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ONTARIO REPORTS,

VOLUME V.,

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:

CHRISTOPHER ROBINSON, Q.C.

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QUEEN'S BENCH DIVISION ..... S. J. VANKOUGHNET, Q. C.

CHANCERY DIVISION ..... A. H. F. LEFROY, GEO. A. BOOMER,

COMMON PLEAS DIVISION ..... GEORGE F. HARMAN,

BARRISTERS-AT-LAW.

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1884.

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JUDGES

OF THE

HIGH COURT OF JUSTICE,

DURING THE PERIOD OF THESE REPORTS.

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HON. JOHN HAWKINS HAGARTY, C. J.
" JOHN DOUGLAS ARMOUR, J.
" MATTHEW CROOKS CAMERON, J.

CHANCERY DIVISION:

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

COMMON PLEAS DIVISION:

HON. ADAM WILSON, C. J.
" THOMAS GALT, J.
" JOHN E. ROSE, J.

Attorney-General:

THE HON. OLIVER MOWAT.

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REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

SCOTT v. BENEDICT.

Vendor's lien.

W. S., being indebted to R. & Co., who held a saw mill and timber license, &c., belonging to W. S., in their own name, as security therefor, wrote to them that he had arranged with his son W. A. S. for the transfer to him of his business, and upon his arranging with R. & Co. the liability of W. S. that W. A. S. was entitled to be placed in the position of W. S. with respect to the property held by R. & Co., and that on settling that liability they were to convey to W. A. S. By a subsequent agreement W. S. agreed with W. A. S. that the latter was to pay off the liabilities of W. S. in two years, upon which W. S. was to transfer to him other lands than those held by R. & Co. Subsequent advances were made by R. & Co. to W. A. S. The defendants B. afterwards paid off R. & Co., and R. & Co. and W. A. S. joined in conveying the property in question to the defendants B., who subsequently made advances to W.A. S. and to his assignee, on his becoming insolvent. To some of these advances the plaintiffs, the executors of W. S., agreed by instrument under seal, stipulating that it should not affect their lien as against any one but the defendants B. They then claimed a lien on the lands for the amount of the liabilities of their testator W. S., which W. A. S. had agreed to pay as the consideration for the transfer to him of the business.

Held, affirming the judgment of GALT, J., CAMERON, J., dissenting, that no such lien existed, even if the defendants had had notice of the transaction between W. S. and W. A. S.

IN this case the plaintiffs were executors of the will of one Walter Scott. They claimed that the testator owned personalty and lands, mills, and timber licenses connected with

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his business of lumbering: that the property was mortgaged to Ross & Co., of Quebec, to secure the balance due them by him in their lumber dealings: that in 1870 he contracted with his son William A. Scott for the sale of all the business and estates on the consideration that the vendee should pay all mortgages and debts due by the vendor in the business, and all debts of the vendee for which the vendor was responsible, and that all such debts should be paid out of the proceeds of the lands, premises, and timber limits sold by said William A. Scott, including the debt, due to Ross & Co., and to one Rogers, and to one Read; and the vendee entered into possession: that Walter Scott by his will, in November, 1871, devised all said property to William A. Scott, on condition of his paying all existing claims against the testator's real estate, and that of his son Walter (a plaintiff): that Walter, Charles, and William A. Scott were appointed executors, and the plaintiff Thomas H. Scott devisee and trustee thereof: that the testator died in November, 1871: that William A. Scott became insolvent, and defendant Kempt became his assignee: that the insolvent died in August, 1876: that William A. Scott not having paid the debts as agreed, the executors filed a bill against him and his assignee Kempt, and obtained a decree on the 6th May, 1874, that they were entitled to a lien on the premises for the consideration of the agreement, and it was referred to the Master to take an account of the amount due, and an order was made for administration of Walter Scott's estate: that on 2nd October, 1881, the Master reported that the mortgages, claim and debt forming said lien amounted to $27,174.42: that on the 15th December, 1872, an agreement was made between Ross & Co., defendants Benedict and William A. Scott, that Benedicts should advance money to Scott to pay off Ross & Co., and to make further advances to Scott, and the Benedicts became mortgagees of the property: that when this agreement was made the Benedicts and Ross & Co. had notice of the agreement between Walter, the father, and Willam A. Scott, and of the lien existing, and that all Benedicts' advances

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were made subject to the lien: that Benedicts had been in possession down to the filing of the bill, and had made large profits: that the mortgage debt to Ross & Co. had been paid and nothing was due to the Benedicts: that for some years before his death William A. Scott was of unsound mind, and his accounts with the Benedicts were never adjusted: that the Benedicts obtained an assignment of the mortgage from Ross & Co.; and the plaintiff prayed redemption, enforcement of the lien, &c., &c.

