defendant's co-executor, the mortgage was deposited with H. as security for an advance of $401, as set out in *McLean* v. *Hime*, 27 C. P. 195, whereby H. was declared entitled to hold the mortgage as collateral security for the said sum. In 1856 R. sold the equity of redemption to Z. In 1877 H., by representing that he controlled the mortgage, procured the executors of Z., for a nominal consideration, to give a conveyance of the equity of redemption to A. B. H., as bare trustee for him; and in 1878 obtained conveyances from other parties interested therein. In 1879 H. sold the equity of redemption to M. for $5,000. In 1880 S. C., a beneficiary under the J. D. C.'s will, having made a claim on defendant for her share of the estate, a settlement was effected by defendant agreeing to pay $2,050, and assigning the mortgage to her as collateral security. S. C. commenced foreclosure proceedings thereon, H. and M. being made parties, when a settlement was effected by H. paying S. C. $500 and procuring an assignment of the mortgage to be made to plaintiff as bare trustee for him. The plaintiff commenced proceedings against defendant claiming the $2,050 secured by the agreement made between S. C. and defendant, and in default of payment foreclosure.

Held, [reversing the judgment of Ferguson, J.,] that H. by representing himself to be mortgagee obtained the conveyance of the equity of redemption, and must therefore account to defendant for the amount realized on the sale thereof to M.

The plaintiff's claim was therefore dismissed, and judgment entered for defendant for the difference between the $5,000 with interest and the $401 with interest, together with the amount payable to S. C. under the agreement. *Wilkins* v. *McLean*, 58.

2. *Deed—Mortgage—Printed form—Proviso for redemption—Construction according to true intent—Inconsistency—Family arrangement.*]—W. H. conveyed his farm to his son, and took back from him a mortgage on it, with a proviso for redemption on payment of $4,000, without interest, in manner following: to pay W. H. and A. H., his wife, during their joint lives $300 a year, and to continue to make the said payments to the survivor during his or her life; and one year after the death of both to pay his brothers and sisters $300 each at the times therein mentioned, which words were inserted in writing, the rest of the instrument being in print. W. H. and A. H. died, and their administratrix brought this action to recover arrears, R. H. contending that in any event he was not to pay more than $4,000, which he had fully paid.

Held, that it being impossible to give literal effect to all the parts of the mortgage, the defeasance clause upon payment of $4,000, without interest, being quite irreconcilable with the particulars regarding the payments, the Court must regard the general scope and intent of the deed, and that evidently being to arrange the terms of an annuity for the joint lives of the father and mother, and of the survivor, the deed must be so construed, and that R. H., therefore, could not succeed in his present contention, that he was not in any event

to pay more than $4,000. *Coleman* v. *Hill et al.*, 172.

3. *Subsequent parol agreement—Contract—Consideration — Forbearance— Short form deed.*]—In an action of foreclosure of a certain mortgage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant: that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form) and give the mortgage: that as a matter of fact the land was at the time of such representations and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the said date: that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff, in consideration that he would forbear the same, agreed with him that the times of payment under the mortgage should be postponed for a length of time equivalent to that during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage; which matters of defence being duly proved,

Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counter-claimed for damages, was entitled to the same, and to a reference to fix the amount thereof. *Keays* v. *Emard et al.*, 314.

4. *Demise clause—Non-execution of mortgage by mortgagee—Tenancy from year to year—Right of distress—Death of mortgagor—Distraining for one thing, justifying for another.*]—The plaintiff's father executed a mortgage, declared to be in pursuance of the short form of Mortgage Act, of certain land, dated 17th November, 1881, to the defendants, but which was not executed by them, for the term of seven years, the principal and interest being re-payable by instalments on the 1st November in each year. The mortgage contained a demise clause for the term of the mortgage, at a rental equal to the instalments of principal and interest and due at the same time, and also a distress clause. The mortgagor was to remain in possession until default. He remained in possession and paid the instalments due on the 1st November, 1882 and 1883. He died intestate in December, 1884, when the plaintiff, a son, by arrangement with the other heirs at law and the widow, occupied the land. At the father's death there was due for principal $100, and for interest $147. The interest was subsequently paid by the plaintiff. In October, 1885, after the interest had been so paid, the defendants executed a distress warrant to their bailiff, directing him to levy $112.55, "the amount of interest due on the 1st November, 1884," under which the bailiff distrained the plaintiff's goods.

Held, that by reason of the provisions of the mortgage, the mort-

gagor remaining in possession, and the payments made by him, the relationship of landlord and tenant on the basis of a tenancy from year to year was created between the parties, with the right to distrain, which was not put an end to by the death of the mortgagor.

Held, also, that notwithstanding the distress was stated to be for interest, the defendants, being entitled to distrain for principal, could justify therefor. *McDonell* v. *Building and Loan Association*, 580.

See FRAUD AND MISREPRESENTATION.

MOTION.

Setting down — Practice.]—*See* SALE OF GOODS, 1.

Practice.]—*See* STOCK AND STOCKHOLDERS.

MORTMAIN.

Statute of.]—*See* WILL, 1.

MUNICIPAL CORPORATIONS.

See MUNICIPAL LAW.

MUNICIPAL LAW.

1. *Incorporation of village— 46 Vic. ch. 18, sec. 9 (O.)—Census—By-law—Illegality—Matters not appearing on face of by-law—Power to quash—Estoppel—Laches.*]—On an application to quash a by-law incorporating a portion of township territory as a village.

Held, that the power of the Court to quash an illegal by-law is not limited to cases where illegality appears upon the face of the by-law, but extends to cases where the illegality shewn is entirely extraneous.

Enquiry may in every case be had upon affidavits as to the existence of the facts constituting the statutory conditions precedent to the passing of the by-law, and as to any illegality in the manner of its being passed.

The applicants in this case had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law, or had any part in the taking of the census objected to:

Held, that the applicants were not estopped from moving to quash the by-law.

Semble, that the by-law incorporating the village was not necessarily illegal by reason of the mere fact that the census was in reality taken before the by-law authorizing the enumeration of the people had been passed by the county council.

But where the census was shewn to be wholly unreliable, and untrue in fact, effect was given to this objection.

Semble, that although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by shewing laches of the applicant, though in this case no such laches existed. *Re Fenton et al.* v. *Corporation of Simcoe*, 27.

2. *Municipal corporations— Expropriation of land—46 Vic ch. 18, sec. 488 (O)—Payment into Court of compensation awarded.*]—Upon the petition of the corporation of the city of Toronto, under "Consol. Mun. Act, 1883," sec. 488, to be allowed to pay into Court money awarded to the estate of B. for the expropriation of certain lands of said estate for a Court house site, on the ground that the executrix and trustee could not, under the will appointing her, sell the property till her son was of age, or died, or she herself married again, and therefore had not the absolute estate; and also that one M. had a rent-charge or annuity charged on the land for her life, payable to one S., *Held*, that the Act does not expressly authorize the payment into Court of the amount awarded: that the section in question is imperative, and makes it obligatory on the corporation to ascertain whether the person in question was absolute owner or not, and if not that the corporation was a statutory trustee of the money, and liable to pay six per cent. interest until the party entitled to the principal claimed the same.

Held, also, that it was not intended the Court should interfere at the instance of the corporation, but at that of the claimant of the money or part of it; but, *Semble*, that the Court might do so at the instance of the corporation, the facts here, however, did not shew sufficient ground for it. *Re Beckett and Corporation of Toronto*, 106.

3. *Municipal corporations—Medical health officer—47 Vic. ch. 20 (O). —By-laws appointing—Absence of fixed salary — Duties — Reasonable remuneration— Objections to by-law.*]—In December, 1884, B. was by by-law appointed health officer of the township of Seymour, but the by-law did not fix any salary as might have been done under 47 Vic. ch. 38, s. 20 (O).

Held, on action brought by B. for remuneration, that the law would fix the salary at a reasonable sum, regard being had to the services performed, and to be performed by the plaintiff.

Where B. brought an action against the township of S. to recover remuneration for medical services performed on the instructions of the corporation and of the Board of Health, and it was objected that the by-law professing to appoint the Board of Health was invalid by reason of the fact that it merely purported to appoint three persons to be a Board of Health, but did not make any mention of the officers who by 47 Vic. ch. 38, sec. 12, sub-sec. 2, are make *ex officio* members of the Board of Health, and because it did not specifically state the three individuals named to be ratepayers.

Held, that looking at the provisions of the said statute, and considering that the attack now made upon the by-law was not by motion to quash it or of a like character, the objections could not be allowed to prevail. *Bogart* v. *Corporation of Seymour*, 322.

4. *Small-pox hospital — Erection thereof in adjoining municipality— Injunction—45 Vic. ch. 29, secs. 12, 14, (O.)—47 Vic. ch. 18, sec. 44, (O.)*] —*Held*, that under 45 Vic. ch. 29, sec. 12 (O.), the corporation of one municipality cannot erect or establish a small-pox hospital within the limits of another, either of a temporary or a permanent character, with-

out the sanction of the corporation of the latter, and an injunction was granted to restrain the same. *Corporation of Elizabethtown et al.* v. *Corporation of Brockville et al.*, 372.

5. *Municipal by-law—Exemption—Taxation — Manufacturing and general business—Power of Municipal council to repeal—Consolidated Municipal Act*, 1883, *sec.* 368.]—C. applied to the corporation of the town of Meaford for a lease of a certain lot of land owned by the corporation, alleging that he and others proposed to erect thereon a mill and other buildings for the purpose of carrying on the business of a flour and grist mill, and a general grain business; they petitioned also for exemption from taxation upon the mill for ten years. Under a by-law passed the 4th of March, 1885, a lease to the applicants was executed by the corporation of the lot in question for twenty-one years, reserving a nominal rent, and containing covenants on the part of the lessees in reference to the nature of the buildings to be erected, to pay taxes, and other provisions. Another by-law was subsequently passed exempting the "manufacturing establishment of C. and others (naming them) established for the purpose of carrying on the milling and grain merchant business, including the lands leased, &c., and the mill and all buildings and property to be erected and placed upon the said land for the purpose of the said business," subject to the performance by the lessees of the stipulations in the lease as to maintaining and working the mill. Upon the faith of this by-law and lease, C, and others, the lessees, purchased a large amount of material, and entered into building contracts for the purpose of erecting the proposed mill, and proceeded to erect the same, and further contracted for the purchase of machinery, the whole involving an outlay, as was alleged, of some $17,000. Upon the 20th of July following the council by by-law repealed the by-law exempting from taxation.

Upon an application by C. and others, to quash the repealing by-law, upon the ground that the same was a fraud upon the applicants and a breach of contract, it appeared that there were other tax-payers of the same town engaged in the same business, and having large amounts of capital invested therein, whose interests were injuriously affected by the repealed by-law.

Held, (1) that inasmuch as the applicants were treated in the lease and by-law as carrying on two distinct kinds of business, viz.: the manufacturing or milling business and the general grain merchant business, the first only of which the council had power to exempt from taxation, the by-law exempting from taxation was bad; (2) that the by-law was also bad in exempting all the land leased, and not the mill only, from taxation, as other buildings, suitable alone for the grain business, might be erected thereon; (3) the fact that other large milling establishments within the same municipality were discriminated against also made the by-law illegal and bad; (4) the repealed by-law being therefore illegal, the council had a right to repeal, or to go through the form of repealing it in order to prevent trouble and expense. *People's Milling Co. and Council of Meaford*, 405.

6. *Municipal corporations — By-law—36 Vic. ch. 18, sec. 503,*

sub-sec. 6 (O.)]—*One penalty on conviction covering distinct offences—Conviction quashed.*]—*Held*, that a by-law passed pursuant to sub-section 6 of section 503 of the "Consolidated Municipal Act, 1883," for granting licenses and regulating the sale of fresh meat in quantities less than by the quarter carcase, and the conviction thereunder, were not bad because the by-law did not embody or refer to the exceptional proviso as to time mentioned in sec. 500; for that sec. 500 did not refer to the subject of sub-sec. 6 of sec. 503; and that, apart from that, sec. 500 was expressly limited to municipalities wherein no market fees were imposed or charged, whereas here a by-law was in existence imposing such fees and charges.

Held, also, that the by-law was not *ultra vires*, express power being given by sec. 503 to pass a by-law respecting the matters mentioned in sub-sec. 6; and that as the reasonable or unreasonable exercise of the power could only be considered on a motion to quash the by-law, the objection was not open on this motion, which was to quash the conviction.

But, *Held*, that the conviction was bad, because, while covering two several and distinct offences under the same by-law, it imposed only one penalty. *Regina* v. *Gravelle*, 735.

7. *Manufactories — Exemption—Public policy—Municipal Act, 1883, sec. 368, 47 Vic. ch. 32, sec. 8 (O.)*]—The Municipal Act of 1883, sec. 368, as amended by 47 Vic. ch. 32, sec. 8, (O.), authorizes a municipal council to exempt any manufacturing establishment, in whole or in part, from taxation for any period not longer than ten years."

A by-law of the town of P. recited that a company had acquired several water privileges on the river O., and intended developing same by erecting thereon factories of different descriptions; and it was advisable in the interests of the town that the privileges, immunities, and exemptions thereinafter mentioned should be granted. It further recited that the total assessment of the said water privileges and the lands in connection therewith amounted to $50,000. The by-law then enacted that the aggregate assessment of the said properties should be and remain for ten years at the sum of $50,000; and the assessors from time to time were required to assess the same at said sum, notwithstanding the erection of any buildings thereon.

Held, not a by-law within said section as amended; and also that it was opposed to public policy and morality in directing the assessors from time to time to limit their assessment. *Re Denne and Corporation of Peterborough*, 767.

See ASSESSMENT AND TAXES, 2.

NATURAL JUSTICE.

Proceedings contrary to.]—*See* CANADA TEMPERANCE ACT, 1878, 4.

NAVIGATION.

Dangers of.]—*See* SALE OF GOODS, 3.

NEGLIGENCE.

Letting of chattel for hire—Implied warranty of fitness.]—Plaintiff sued the defendants for the value of a portable engine and boiler which had

been hired by the defendants, and which boiler had exploded while in their possession immediately after they had begun to use it, and while in charge of a competent engineer.

Held, that as the lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff, in the absence of negligence on the part of the defendants, could not recover.

Per ARMOUR, J.—The plaintiff was bound to establish beyond reasonable doubt that the defendants were guilty of negligence, and that such negligence caused the explosion and destruction of the boiler and engine, and the negligence required to be established was ordinary negligence, for the hirer of a chattel is required to use no more than that degree of diligence which prudent men use, that is, which the generality of men use in keeping their own goods of the same kind.

The explosion and destruction of the engine and boiler not being legally attributable to the negligence of the defendants, they were relieved from the performance of their promise to return them, and the contract of hiring was dissolved. *Reynolds* v. *Roxburgh et al.*, 649.

Contributory.]—*See* MASTER AND SERVANT.

See MEDICAL PRACTITIONER — RAILWAYS, 1, 4, 5—SALE OF GOODS, 3.

NEW TRIAL.

Refusal of—Nominal damages.]—*See* DEFAMATION, 2.

See INSURANCE, 1.

NONSUIT.

Motion to set aside—Jury case—Practice.]—*See* STOCK AND STOCKHOLDERS.

See DEFAMATION, 1—RAILWAYS, 5.

NOTICE.