The defendants submitted to be redeemed, but in substance claimed payment of all their advances to W. A. Scott before plaintiffs' lien. They denied all notice thereof, and of their being bound by the decree in equity of May, 1874.

It appeared that Robert Scott had for some years carried on the business of lumbering. He had a mill and limits. He was drowned in 1863, and died intestate.

His father Walter was his heir-at-law. His brother W. A. Scott was administrator, and for a year carried on the business. Then he carried it on for his father Walter.

They all had dealings with Ross & Co., timber merchants, at Quebec, Robert, Walter, the father, and William A. Scott, making advances for the business.

It seemed that the properties, mill limits &c., were put in Ross & Co.'s name absolutely, but it was admitted only as security for advances. Walter, the father, lived on his farm, and did not appear to have engaged actively in the business.

On 22nd November, 1869, Walter, the father, wrote to Ross & Co. that he had arranged with his son William A. "for the transfer to him of my business, and upon his arranging with you the amount of my liability to you upon our transactions he is entitled to be placed in my position with reference to Harvey Mill property, licenses and other property which you now hold in your names as security from me; and on his settling with you the amount of my liability to you, you will pray transfer this property to him, or as he may desire; for all which this shall be sufficient authority to you."

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On 21st December, 1869, Ross & Co. wrote to William A. Scott that under the authority of the preceding letter they acknowledged that "we own the property therein called the Harvey Mill property, being composed of lots 15, 8th concession, and 15, 9th concession, Harvey; also the Crown timber licenses standing in our names, &c., as security to us for all transactions which we have had or hereafter may have with you, including amounts due us standing at the debit of R. H. Scott's estate, and at debit of Walter Scott, the payment of which you assume, it being fully understood that nothing herein shall prevent our selling the said limits, or any of them, and placing proceeds to your credit in account; and should we deem it advisable so to do, we have right so to sell and dispose of such limits, or any part thereof," &c.

W. A. Scott wrote on this letter, 21st December, 1869: "I hereby acknowledge that Mr. J. J. Ross, now carrying on business under the name of Ross & Co., at Quebec, holds or is entitled to hold the property and licenses in the annexed letter as therein stated, and that he has the right to deal with them as therein stated."

On the 27th December, 1869, there was a bill of sale given by Walter Scott, per William A. Scott, his attorney, to Ross & Co., consideration over $71,000 (no redemption clause.)

On the 4th April following a memorandum of agreement between father and son was drawn in duplicate by Mr. Dennistoun.

Ross came up to Peterborough when these letters of 21st December were written. The amount of their claim was spoken of as about $250,000, including the whole charges and all the accounts. The $70,000 in the bill of sale was said to be a different thing.

The following was the memorandum of agreement:

"Whereas Walter Scott, the elder, of the Township of Asphodel, has been carrying on business as a lumber merchant and manufacturer of square timber, and has transferred the said business to his son William Adam Scott, and it was amongst other things agreed between them

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that the same William Adam Scott should pay, or cause to be paid, all debts due by the said Walter Scott in connection with the said business, and indemnify and save him harmless against the same; and further, that within two years from the date hereof the said William Adam Scott should pay off and procure the discharge of two certain mortgages made by the said Walter Scott on his lands at Asphodel, one held by one John Rogers, and the other by Mrs. Reed, amounting together to about the sum of $12,000, and in the meantime pay all interest moneys and charges which may accrue in respect thereof; and that the said Walter Scott should, upon the said William Adam Scott performing his part of the said agreement herein set out, or satisfactorily securing the performance thereof, he the said Walter Scott should grant and convey unto the said William Adam Scott the west half of lot 29 in the 3rd concession of Otonabee, lots Nos. 6 and 7, in the 8th concession, and lots No. 6, the south-half of lot No. 7, and lots Nos. 8 and 9 in the 9th concession of the township of Ennismore; lot No. 14 in the 8th concession, lot No. 18 in the 9th concession, and lot 14 in the 12th concession of the township of Harvey; and also lot No. 5, north of Sherbrooke street and west of George street; lots Nos. 3 and 4 south of Sherbrooke and west of George street; and lots Nos. 2, 3 and 4, north of Dalhousie street and west of George street, and also the north part of lot No. 10, north of Hunter street and west of George street, in the town of Peterborough—all the lots being in the county of Peterborough—free and clear from any incumbrances done, created, or permitted by him the said Walter Scott; such conveyance to be in fee :—

"Now these presents witness that each of them the said parties hereby for himself and his heirs, executors and administrators, covenant, promise and agree to and with the other of them, his respective heirs, executors, administrators and assigns, for the due fulfilment by him or his heirs, executors and administrators, of his or their part of the said agreement above recited.

"And it is further agreed and understood by and between the said parties, that should the said Walter Scott hereafter be called upon to pay any debts or sums of money above agreed to be paid by the said William Adam Scott, it shall and may be lawful for the said Walter Scott, (notwithstanding anything herein contained,) to sell and dispose of the above lands, or so much thereof as may be necessary to reimburse him the said Walter Scott, his heirs, executors, or administrators, such amounts.

"In witness whereof," &c., &c.

The mill property and limits were not mentioned in this agreement.

Mr. Dennistoun said, on this being mentioned, that the mill property had been dealt with by letter, and that this was property beyond the mill property.

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On the 26th April, 1870, there was a bill of sale from William A. Scott to Ross & Co., also another on the 17th February, 1870, all, as Mr. Dennistoun said, in substance the same, taken as security for advances, probably two or three in the course of a season.

The defendants, the Benedicts, were said to have had dealing for some years with the Scotts.

On the 10th August, 1871, a bill of sale was executed by William A. Scott to the Benedicts, with a copy of contract attached. It seemed that Ross & Co. were dissatisfied with William A. Scott's dealings with them, and negotiations were opened between them and the Benedicts, by which the latter took over the Ross mortgage. Walter, the father, had died in November, 1871. The suggestion to take this position came, it is alleged, from Mr. Bell, their solicitor, who communicated with the other parties.

An agreement, dated 15th December, 1871, between Ross, the Benedicts, and William A. Scott was put in. It recited that $73,171 was due from Scott to Ross for advances: that Ross was seised in fee of the two lots on which was the mill property and certain timber licenses in Harvey, Cavendish, Anstruther, and Sherbourne, with full power to sell to realize their claim, and desired Scott to pay, and that Scott had requested the Benedict to pay said moneys, and Scott had desired Ross to convey the same to the Benedicts on their paying Ross on behalf of Scott. Then Ross agreed to convey all said properties to Benedict; licenses to be all transferred. Scott covenanted not to cut timber without the Benedicts' assent, and to repay them the $73,171, and interest, and all moneys that they might pay as Crown dues, on or before 1st January, 1873, and also all money for insurances, or repairs, and all moneys payable or unpaid to them by reason of any accounts theretofore had between them; and the Benedicts agreed on Scott making said payments, and paying any further sums which might then be due and owing from him to them, they would convey and assign to him the lands and licenses, except the same, or such part thereof as might be sold under the

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conditions after mentioned. Then it was distinctly agreed that the Benedicts should have the absolute and unconditional right to sell absolutely the said lands and limits if Scott made default in payment of any advances which they might make to him as thereinafter mentioned, or in default of keeping the covenants in respect of getting out timber, &c., or making default in payment of all moneys due or to fall due by reason of any advances theretofore made to Scott, or under any previous agreement, or if he made default in payment in January, 1873, or in case of death, bankruptcy, &c., on a sale taking place, if there was any surplus after deducting expenses and said moneys respectively, and interest, they were to pay over the surplus to him. Then it recited that Scott was desirous of continuing his business, and that under arrangement the Benedicts had become entitled to said lands, limits, trees, timber, &c. Then followed various provisions for Scott cutting, &c., at certain rates, and that the Benedicts would make advances at certain rates on the quantities, &c., they to sell in Albany, reimbursing themselves all advances. Then provision was made for ten per cent. commission, the net proceeds to be applied first to the payment of the moneys to be paid in January, 1873, and then to the other payments. If Scott violated any of his covenants he was to become a tenant to the Benedicts of the premises; with various other provisions.

On the same 15th December, 1871, a deed was executed between the same parties, reciting that by the contemporaneous deed it was agreed that the lands, mills, and premises should be absolutely conveyed to the Benedicts, and that Scott joined in the same. Then Ross & Scott conveyed the two Harvey Mill lots to the Benedicts in fee, with covenants for right to convey, quiet possession, and further assurance, and that Ross & Scott had done no act to encumber. The Benedicts paid Ross the whole consideration.