See COMPANY, 3—VENDORS AND PURCHASERS, 2.—WAYS.

PAROL EVIDENCE.

See DEED, 1.—MORTGAGE, 3.—STATUTE OF FRAUDS, 1, 2.

PARTIES.

In actions for rectification of deeds.]—*See* DEED, 1.

PENALTY.

See CANADA TEMPERANCE ACT, 1878, 1.—CONTRACT.

PETITION.

See TIMBER LICENSE.

PLAN.

Alteration.]—*See* ASSESSMENT AND TAXES, 1.

Uncertified.]—*See* DEED, 1.

PLEADING.

Issue.]—*See* ARBITRATION AND AWARD.

Statement of claim.—Omission of necessary averments.]—*See* RAILWAYS, 4.

See BANKRUPTCY AND INSOLVENCY, 3.

PLEDGE.

See STOCK AND STOCKHOLDERS.

POLICE MAGISTRATE.

Appointment of.]—*See* MALICIOUS PROSECUTION, 1.

PRACTICE.

Setting down motion.]—*See* SALE OF GOODS, 1.

Death.—Survival of action.]—*See* SEDUCTION.

Motion to set aside nonsuit—Jury case.]—*See* STOCK AND STOCKHOLDERS.

Sivil and criminal cases.]—*See* WAREHOUSEMEN.

See SEQUESTRATION—STATUTE OF FRAUDS, 1.

PRINCIPAL AND AGENT.

See COSTS, 1.

PRIVILEGED COMMUNICATION.

See DEFAMATION, 2.—MALICIOUS PROSECUTION, 2.

PUBLIC LANDS.

See INDIANS.

PUBLIC POLICY.

See CONTRACT.—MUNICIPAL LAW, 7.

QUORUM.

See COMPANY, 5.

RAILWAYS AND RAILWAY COMPANIES.

1. *Negligence—Railway employee—Common employment—Dominion Railway Act, 42 Vic. ch. 9, sec. 27 (D)—Limitation of action — "By reason of the railway."*]—The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying: that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used: that they also directed and required him to be carried, as part of his employment, on the defendants' trains: that accordingly he was received by the defendants "to be safely carried" on a train, and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured:

Held, 1. That if the plaintiff accepted a different employment from

that originally contemplated, he became the defendants' workman in that new employment, just as he had been in his former employment.

2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment, and that there was no cause of action.

The defendants set up that the injuries complained of happened more than six months before action brought, and that the action was barred by the 27th sec. of the Consolidated Railway Act, to which the plaintiff demurred.

Held, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway."

Browne v. *Brockville and Ottawa R. W. Co.*, 20 U.C.R. 202; *McCallum* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527, and *Kelly* v. *Ottawa Street R. W. Co.*, 3 A. R. 616, referred to and followed.

Semble, that the concluding words of the 27th section of the Consolidated Railway Act, viz., that "the defendants may prove that the same" (that is the damage) "was done in pursuance of the authority of this Act and the Special Act," should be read as meaning "in the course and prosecution of their businsss as a railway company, constituted in pursuance of," &c. *May* v. *Ontario and Quebec R. W. Co.* 70.

2. *Bonus—Trustees, necessity for—By-law—Compliance with conditions of—Separate agreement—Necessity to comply with before issue of debentures—Action for damages—R. S. O. ch. 174, sec. 559, sub-sec. 4, 36 Vic. ch. 70, (O.)—Construction of.*]—Under a by-law to grant aid by way of bonus by the issue of debentures to a railway company, no issue or delivery thereof was to take place until certain conditions and stipulations contained in the by-law were performed, amongst others, the completion of the road, and obtaining the certificate of the Government engineer. By an agreement entered into before the final passing of the by-law, the company covenanted to perform certain other acts, amongst which was the location of a station "at or near" the corner of certain named streets.

By the Municipal Act, R. S. O. sec. 559, sub-sec. 4, authority is given to grant bonuses and issue debentures in aid of a railway company, payable at such times, &c., as the municipal council may think meet. By the defendants' special Act of incorporation, 36 Vic. ch. 70, (O.), the debentures were to be issued and delivered to trustees within six months after the passing of the by-law, who were to receive and convert the same into money, and deposit the proceeds in a chartered bank, and pay the same out on the certificate of the chief engineer of the railway company.

Held, on the evidence that the station, though not located at the corner of the said streets, was not so far therefrom as to prevent its location being by reasonable intendment within the meaning of the word "near;" at all events non-compliance with the terms of the agreement not covered by the conditions, &c., of the by-law would not prevent the accruing of the plaintiff's title to the debentures; but

that the defendants' remedy must be for damages for breach of covenant.

Held, also, that a compliance with the terms of the general Act was sufficient, for that the provisions of the special Act, were not restrictive, but enabling and enlarging the powers under the general Act; and that under the circumstances the appointment of trustees would have been useless. *Bickford* v. *Corporation of Chatham*, 257.

3. *Compensation for lands taken—Statute of Limitations — R. S. O. c. 108, s. 23.*]—*Held*, that the right of compensation for land taken by a railway company is not barred short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years.

Per ARMOUR, J., the plaintiff's claim to compensation was not money secured by lien, or otherwise charged on land, within s. 23 of R. S. O. ch. 108, and he had not a vendor's lien, for the relation of vendor and purchaser never arose between him and the company. *Ross* v. *Grand Trunk R. W. Co.*, 447.

4. *Accident— Negligence — Omission to pack frog—44 Vic. ch. 22 (O.) —46 Vic. ch. 24 (D.)—Statement of claim—Omission of necessary averments.*]—Action by plaintiff, an administrator of C., for damages under 44 Vic. ch. 22 (O.), by reason of the omission to pack a frog on the Midland Railway which the defendants were operating, whereby C.'s foot was caught in the frog and he was killed by a train.

Held, that defendants were not liable: that the Midland Railway was a railway connecting with or crossing the defendants' railway, and under 46 Vic. ch. 24 (D.), was exempt from the operation of the Ontario Act.

Held, also, that the omission to state in the statement of claim, as required by sub-sec. 2 of sec. 8 of said Ontario Act, and to prove, that the defendants knew that the frog was not packed, or that the deceased did not know it, or that he had notified the defendants or any person superior to himself in the service of the defendants, or that such person was not aware thereof, would preclude any recovery. *Clegg* v. *Grand Trunk R. W. Co.*, 708.

5. *Accident—Contributory negligence—Withdrawing case from jury.*] —On the undisputed facts disclosed in the plaintiff's case it appeared that there was a switch-stand erected in the defendants' yard close to the track, the deceased, who was a brakesman in the defendants' employment, being aware of its position and proximity to the track. On the day in question the deceased was engaged as a brakesman on a train passing through the yard. His position as brakesman should have been on top of the car, but for some reason which did not appear he was on the side of the car, holding on to the ladder by which brakesmen mount to the top of the car, and his attention being drawn towards the end of the train he did not see the switch-stand, when he was struck by it and thrown under the wheels of the car and killed.

Held, that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and the case was therefore properly with-

drawn from the jury. *Ryan* v. *Canada Southern R. W. Co.*, 745.

Compensation for lands taken.]—*See* ARBITRATION AND AWARD.

RECEIPT.

See STATUTE OF FRAUDS, 1.

REGISTRY LAW.

See DEED, 1.

RENT.

See LANDLORD AND TENANT.

REPAIRS.

Covenant to keep houses suitable for tenants.]—*See* ANNUITY.

REPEAL.

Of by-law.]—*See* MUNICIPAL LAW, 5.

RIPARIAN PROPRIETOR.

See WATER AND WATERCOURSES.

RIVERS.

See WATER AND WATERCOURSES.

ROAD.

See WAYS.

SALARY.

Medical health officer.]—*See* MUNICIPAL LAW, 3.