In 1872, William A. Scott became deranged in mind, and also became insolvent, and Kempt was appointed his assignee. The dealings with the Benedicts appeared to have been continued.

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On the 29th October, 1873, appeared a deed by Kempt and the Benedicts, with the assent of the creditors, setting out that the estate could not then pay the Benedicts' claims: that destructive fires had occurred on the lands and large sums were required in lasting improvements before the logs could be got out, &c., and agreeing that the Benedicts should make advances to get them out and ship to market, &c., for the seasons of 1873-4: that if their claim on the limits and mills were paid off by the estate before the Benedicts had sold any of the limits, they were to account to the estate, &c.: otherwise confirming existing rights under the agreements of 1871; the Benedicts not to be treated against their will as mortgagees in possession.

Among the creditors' signatures to this agreement was "Walter Scott by T. H. Scott."

In May, 1874, the decree was made in the Chancery suit set out in plaintiff's bill.

A deed substantially to the same effect was executed 2nd September, 1874, for advances, &c., for the seasons of 1874-5.

To this deed Walter and Charles Scott, executors of the late W. A. Scott, were executing parties. Another deed substantially to the same effect was executed 13th July, 1875, the executors joining, for advances for the seasons of 1875-6.

A sealed memorandum was at the foot of this deed executed by all the parties:

"It is understood and agreed by and between the parties to the above contract, that the consent of the said parties of the third part (the executors) is not *as to parties other than the said James Benedict and Ezra G. Benedict, the parties of the second part thereto*, to operate as a waiver of or in any manner to prejudice the lien of the said parties of the third part under a decree of the Court of Chancery for Ontario in the cause of *Scott* v. *Kemp*."

A letter of T. H. Scott, of 16th September, 1875, shewed very clearly that he was a consenting party to this instrument.

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Several other letters of his to the Benedicts shewed how he understood the matter as to their position and as to his view of the Chancery proceedings.

Ross & Co. held absolutely in form, but really in security, Walter Scott's mill property, 400 acres in Harvey, and the timber licenses. They had the right to sell these if they thought proper to realize.

Walter made over the business to his son, and by the arrangement with Ross placed the son in the same position that he held towards Ross. He directed Ross to deal with the son, and in payment of this claim to convey to the latter, or as he might appoint.

By a separate arrangement with the son it was agreed that William A. Scott should get the business, and was to pay all debts due by Walter in connection therewith, and indemnify him against them, and in two years the son was to pay off two mortgages, one to Rogers, the other to Reid, to about $12,000; these mortgages did not affect the mill property, but were on Walter's lands in Asphodel.

On the son's due performance of his part of the agreement Walter was to convey to him a number of lots also, apart from the mill property, and if Walter should be called on to pay any of these debts, Walter might sell any of these lands necessary to reimburse himself.

No right or power was reserved by Walter as to the mill property, licenses, &c.

About eighteen months after this the arrangement with the Benedicts was made.

The case was tried by Galt, J., on 28th November last, without a jury, when he gave the following judgment:—

In this case the evidence satisfies me that the defendants had no notice, either actual or constructive, of the existence of any vendor's lien. I therefore give judgment affirming Mr. Justice Proudfoot's decree. As respects what may be called the "realty," as distinguished from the "timber limits," Mr. McCarthy admits that under the provisions of the registry law express notice was necessary to affect Mr. Ross, under whom the defendants claim, but he contended

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Mr. Ross had such notice, because Mr. Dennistoun, who acted as his solicitor, had knowledge of the dealings between the father, Walter Scott, and the son, W. A. Scott. Mr. Dennistoun, however, expressly denies any knowledge of any lien. He states, in answer to the question, "Did you suppose at the time that Walter Scott had any lien upon this property which had gone to Ross & Co.?" "I did not. What Benedict was buying from Ross & Co. was Walter Scott's debt. I did not suppose Walter Scott had any lien on the property which had been transferred by him to W. A. Scott. In the lumbering business, as far as Benedict is concerned, I don't think anything of the kind could come up, because what Mr. Benedict was buying was Walter Scott's debt." 2. "And I suppose I need not say you would not have been a party to a transfer of property from W. A. Scott to Benedict if you had supposed Walter had any lien upon it?" "No such an idea ever entered any one's head."