SALE OF GOODS.

1. *Re-transfer—Statute of Frauds—Bailees—Practice—Setting down motion.*]—The plaintiff in England sold certain goods to M. & Co., at Toronto. After the arrival of the goods at Toronto, the plaintiff discovered that M. & Co. were insolvent, and he notified his agent to stop the goods; but it appeared that M. & Co. had paid the freight and duty and removed the goods into their warehouse. After negotiations between plaintiff's agent and M. & Co., the latter verbally agreed to hold the goods subject to plaintiff's order, and on the following day wrote plaintiff's agent to the same effect, but no written assent was made thereto. M. & Co. subsequently made an assignment for the benefit of their creditors to defendant, who took possession of the goods, and on demand refused to deliver them up to plaintiff, whereupon trover was brought.

Held, that the goods having become the property of M. & Co., and being of greater value than $40, in order to re-transfer them to the plaintiff, it was necessary that there should be a memorandum in writing, shewing the terms of the transfer, or some other act sufficient to take the case out of the Statute of Frauds: but, *Semble*, if any consideration had been stated between the plaintiff's agent and M. & Co., for the latter assuming the position of bailees of the goods, and holding them for the plaintiff's benefit, the transaction might have

been supported as not coming within the statute.

An objection that a notice of motion given for a sittings of the Divisional Court, and served in time to be set down during that sittings, could not be set down during the following sittings, was overruled.

Per CAMERON, C. J.—Stoppage in transitu does not rescind a contract on the sale of goods, but merely gives the vendor a lien on the goods for their price. *Brassert* v. *McEwen et al.*, 179.

2. *Hire contract—False representation—Deceit—Breach of warranty—Damages.*]—The defendant delivered a piano to the plaintiff on a "Hire contract," the price being stated to be $500, payable by crediting $100 on an old piano taken in exchange, and the balance of $400 by monthly instalments, the plaintiff giving a note for the $400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, and there were instalments in arrear when action was brought. The plaintiff sued for fraudulent misrepresentations, and for general damages for breach of implied warranties; the alleged misrepresentations or warranties being that the piano was worth $500: that it was a first class instrument; and as good as any Steinway or Chickering piano. The jury found for the plaintiff with damages.

Held, that the plaintiff could not succeed as to the false representation, for the evidence shewed that after she discovered the piano was not as represented, she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting; nor could she recover in an action for deceit, for she failed to show that the defendant did not believe the statements made to be true, or that they were made recklessly; and also no damages were shewn; and *Semble*, the statements were such as are properly styled simple commendation.

Held, also, that as the property had not passed, an action for the breach of warranty would not lie. *Frye* v. *Milligan*, 509.

3. *Consignor and consignee — Property passing—Right to maintain action—R. S. O. ch.* 116, *sec.* 5—*Dangers of navigation.*]—Three cases of goods exceeding $40 in value, were verbally ordered by L. at M. from plaintiff at T., through plaintiff's traveller, and were shipped, consigned to L., and carried by railway and then by defendant's steamer to M. Two of the cases was received by L., one of which was in a damaged condition. The third case remained on board the vessel, as the purser refused to deliver it up until the freight on these cases, as well as on a variety of other goods consigned to L., was paid, which L. refused to do until he had first an opportunity of checking over the goods. Before the dispute was settled the vessel left, and was subsequently wrecked and this case lost. An arrangement was made between plaintiff and L. whereby plaintiff allowed L. 25 per cent. on the value of the two cases received by L. The plaintiff then brought an action against the defendants to recover the 25 per cent. so allowed, and the value of the case lost.

Held, [GALT, J., dissenting], that there was an acceptance and receipt

of the goods by L. so as to pass the property therein to him; and therefore the action should, under the Mercantile Amendment Act, R. S. O. ch. 116, sec. 5, sub-sec. 1, have maintained by him and not by plaintiff.

Per GALT, J. The action was properly brought by plaintiff, as the property in the goods had not passed from him: and he was entitled to recover the 25 per cent. so allowed by him, as also the price of the case lost; for although the loss thereof was occasioned by the dangers of navigation, the defendants were not protected under 37 Vic. ch. 25, (D.), the evidence shewing that the loss was by the fault or neglect of the defendants. *Friendly* v. *Canada Transit Co.*, 756.

SALE OF LAND.

See SPECIFIC PERFORMANCE.

SECONDARY EVIDENCE.

See COSTS, 1.

SEDUCTION.

Death of plaintiff—Survival of action—17 Car. II. ch. 8—R. S. O. ch. 50, s. 236—O. J. Act, Rule 383—Witness, competency of.—In an action of seduction the plaintiff obtained a verdict, and judgment was directed to be entered in his favour. In the following sittings of the Divisional Court an order *nisi* was obtained to set aside the verdict and judgment, and to enter judgment for the defendant, on the ground of the improper admission of the evidence of the seduced girl by reason of her incompetency to give evidence. The order was set down, and on its coming on for argument, it appeared that after the order had been served the plaintiff had died.

Semble, that under O. J. Act, Rule 383, the action abated by reason of the plaintiff's death; but

Held, that the girl's evidence was improperly received, as it clearly appeared that she was not capable of understanding or appreciating the nature of an oath or the obligation she assumed in swearing to tell the truth, and was therefore incompetent to give evidence; and without her evidence the verdict could not be supported.

Under the circumstances an order was granted staying further proceedings in the action.—*Udy* v. *Stewart*, 591.

SEQUESTRATION.

Toronto Stock Exchange, sale of seats at—Practice—Order to pay after judgment, by a day certain, writ of sequestration on—G. C. O. 291—O. J. Act, Rules 339, 342, 343, 352, 357, 360.]—The plaintiffs having recovered a judgment against the defendants for a large sum, obtained an order from a Judge in Chambers ordering defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against defendants' goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made a writ of sequestration issued accordingly.

Held, that although the writ should not have issued to enforce

the judgment, which was for the payment of money, without limiting a time certain, yet that the Judge's order was a judgment for disobedience of which the writ might issue, and that the writ was regularly issued.

Defendants were members of the Toronto Stock Exchange (a corporation), and had seats at the Stock board thereof, shewn to be of considerable value, and to be saleable by the defendants on compliance by them with certain by-laws of the corporation, which, among other things, provided for a written application to the Exchange by any member wishing to sell his seat, for leave to sell, submitting at the same time the name of the proposed purchaser, and if the purchaser was in such a case acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the Stock Exchange could not, under the by-laws, be admitted a member unless he had been previously a stock broker, resident, doing business publicly as such, in Toronto, for at least six months previously to his application, and had upon his own application been accepted by the Exchange as a member, the vote for his acceptance to be by ballot, and one black ball in five, or a portion of five, to exclude. After being accepted he might purchase a seat from some one already a member, or pay an entrance fee of $4,000 to the Exchange, and by such payment create a seat for himself. The total number of seats on the board was limited to 40, whereof 33 were taken up by the 33 members of the Exchange. The sequestrator having applied for an order under the writ of sequestration to sell the defendants' seat at the Exchange.

Held, that although such seats were the property of the debtor and should be saleable under process, and that the Court should implement its execution by ordering the defendants to do any act necessary to affect, or to refrain from any act to obstruct, the sale of the said seats; yet that, inasmuch as the Court could not control the exercise of the ballot by the members of the Exchange, no effectual order for sale of the seats could be made: the application was, therefore, refused, without costs.

Remarks on the desirabilty of legislation to extend the operation of the writ of sequestration to meet such cases. *London and Canadian Loan and Agency Co.* v. *Morphy et al.*, 86.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

Non personal.]—*See* CANADA TEMPERANCE ACT, 1878, 2.

SET-OFF.

Evidence.]—*See* ANNUITY.

SHIPPING.

See SALE OF GOODS, 3.

SMALL POX.

Hospital.]—*See* MUNICIPAL LAW, 4.

SOLICITOR.

See COSTS, 1 — TRUSTS AND TRUSTEES.

SPECIAL MEETING.

See COMPANY, 5.

SPECIFIC PERFORMANCE.

Agreement to give covenant to build—Refusal to execute.]—In an agreement for the sale of land from R. to P., the terms were inserted in these words: "Price $1,000, $200 cash, and balance in five yearly payments, interest at the rate of seven per cent., and covenant of P. to build a house worth not less than $4,000, to be commenced in a year from date and finally completed in two years * * *." The $200 was paid down, and R.'s solicitor prepared and tendered the deed (in which was inserted a covenant to build) and the mortgage to P. for execution. P. refused to execute them and R. brought an action for specific performance, which P. defended on the ground that the covenant to build was too vague and would not be enforced by the Court.

Held, that the plaintiff was clearly entitled to the performance of the defendant's agreement to give a covenant to build a house of a certain value within a specified time.

Wood v. *Silcock*, 50 L. T. N. S. 251, distinguished. *Robertson* v. *Patterson*, 267.

STATUTE OF FRAUDS.

1. *Receipts for money—Parol agreement—Inadmissibility of evidence of to contradict written contract—Setting aside verdict of jury for the defendant and entering judgment for plaintiff.*]—Defendant got from plaintiff six different sums of money, amounting together to $3,000, for which he gave receipts. Three of these stated that defendant received so much money from plaintiff, "loan on oil, usual rate of interest." The remaining three were similar to the others, but concluded, "payable within one year from date, with interest at 9 per cent. per annum." Defendant set up a parol agreement with plaintiff, by which defendant had the right at any time to require plaintiff to take in payment of the moneys so lent the oil which defendant had in plaintiff's tanks at the market price at the time when the plaintiff so required plaintiff to take the oil.

Held, that such a parol agreement could not be set up to alter the terms of the receipts which shewed such loans were to be repaid in money; and although the jury found the parol agreement to have been made, the Court having all the facts before them set aside the verdict and judgment for defendant and directed judgment to be entered for the amount of the plaintiff's claim.—*Lancey* v. *Brake*, 428.

2. *Note or memorandum in writing—Parol evidence—Words, meaning of.*—Parol evidence is always admissible to shew the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties.

When there is no actual agreement as to price or time for payment, the law will supply the defici-

ency by importing into the bargain a promise by the buyer to pay a reasonable price, and by implying, in the absence of evidence to the contrary, that payment should be made on delivery.

Held, that the letters of the defendant, set out in the case, and read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within the 17th sec. of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to.—*Christie* v. *Burnett*, 609.

STATUTES, CONSTRUCTION OF.

17 Car. II. ch. 8.]—*See* SEDUCTION.

12 Vic. ch. 72.]—*See* VENDORS AND PURCHASERS, 1.

29 Vic. ch. 17.]—*See* INSURANCE, 2.

B. N. A. Act, sec. 9, item 24, secs. 6, 92, item 5, secs. 109, 117.]—*See* INDIANS.

32 & 33 Vic. ch. 31 (D.)]—*See* CANADA TEMPERANCE ACT, 1878, 2.

34 Vic. ch. 5, sec. 45 (D.)]—*See* WAREHOUSEMAN.

36 Vic. ch. 18, sec. 503, subsec. 6 (O.)]—*See* MUNICIPAL LAW, 6.

36 Vic. ch. 70 (O.)]—*See* RAILWAYS, 2.

37 Vic. ch. 25 (D.)]—*See* SALE OF GOODS, 3.

R. S. O. ch. 40, sec. 76.]—*See* VENDORS AND PURCHASERS, 1.

R. S. O. ch. 43, sec. 18, sub-sec. 5.]—*See* COSTS, 2.

R. S. O. ch. 47, sec. 53, sub-sec. 7.]—*See* COSTS, 2.

R. S. O. ch. 50, sec. 236.]—*See* SEDUCTION.

R. S. O. ch. 50, secs. 266-7.]—*See* ANNUITY.

R. S. O. ch. 72.]—*See* MALICIOUS PROSECUTION, 1.

R. S. O. ch. 73.]—*See* VENUE.

R. S. O. ch. 106, sec. 26.]—*See* WILL, 3.

R. S. O. ch. 106, sec. 35.]—*See* WILL, 2.

R. S. O. ch. 108, sec. 23.]—*See* RAILWAYS, 3.

R. S. O. ch. 111, sec. 82, sub-sec. 2.]—*See* DEED, 1.

R. S. O. ch. 116, sec. 5.]—*See* SALE OF GOODS, 3.

R. S. O. ch. 118.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

R. S. O. ch. 129, sec. 14.]—*See* INSURANCE, 2.

R. S. O. ch. 150.]—*See* COMPANY, 1.

R. S. O. ch. 162.]—*See* INSURANCE, 3.

R. S. O. [ch. 174, sec. 559, sub-sec. 4.]—*See* RAILWAYS, 2.

R. S. O. ch. 180, sec. 150.]—*See* ASSESSMENT AND TAXES, 4.

R. S. O. ch. 180, sec. 156.]—*See* ASSESSMENT AND TAXES, 3.

40 Vic. ch. 43.]—*See* COMPANY, 5.

42 Vic. ch. 9, sec. 9, sub-sec. 21 (D.)]—*See* ARBITRATION AND AWARD.

42 Vic. ch. 9, sec. 27 (D.)]—*See* RAILWAYS, 1.

43 Vic. ch. 22, sec. 7 (D.)]—*See* WAREHOUSEMEN.

43 Vic. ch. 28, sec. 66 (D.)]—*See* CRIMINAL LAW, 3.

44 Vic. ch. 22 (O.)]—*See* RAILWAYS, 4.

O. J. Act, Rule 254.]—*See* VENUE.

O. J. Act, Rules 339, 342, 343, 352, 357, 360.]—*See* SEQUESTRATION.

O. J. Act, Rule 383.]—*See* SEDUCTION.

45 Vic. ch. 23 (D.)]—*See* COMPANY, 3.

45 Vic. ch. 29, secs. 12, 14 (O.)]—*See* MUNICIPAL LAW, 4.

Municipal Act, 1883, 46 Vic. ch. 18 sec. 9 (O.)]—*See* MUNICIPAL LAW, 1.

Municipal Act, 1883, sec. 368.]—*See* ASSESSMENT AND TAXES, 2.—MUNICIPAL LAW, 5, 7.

Municipal Act, 1883, sec. 368.]—*See* MUNICIPAL LAW, 7.

Municipal Act, 1883, sec. 488 (O.)—*See* MUNICIPAL LAW, 2.

Municipal Act, 1883, sec. 503, sub-sec. 6 (O.)]—*See* MUNICIPAL LAW, 6.

Municipal Act, 1883, sec. 546 (O.)]—*See* WAYS.

46 Vic. ch. 24 (D.)]—*See* RAILWAYS, 4.

46 Vic. ch. 30, sec. 91 (D.)]—*See* CANADA TEMPERANCE ACT, 1878, 1.

47 Vic. ch. 18, sec. 44 (O.)]—*See* MUNICIPAL LAW, 4.

47 Vic. ch. 32, sec. 16 (D.)]—*See* CANADA TEMPERANCE ACT, 1878, 1.

47 Vic. ch. 32, sec. 8 (O.)]—*See* ASSESSMENT AND TAXES, 2.—MUNICIPAL LAW, 7.

47 Vic. ch. 38, sec. 44 (O.)]—*See* MUNICIPAL LAW, 4, 7.

47 Vic. ch. 38, sec. 20 (O.)]—*See* MUNICIPAL LAW, 3.

47 Vic. ch. 39, secs. 2, 4 (D.)]—*See* COMPANY, 3.

STATUTORY CONDITIONS.