I accept this statement as entirely correct. It was, however, argued by Mr. McCarthy that old Mr. Benedict had notice through a conversation which he alleges he had with a witness named Crandall, who was a creditor both of Walter Scott and W. A. Scott. This conversation is denied by Benedict; but whether it took place or whether it did not, it would not, in my opinion, affect Benedict with notice. If it took place at all, it was before Mr. Benedict entered into negotiations for the purchase of the Ross claim, and was made when he was making advances to W. A. Scott to carry on his business during the then current year. It is to me incredible that the defendants would have gone on making advances to W. A. Scott had they the slightest idea that after the original debt due to Ross & Co. was paid, the alleged debt to Walter Scott must be discharged before any subsequent advance was payable. As respect the question of waiver, it is unnecessary to consider it, as, in my opinion, the vendor's lien has no existence as respects defendants.

December 5, 1883. *McCarthy*, Q. C., moved to set aside the judgment for the defendants and to enter it for the plaintiffs on the evidence and weight of evidence. He contended that the evidence shewed that there was no intention to waive the lien, and that there could be no waiver under the authorities without "a *manifest inten-*

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tion" to do so, and that the special security mentioned was only nominal and worthless: that in addition to the evidence of actual notice the law must impute notice to the defendants on the following grounds—that the evidence shewed that the defendants had made no enquiry whatever as to the title of the purchaser before creating a mortgage, and that such enquiry, if made, must at once have disclosed the lien of the plaintiffs: that the defendants obtained the legal estate through another mortgagee, who held it in trust for both vendor and purchaser under the form of an absolute deed, and that such mortgagee had notice of the lien through his solicitor, and that the defendants as assignees of a trust and a mortgage stood in the same position as the assignor thereof; and also that a Crown Timber License was itself a *chose in action*, and the assignee of it stood in the same position as the assignor as to equities arising upon it: that the agreement of 13th July, 1875, and other evidence shewed that the plaintiffs had not waived the lien; and that the Statute of Limitations had commenced to run at the time this suit began.

Bethune, Q. C., and *Barwick*, contra, contended that the decree against the purchaser had been waived by the special agreement of 13th July, 1875, between plaintiffs and defendants: that the vendor had waived his right to lien by his letters and dealings in the matter, and by taking special security: that the defendants were purchasers for value without notice, and that the lien was barred under the Statute of Limitations. The following authorties, on the question of lien, were cited: *Colborne* v. *Thomas*, 4 Grant 102; *Hughson* v. *Davis*, 4 Grant 588; *Paine* v. *Chapman*, 6 Grant 338; *Rutherford* v. *Rutherford*, 11 Grant 565; *Mitchell* v. *McGaffey*, 6 Grant 361; *Foulds* v. *Powell*, 6 Grant 375; *Mackreth* v. *Symmons*, 15 Ves. Jr. 329; *Winter* v. *Lord Anson*, 3 Russ. 490-2, S. C. 1 Sim. & St. 438.

On the question of notice through want of enquiry for title deeds were cited: *Gilleland* v. *Wadsworth*, 1 A. R. 96; *Hewitt* v. *Loosemore*, 9 Hare 458; *Atterbury* v. *Wallis*, 8

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DeG. M. & G. 466; *Peto* v. *Hammond*, 30 Beav. 502, 511; *Worthington* v. *Morgan*, 16 Si. 551; *Jackson* v. *Rowe*, 2 Si. & St. 475; *Montifiore* v. *Browne*, 7 H. L. C. 269.

On the point of notice through a trustee: *Loveridge* v. *Cooper*, 3 Russ. 58; *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Stackhouse* v. *Countess of Jersey*, 1 J. & H. 721; *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556.

On notice through assignment of a mortgage: *Ryckman* v. *Canada Life Assurance Co.*, 17 Grant 550; *Smart* v. *McEwan*, 18 Grant 623; *Elliott* v. *McConnell*, 21 Grant 266.

Chose in action: *Bennet* v. *O'Meara*, 15 Grant 396.

Notice through solicitor: *Boursot* v. *Savage*, L. R. 2 Eq. 134; *Fuller* v. *Benett*, 2 Hare 394; *Le Neve* v. *Le Neve*, White & Tudor's L. C. Equity, 3rd ed. 28.

February 16, 1884. HAGARTY, C. J.—A very large portion of the evidence and an equally large portion of the argument addressed to us applied to the question whether the Benedicts had or had not notice of the dealings between the father and the son, and it was pressed on us that if not directly, still constructively, through Mr. Dennistoun, they had such notice, and of an alleged vendor's lien in Walter.

The learned Judge who tried the case found, after full consideration, that they had no notice of either kind. Mr. Bell, in his and in my opinion, clearly acted as their solicitor in the dealing, and not Mr. Dennistoun, and any knowledge of the latter was not their knowledge, at least as to the agreement of the 7th April, 1870. The utmost extent of any alleged notice to Benedicts would be that the son had agreed out of the business to pay the debts thereof, for which the father was liable.

In the view I take of the case, the existence or non-existence of such notice is of little importance, and my opinion would be the same if all the documents executed had been before the parties.

The question for us is not whether as between Walter

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and his son William A. Scott there may not have been a lien, as shewn by the Chancery decree, on certain property, but whether on the evidence before us the property obtained by Benedicts through Ross, namely, the mill property and timber licenses, with their various renewals, is in any way affected thereby.

Benedicts' readiness to be redeemed on payment of these claims removes much difficulty, and after payment thereof the whole of the property made over by Walter to his son may be held bound by such lien. The decree does not affect to bind any but the parties before the Court.

The question for us is narrowed down to the point whether the Benedicts have the right to claim the amount due them as it stood after the lumbering operations for 1875-76, specially sanctioned by the last of the three deeds executed in successive years.

If we had now to decide whether a vendor's lien ever did exist as to the mill property and the licenses, I think we would feel great difficulty in upholding any such claim.

The limits, as we understand, constitute the great bulk of the property claimed, and getting the timber therefrom, and manufacturing it at the mills was emphatically "the business" made over by the father to his son. In carrying on that business the timber might be all used up, and the limits become almost valueless. It might be otherwise with the other properties specified in the deed or memorandum of 4th April, 1870, which had nothing to do with either the mill property or the limits, although as to that the vendor retained the title in himself as his security.

It must be borne in mind that Ross & Co. held the mill property and limits in their own name, with full power to sell at any time to realize their security.

All their rights passed to the Benedicts. So long as the latter continued making advances to William A. Scott in that business, so long had they the right to hold these properties as their securities.

Then, when Scott became insolvent, his assignee and creditors arrange with Benedicts to go on making advances

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to get out the timber, conceiving such a course most advantageous for the interests of the estate.

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At what period then were the Benedicts to be aware that anything had occurred, or was occurring, to prevent them going on as before?

If the plaintiffs' contention be sound, then, with knowledge of the original bargain between father and son, the Benedicts must have always gone on making their advances, knowing the property in their hands was primarily bound for the payment of all the debts of the business for which Walter the father was liable.

I am unable to understand how such an idea could have been entertained by either vendor or vendee, or by any one else, and I can enter into Mr. Dennistoun's understanding that the idea of lien was never thought of for a moment.

I think much confusion has been created by not bearing in mind the distinction between the two properties.

Ross & Co. had the mill property and limits in their own names, and with full uncontrolled powers to realize from them the whole of their claims.

Walter hands over all his interest therein, and in the business, to his son, the latter to pay the claims of Ross & Co., and on that being done these properties might be transferred to his order. They agree to this, subject to their present claims and for future advances. All these properties pass over to the Benedicts on the same terms. All this is distinct from the agreement already set out as to other lands, &c.

In my opinion so long as either Ross & Co. or the Benedicts, their vendees, continued making advances to the business, they could hold these mill and limit properties as security with or without notice of the original agreement between Father and son as to transferring the mill and limits.

When William A. Scott's estate passed to his assignee, Kemp, all the parties, including the present plaintiffs, join in recognizing their position, and requesting the continuance of their advancing monies from season to season.

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The second and third of the deeds are actually executed by the executors. The memorandum at foot of the last deed in 1875, after the Chancery proceedings, confirms my view that the decree has no effect on the present defendants' position.

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It provides that the executors' assent is not to operate as a waiver of or in prejudice of their lien under the decree as to all the world *except the Benedicts*. So that, as I read it, they expressly declare that their alleged lien is substantially waived as regards the Benedicts. This memorandum seems to me a distinct admission of and assent to this arrangement, and an exemption of the Benedicts from their claims under the decree.

The signers of the memorandum must be credited with meaning something by it. They must have known the absurdity of agreeing to the Benedicts being requested to go on making their advances, and yet making them under an unascertained claim of vendor's lien, amounting, as afterwards appeared, to over $26,000. But they now say, as I understand, that they do not dispute that the advances for these years are unaffected by their claim of lien. They must have been aware of the annual settlements of account with the estate, and of the very large claims of these defendants.