See INSURANCE, 1, 3.

STOCKS AND STOCKHOLDER.

Pledge by broker — Recovery of purchase money—Jury cases—Non-suit—Motion to set aside—Practice.] — A firm of brokers purchased twenty shares of bank stock for the defendant, the latter agreeing to repay to the former the price paid therefor on demand with interest, the brokers to hold the stock as collateral security and receive a ten per cent. margin and one quarter per cent. commission. The brokers took stock in their own names, and then transferred it to a loan company together with other stock of the same character, the transfer by them, though absolute in form, being in fact a pledge to secure the repayment of a much larger amount than the sum payable by the defendant. The pledge had no reference to the transaction with defendant, but was for the broker's own purposes. The defendant was not informed of the transfer, and calls for further margins were made from time to time as the stock fell. On the 27th June, 1884, the brokers suspended payment, at which date the stock had fallen considerably; and on the 26th December they made an assignment for the benefit of creditors to the plaintiff. Neither at the time of the suspension or assignment, was any unpledged or unhypothecated stock held for or by the brokers, nor was any transferred to the plaintiff, there being only a right in him to redeem any stock undisposed of by the pledgees. On the 4th August, 1885, after the stock had, by legislative enactment, been reduced to one-half its original par value, or from $100, to $50 per share, the plaintiff offered to transfer twenty shares of the reduced stock, which the defendant refused to accept.

The plaintiff then brought this action against defendant to recover the alleged balance due on the stock.

Held, there could be no recovery, for that the delivery of the stock and payment of the price were concurrent acts, and the brokers were not in a position after the time of insolvency to deliver the same, while at the time of the plaintiff's offer there was no stock of the nominal value per share of that which the brokers purchased for the defendant.

Where in a jury case the learned Judge at the trial enters a nonsuit, a notice of motion, and not an order *nisi*, is the proper mode of moving against the nonsuit. *Clarkson* v. *Snider*, 561.

See COMPANY, 1.

STOPPAGE IN TRANSITU.

See SALE OF GOODS, 1.

STREAM.

See WATERS AND WATERCOURSES.

STREET.

See WAYS.

SUMMONS.

Non-personal service.]—*See* CANADA TEMPERANCE ACT, 1878, 2.

SURVIVORSHIP.

See SEDUCTION.

TAVERNS AND SHOPS.

See CANADA TEMPERANCE ACT, 1878, 1.

TAX SALE.

See ASSESSMENT AND TAXES, 1, 2.

TAXES.

See ASSESSMENT AND TAXES.

TENANT.

See LANDLORD AND TENANT.

TIMBER LICENSE.

Application for timber license—Notice of acceptance—Assignment for value—Petition for issue of same—Demurrer—Laches—Rule as between subjects and as between Crown and subject.]—McA. filed an application with the proper Government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the Commissioner of Crown Lands; but owing to a defective survey it was impossible then to convey the berths. Subsequently the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he never having removed to the United States, never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for $4,000. B.

afterwards became entitled by subsequent assignments for value to all McA.'s interest, the assignments being duly filed in the Crown Lands Department. McA. and B., in 1884 joined, in a petition of right for the issue of the license, and the Attorney-General demurred to the same.

Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would probably be under ordinary circumstances, a defence to a claim for specific performance; but under the facts in this case a vendor would not be allowed to set up such a defence.

Held, also, that as the assignments were duly filed, and the Crown had the power of forfeiting the claim for non-payment, and did not do so, even were the rule between subjects to apply, it would not be a bar in this case.

Semble. It may be doubted whether the same rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited.—*McArthur* v. *The Queen*, 191.

TIME.

Within which tax deed can be questioned.] — *See* ASSESSMENT AND TAXES, 4.

See ASSESSMENT AND TAXES, 1.—BANKRUPTCY AND INSOLVENCY, 1.

TITLE.

To land.]—*See* INSURANCE, 1.—VENDORS AND PURCHASERS, 1.

TORONTO STOCK EXCHANGE.

See SEQUESTRATION.

TRADE.

Restraint of.]—*See* CONTRACT.

TRADES UNIONS.

See COMPANY.

TREES.

See CRIMINAL LAW, 3.

TRESPASS.

See DEED, 2.—MALICIOUS PROSECUTION, 1.

TRUSTS AND TRUSTEES.

Trust for sale—Wilful default—Delay of many years — Account rendered by trustee—Appropriation of receipts—Principal and interest—Error in accounts—Sums paid by trustee to land agent and accountant—Costs—Trustee-solicitor—Compensation—Double commission.]—C.M., a solicitor, invested money of T. in a third mortgage of the E. property. Afterwards, in 1862, the property was put up for auction under a decree for sale at the suit of the first mort-

gager. A. M. held the mortgage on the property next after the first mortgagee. Finding that owing to the great depreciation of the value of the E. property, it would, if sold then, scarcely fetch enough to pay off the first mortgage, it was agreed between C. M. and A. M. that C.M. should, out of his own moneys, buy in the property by paying off the first mortgage, and then hold the same in trust to sell, and out of the proceeds to first repay himself the amount so advanced by him, with interest from the date of the sale, then to pay A. M. his claim on the property, with interest, and then to pay T. his claim with interest. C. M. accordingly advanced sufficient to buy in the property as agreed. In 1864 a formal deed of trust was drawn up and executed by the first mortgagee, and by C. M., A. M., and T., whereby the property was conveyed to C. M. on trust to sell "without delay," and apply the proceeds as aforesaid, and giving him power to lease in the meanwhile, and making him answerable only for loss resulting from his own "wilful neglect and default."

C. M. leased the property from time to time, but he did not sell it until 1883, when T.'s executrix brought an action charging him with default and breach of trust, and claiming an account and damages.

The evidence showed that the property had all through been of a very unsaleable kind, consisting of a farm, very stumpy, and badly fenced, and an old mill which had quite lost its value. It also appeared that C. M. had never advertised the property for sale, but at the same time it was well known in the neighbourhood that it was for sale, and that it was not the sort of property that was likely to be bought by a stranger. There was, also, no positive evidence that at any time C. M. could have effected a more advantageous sale than that he effected in 1883; and it appeared that up to 1880 neither A. M. nor T. had complained of the delay, but, if anything, acquiesced in it.

Held, under all the circumstances of the case, affirming the decision of the Master in Ordinary, that C. M. was not proved to have been guilty of neglect and default as trustee, nor did the evidence afford any basis for assessing damages against him.

It also appeared that in 1880, on T.'s solicitors demanding an account from C. M. of his dealings with the trust estate, C. M. employed S., a professional accountant, to make out from his books a detailed account, and S., in so doing, applied receipts from time to time in liquidation of the principal moneys due to C. M. under the trust deed, instead of applying them in the first instance in liquidation of the interest accruing due thereon, and the account so drawn up was delivered to the solicitors of T. An affidavit of C. M. moreover, was produced in the Master's office, wherein he stated that this account was correct, and made ont under his supervision, and he spoke to the same effect in an examination taken *de bene esse* in this action. After judgment in this action, which referred it to the Master in Ordinary to take the account of C. M.'s dealings as trustee and before the same was taken into the Master's office, C. M. died, and on return of the Master's warrant to bring in the account C. M.'s executors brought in a new account differing from that rendered as aforesaid to T.'s solicitors, in that they applied receipts in liquidation in the first instance of the interest accruing

on C. M.'s claim, which method made a difference in the result of many thousand dollars. No account had been rendered to A. M.

Held, that as against T., C. M. and his executors were bound by the account previously rendered to T.'s solicitors and by the method of appropriation of receipts to principal contained therein, but were not so bound as against A. M., as against whom the account brought in by C. M.'s executors could stand.