I have already stated that I think notice was unimportant.

Such a notice as Crandall speaks of would hardly amount at the best to a notice that the transactions with Ross and afterwards with Benedict were subject to a large claim on behalf of Walter's estate, taking priority of all advances made or to be made for carrying on the business.

This witness Crandall, as well as other creditors, was partly paid by the assignee out of proceeds of the estate which had been so far worked on Benedict's advances.

Lord St. Leonards says, V. & P. 671, 14th ed.: "In the case of a vendor who has actually conveyed, the lien remains, although he has no longer the estate. The principle is, that the lien for the purchase-money represented

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the estate, which in equity no longer was his;" * * * and this "though there was not any special agreement for that purpose."

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In *Wilson* v. *Daniel*, 9 Gr. 493, Esten, V. C., says: "It is quite clear that the law confers the right which is asserted in the present case independently of the agreement of the parties, and that in order to prevent its operation it must either expressly or by implication be extinguished. An intention of that nature may be, and often is, inferred from the circumstances, indeed almost always, when it is deemed to have become extinct, for it is seldom the subject of express stipulation." He points out the difficulty when both land and chattels of a partnership were assigned by one partner to another for a named consideration, no apportionment of the whole consideration having been made, and he adds, that if the lien could not be established for the full amount, (it could not be in the chattels,) it could not be established for any part, for it was impossible to say for what part it ought to be established, "and the circumstance that the parties have not apportioned and defined the particular part of the consideration appertaining to the land I may regard as evidence of their intention that no lien on the land should exist."

In connection with this we may notice that almost contemporaneous with the letters to and from Ross & Co., a bill of sale of chattels absolute in form was made by Walter Scott to Ross & Co. for the consideration of $71,000. This we presume to be loose property and plant used in the lumbering business.

Mathers v. *Short*, 14 Gr. 256, and the remarks of Van-Koughnet, C., noticing *Wilson* v. *Daniels*, may be read in this connection. *In re Brentwood Brick Co.*, L. R. 4 Chy D. 565, in Appeal, may be referred to as to what a vendor looks to for payment on the sale of an estate. To my mind the inference seems irresistible that no lien was either intended or created; that the sealed memorandum of 7th April, 1870, between the father and son, clearly shews on what the father relied. He says he has trans-

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ferred his lumber business to his son, who is to pay the debts and indemnify him, and within two years pay off two named mortgages to about $12,000, and on his so doing the father would convey to him the large quantity of *other* lands there named, with power to the father to sell all or any of such lands if the son did not pay the debts.

I have seen no case resembling this fully in its facts. A lumbering business is given over, out of which the vendor's business debts are to be paid. Such payment could only be made by working the business and getting advances therefor, and the valuable part of the property, the limits, were of the character of property *quod ipso usu consumitur*.

If the lien existed at all, it existed from the very beginning, and would always take precedence of all advances made to William A. Scott by any one having notice, and the amount of the lien would remain shifting from time to time, as any debts of Walter might be paid off.

I think the bill in its primary object to obtain priority over those defendants wholly fails, and should be dismissed with costs; but, as there is no difficulty as to defendants submitting to redemption, there may be decree therefor.

Nothing has been brought before us to warrant the opening of the account as settled from time to time between the assignee and these defendants.

ARMOUR, J.—On the argument I expressed the opinion that Walter Scott was not entitled to a vendor's lien, as claimed, upon the property held by Ross & Co and assigned by them to the defendants, Benedict, and subsequent consideration has only served to strengthen that opinion.

It was strongly urged, however, that because in a suit brought to establish this same lien by the present plaintiffs, or some of them, against the defendant Kempt, the present Chief Justice of Ontario had, when Chancellor, determined that there was such a lien we should follow his decision and be bound by it to its extent. That decision of the Chancellor has, however, never been reported, and

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it is impossible for us to hold ourselves bound by unreported decisions, for we cannot tell the evidence upon which they proceeded, or the reasons upon which they were founded.

In 1869 Ross & Co. held the property upon which this lien is claimed by titles absolute in form, but as mortgagees of Walter Scott, and, subject to the payment of their claim, in trust for him; and on the 22nd day of November, 1869, Walter Scott wrote to Ross & Co., as follows: "I have arranged with my son William A. Scott for the transfer to him of my business, and upon his arranging with you the amount of my liability to you upon our transactions he is entitled to be placed in my position with reference to Harvey mill property licenses and other property which you now hold in your names as security from me, and on his settling with you the amount of my liability to you, you will pray transfer all this property to him, or as he may desire, for all which this shall be sufficient authority to you."