In the account thus delivered in 1880, after the principal moneys were satisfied by application as aforesaid of receipts, interest was charged at ten per cent, on all subsequent receipts against C. M.

Held, that this was an error in the account, and the executors of C. M. were not bound by it, and to this extent the account might be rectified. *McGregor* v. *Gaulin*, 4 U. C. R., 378, considered and distinguished.

Held, by the Master in Ordinary, that the amounts paid by C. M. to a professional land agent in connection with the sale of the property, and a certain sum paid by C. M. to a professional accountant for making up the accounts delivered in 1880 should be allowed to him in his accounts.

But that sums paid by C. M.'s executors to a professional accountant for making up the account brought in by them into the Master's office, and a certain sum paid to C. M.'s solicitors on account of their costs in the action should not be allowed to C. M. in his accounts.

Held, also, by the Master in Ordinary, that C. M., as trustee-solicitor, was not entitled to profit costs, but, nevertheless, he was entitled to a commission of five per cent. on the amounts coming to A. M. and T., from which, however, must be deducted a certain sum paid as commission to a land agent for effecting the sale of the property, since double commission cannot be allowed. *Taylor* v. *Magrath*, 669.

See EXECUTORS AND ADMINISTRATORS—MORTGAGE, 1—RAILWAYS, 2—WILL, 5.

ULTRA VIRES.

See COMPANY, 1, 5—MUNICIPAL LAW, 6.

USAGE.

See DEFAMATION, 1.

VENDORS AND PURCHASERS

1. *Sale of infants' estate—Title—12 Vic. c. 72—R. S. O. c. 40, s. 76.*] —Certain infants' lands were sold under an order which appeared upon its face to have been presented under the statutable jurisdiction of the Court of Chancery relating to the sale of infants' estates: 12 Vic. c. 72—R. S. O. c. 40, s. 76. The petition and order were entitled in the matter of the infants, and the subsequent proceedings were taken as provided by the general orders of the Court, the order setting out that what was being done was because it was beneficial to the infants, and the conveyance was executed by the Referee for the infants. A subsequent purchaser objected that the order for the sale did not disclose any jurisdiction.

Held, that as the Court would never allow the infants to recede from what was so done for their

benefit, a subsequent purchaser could not raise doubts as to jurisdiction, when upon the face of the proceedings the statute authorizing the sale appeared to have been followed.

Calvert v. *Godfrey*, 6 Beav. 97, considered and distinguished. *Blean* v. *Blean*, 693.

2. *Sale at undervalue—Purchaser for value without notice—Advance by wife to husband without any contract for repayment.*]—L. F. D. being owner of certain valuable property, mortgaged it for $700, became of unsound mind and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and the property was sold for $900 to E. R., sister of M. A. D. Two years after E. R. sold the property to M. E. B. for $5,000, and a mortgage for $4,000 unpaid purchase money was taken to M. A. D.

In an action by L. F. D., his next friend, to set aside the sale or for an account, it was

Held, on the evidence that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D., but that as M. E. B. was a purchaser of value without notice, the sale must stand, but an account of the proceeds was ordered against M. A. D.

During the trial M. A. D. obtained leave to amend, and claimed to be allowed a sum of $1,500, which she alleged she had given to her husband, the plaintiff, as a loan, and which was employed in the purchase of the property and the building thereon.

Held, that as no contract for repayment was shewn, no security being taken and no attempt having been made to collect the amount, although many years had passed, the transaction could not be treated as a loan, and the wife could not recover or be allowed the amount so claimed. *Dufresne* v. *Dufresne et al.*, 773.

See SPECIFIC PERFORMANCE — WILL, 4.

VENUE.

Local venue—Abolition by Judicature Act—Vexatious Actions Act, R. S. O. ch. 73—O. J. A., Rule 254.] —*Held*, that the effect of Rule 254 of the Ontario Judicature Act is to abolish all local venues as well as those made so by statute as at the common law, except actions of ejectment.—*Legacy* v. *Pitcher et al.*, 620.

VERDICT.

Of jury for defendant—Setting aside and delivering judgment for plaintiff.]—*See* STATUTES OF FRAUDS, 1.

Addendum to.]—*See* MEDICAL PRACTITIONER.

WAREHOUSEMEN.

Administration— Banks — Warehouse receipts—Warehousemen taking possession of goods—Creditors without execution—Estoppel—Rights of personal representative—Corroborative evidence—43 Vic. ch. 22, sec. 7 (D.)]—In proceedings taken in the Master's Office to administer the estate of M. which was insolvent, the M. and D. banks brought in their claims as creditors. Other creditors opposed these claims on the

grounds that the banks had been paid large sums in reduction of their debts by assets of the deceased, which they had taken after his death and before administration. The banks set up their right to the assets so taken under warehouse receipts therefor, signed by H. and held by them. It appeared that M., who was a provision merchant, in his lifetime had obtained advances from the banks on the faith of the receipts being valid securities, he representing to them that he had rented the cellar of his warehouse to H. as warehouseman, and that as such H. had sole charge of the cellar. Before the receipts matured M. disappeared and was subsequently found dead. Before his death became known, H. and his solicitor took possession of the cellar and the property covered by the receipts, and posted up in the cellar a notice stating that H. held the property therein as warehouseman of the banks, to whom he had granted receipts. Two days after taking possession, H. refused to be any longer responsible for the property, which was subsequently taken by the banks under their receipts, and as it was rapidly deteriorating was sold by them. At the time of the sale there was no personal representative to M.'s estate, nor was there any execution creditor. It appeared by the evidence of H. that he had signed the receipts at M.'s request and as a matter of form, but that he had not leased the cellar, nor had he any control over it or the property contained in it.

Held, that the receipts were good between the parties, and by the result of the subsequent dealings they were rehabilitated so as to be valid against creditors by the act of intervention on H.'s part during the life of M.; but in any event, there being no creditor who had any *locus standi* when the banks sold under the receipts, they had the right to apply the proceeds to reduce their claim against M.'s estate.

Per BOYD, C.—There are two classes of persons authorized to issue warehouse receipts by section 7 of 43 Vic. ch. 22 (D.), (substituted for 34 Vic. ch. 5, sec. 45 (D.)) viz., bailees of goods and keepers of a warehouse, &c., and the same sort of proof is not required in the case of the latter as in the former. The test of their validity does not necessarily depend upon proving that the warehouseman was actually, visibly, and continuously in possession of them from first to last.

Per PROUDFOOT, J.—That section authorizes persons who are not warehousemen alone, but who may have other business also to give receipts, but these are comprised in the definition of "warehouse receipt," previously given in the statute, which requires the goods to be in the "actual, visible, and continued possession of the bailees."

Remarks as to the application to civil causes of the practice in criminal cases regarding the corroboration of accomplices. *Re Monteith—Merchants Bank et al.* v. *Monteith*, 529.

WARRANTY.

Chattels.]—*See* NEGLIGENCE.

See SALE OF GOODS, 2.

WATERS AND WATER-COURSES.

Riparian proprietor—Navigable stream—Reservation in patent.]—J.

A. was the patentee of a certain water lot on the River Ottawa, and the description in the patent covered the lot and two chains distant from the shore, but a reservation was contained therein "of the free uses, passage and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found in or under, or be flowing through, or upon any part of the said parcel of land hereby granted." The said water lot was subsequently conveyed to A. R., but the description in the deed to him only went to the water's edge.

In an action by A. R. against some owners of saw-mills on the river above his lot to prevent them from throwing saw dust, slabs, &c., into the river to his detriment in the use of his water lot. It was

Held, that the Ottawa River is a navigable stream in fact, and a riparian proprietor as such would therefore only be entitled to the water's edge. The reservation in the patent still left that part of the river a navigable stream, and did not convey an exclusive right to the grantee of the Crown, and the conveyance to the water's edge, did not carry the right further than to that edge. It is only by the special grant that a title passed to the two chains, and it still left the river with all its characteristics of a navigable stream.

The plaintiff also set up that he had a right by prescription to keep and use a boat house in front of his lot without being interfered with.

Held, that any structure on the water, even if existing for twenty years, would be an interference with the free use of the river reserved by the Crown and the right to so interfere could not be acquired by lapse of time. The action was therefore dismissed.

Warin v. *London, &c., Loan and Agency Co.*, 7 O. R. 706, distinguished. — *Ratté* v. *Booth et al.*, 351.

[Reversed on appeal to Divisional Court, 11 O. R. 491.]

WAYS.

46 Vic. ch. 18, sec. 546 (O.)—Closing up highway—Notice of intended by-law—Conditions precedent—Uncertainty.]—A municipal corporation passed a by-law to close up a highway, but the notices of the intended by-law required to be given under the "Consolidated Municipal Act, 1883," were only published for three successive weeks in a newspaper instead of four, as required by section 546 of that Act, and it was not shewn when the six notices required to be posted up, were posted, nor what they or the advertisement contained.

Held, in action for breaking down fences across the road closed up under the by-law, that the notices required to be given were conditions precedent, the due performance of which were essential to the validity of the by-law.

Held, also, that a by-law closing a road across a lot when there was more than one road was void for uncertainty in not shewing which road was meant. *Wannamaker* v. *Green et al*, 457.

See DEED, 2.

WIFE.

Insurance for benefit of.] — *See* INSURANCE, 2.

WILL.

1. *Devise—Statute of Mortmain—Bequest of personalty to a charitable institution to build a college.*]—J. M. died on August 9th, 1884, having made his will three days before, in which after giving certain legacies, he provided as follows: "I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church for the purpose of building a college in Canada and not elsewhere, and in his name." The Lutheran Church was not incorporated and held no lands, but was composed of a number of congregations in different parts of the Province. The lands upon which the various churches belonging thereto were erected, were vested in trustees for the benefit of the congregations, and some of these lands were suitable as building sites for a College.

Held, that the devise of the realty and all personalty savouring of the realty was void.

Held, also following *Giblett* v. *Hobson*, 3 My .& K. 517, that the bequest of the pure personalty was also void; that a bequest of money or other personalty to any charitable institution to build or erect builings, taken by itself, is within the Statute of Mortmain; and that the *onus* of shewing that the intention of a testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in Mortmain must be indicated or the future acquisition of building-land, otherwise than by means of the legacy, must plainly be contemplated, or the words of the will must expressly exclude the application of the money given in the acquisition of land, which was not done in this case. *Murray et al.* v. *Malloy et al.*, 46.

2. *Devise—Illegitimate child as as legatee—Death of illegitimate child during life of testator leaving legitimate issue—Lapse of legacy—R. S. O. c. 106, sec. 35.*]—R. B. by his will devised his property to executors upon trust as follows: "Fifthly, in trust to pay to each of my two surviving children F. B. and M. A. B. the sum of $1,000," and the residue after the payment of his debts, &c., &c., and the said legacies and an allowance to his executors, to his four sisters.

F. B. and M. A. B. were illegitimate children, and M. A. B. married and died during the lifetime of the testator leaving children surviving.

In a suit for administration and construction of the will it was

Held, that the words "child or other issue" in R. S. O. c. 106, sec. 35, mean legitimate child or other legitimate issue, and do not apply to an illegitimate child, and that the legacy to M. A. B. lapsed. *Hargraft et al.* v. *Keegan et al.*, 272.

3. *Devise — After-acquired property—"Contrary intention" — R. S. O. ch. 106, sec. 26.*]—The judgment of BOYD, C. (reported *ante* 9 O. R. 223), sustained on appeal to the Divisional Court, PROUDFOOT, J., dissenting.

Per BOYD, C.—The residuary clause in the will covers unquestionably all that the testator might acquire subsequent to the date of the will and down to the day of his death.

Per PROUDFOOT, J. — There is nothing in the will indicating that the testator was referring to a specfic

piece of property. The words, "The property on Hughson Street," read immediately before the death of the testator, would apply to all the lands on Hughson Street he then possessed, which, therefore, all passed to Robert Morrison; and the will should be thus read under R. S. O. ch. 106, sec. 26.

Per FERGUSON, J. — The will shews an intention on the part of the testator that his subsequently acquired property should be disposed of differently from the property vested in him at the time of the making of the will, and thus the "contrary intention" mentioned in sec. 26 of R. S. O. ch. 106, appears by the will, which consequently does not "speak or take effect as if executed immediately before the death of the testator." *Morrison* v. *Morrison*, 303.

4. *Devise—Estate in fee tail or fee simple—Vendor and purchaser—R. S. O. ch. 109.*]—M. C. by her will devised as follows: "First, I give and devise to my grandson J. C., the farm * * to have and to hold the same and every part thereof for and during his natural life, and after his death to the heirs of his body, should he leave any such, him surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be, amongst * * to have and to hold the same to them, their heirs and assigns forever; but my will and desire is that my grandson, J. C., shall not have or go into the possession * * until he shall have attained the age of twenty-five years, or five years after my death. Secondly, I give and bequeath to my son, J. C., $100 annually during his natural life, the same to be paid to him quarterly * * and to be a charge on the farm or homestead above devised to his said son John."

Held (reversing the decision of Proudfoot, J.), that the effect of the limitations was to give J. C. an estate tail, which he had barred as the result of his dealings with the land by way of conveyance. *Greenwood* v. *Verdon*, 1 K. & J, 74, distinguished.

Per PROUDFOOT, J.—"Heirs of the body" mean heirs of the body living at the death of J. C. J. C. took only a life estate, and his heirs of his body would take as purchasers a fee simple, if at J. C.'s death there were no heirs of his body, the estate would go to his then living brothers and sisters in fee simple. *Eden* v. *Wilson*, 4 H. L. C. 257, distinguished. *Re Cleator*, 326.

5. *Construction—Trust—Discretion—Failure of trust by death of trustee—Reference to Master to work out a scheme.*]—A testator having disposed of one-third of the residue of his estate, real and personal, devised and bequeathed the remainder to J. C., to hold to him, his heirs, executors, administrators, or assigns for ever in trust for the benefit of the testator's two sisters, and with all reasonable expedition to convert the same into money, and apply the same, or the proceeds thereof for the benefit of the said two sisters as he should consider just. And he directed that his other trustees should not enquire into or interfere with such distribution as J. C. might choose to make among the said two sisters, except when their concurrence should be necessary for conformity.

J. C. predeceased the testator.

Held, that the above was in substance an imperative declaration of a trust of the whole remainder for the equal benefit of the two sisters with a discretionary power reposed in the trustee as to its mode of execution, and the Court would undertake to discharge vicariously what could not otherwise be done, owing to J. C. predeceasing the testator, by referring it to the Master to ascertain the proper mode of carrying out the directions of the will.

Re Charteris, 25 Gr. 376, commented on.

Order made referring it to the Master to work out a scheme for the application and distribution of the fund.—*Charteris* v. *Charteris et al.*, 738.

WINDING UP

See COMPANY, 1, 3.

WITNESS.

Competency.]—*See* SEDUCTION.

WORDS, CONSTRUCTION OF.

"*Error or miscalculation.*"]—*See* ASSESSMENT AND TAXES, 3.

"*Line of credit.*"]—*See* BANKRUPTCY AND INSOLVENCY, 1.

"*Rig.*"]—*See* STATUTE OF FRAUDS, 2.

"*Work*"]—*See* STATUTE OF FRAUDS, 2.

"*By reason of the railway.*"]—*See* RAILWAYS, 1.

"*Contrary intention.*"]—*See* WILL 2.