On the 21st December, 1869, Ross & Co., wrote to William A Scott as follows: "Under the authority given us by your father Walter Scott, under his letter to us dated 22nd November last, we acknowledge that we hold the property therein called the Harvey Mill property (being composed of lot 15, in the 8th concession, and 15 in the 9th concession of Harvey, county of Peterborough), also the Crown timber licenses now standing in our names in the following townships, viz., Cavendish, Anstruther, Harvey, and Sherbourne, as security to us for all transactions which we have had or hereafter may have with you, including amounts due to us standing at the debit of R. H. Scott estate, and at the debit of Walter Scott, the payment of which you assumed, it being fully understood that nothing herein shall prevent our selling the said limits, or any of them, and placing proceeds to your credit in account; and should we deem it advisable so to do, we have the right to sell and dispose of such limits, or any part thereof. You of course fully understand that the firm of Ross & Co. is

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composed of James G. Ross alone, that being the name which Mr. James G. Ross is now carrying on business under."

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On the same day William A. Scott signed the following acknowledgment, annexed to the said last mentioned letter: "I hereby acknowledge that Mr. James G. Ross, now carrying on business under the name of Ross & Co. at Quebec holds or is entitled to hold the property and licenses in the annexed letter as therein stated, and that he has the right to deal with them as therein stated."

I hold upon the evidence that the defendants Benedict had through Mr. Bell, their solicitor, actual knowledge of these letters, but even were I wrong in this the defendant Benedicts must still be held to have had notice of them.

"So the purchaser is in like manner supposed to have knowledge of the instrument under which the party, with whom he contracts as executor or trustee or appointee, derives his power." *Story's* Equity Jurisprudence, sec. 400.

William A. Scott became a party to the assignment from Ross & Co. to the defendants Benedict at the express suggestion of Mr. Bell. He became such party expressly as mortgagor, and the defendants Benedict must be taken to have had knowledge of his title as mortgagor, and the instruments under which he acquired it.

Now if a lien arose in favour of Walter Scott upon this property, it must have arisen upon his having written the letter of the 22nd of November, 1869, and would take priority immediately after the then claim of Ross & Co. and before the advances made by Ross & Co. during the two years next succeeding the writing of this letter, during which they are proved to have been making advances to William A. Scott.

Then what was the lien to be for? For the consideration to be paid by William A. Scott for the property held by Ross & Co. What was that consideration? Why, plainly, the relief of Walter Scott by William A. Scott from the liability of Walter Scott to Ross & Co.; "and on his settling with you the amount of my liability to you, you will pray transfer all the property to him, or as he may desire."

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Suppose that after this letter was written William A. Scott had paid to Ross & Co. the liability of Walter Scott to them, and had then sold the property to the Benedicts for double the amount of Ross & Co.'s claim, and had put the money in his pocket, could Walter Scott have been held to have a lien upon the property in the hands of the Benedicts, and if so, for what? and what difference is it that William A. Scott mortgaged it to the Benedicts?

The plain import of this letter seems to me to furnish a sufficient answer to these questions.

It will have been observed that in this letter Walter Scott says: "I have arranged with my son William A. Scott for the transfer to him of my business;" and it is contended that whatever William A. Scott agreed to do in consideration of such transfer, Walter Scott became entitled to a lien for upon the property held by Ross & Co.; but I think this letter manifests a clear intention on the part of Walter Scott that there should be no such lien. "And on, his settling with you the amount of my liability to you you will pray transfer all this property to him, or as he may desire," seems to manifest this intention beyond doubt.

The arrangement for the transfer by Walter Scott of his business to William A. Scott does not seem to have been finally concluded until the fourth day of April, 1870, when this instrument was drawn up and executed by them under their hands and seals: [The learned Judge here read the agreement set out, *ante* pp. 4 & 5.]

I hold upon the evidence that neither Mr. Bell nor the defendants Benedict, nor Ross & Co., except through Mr. Dennistoun, had any actual notice of this agreement, and that the defendants Benedict had no notice whatever of it, unless they must be held to have had notice of it from the fact of their having had notice of the letter of the 22nd November, 1869. "And, generally, it may be stated as a rule on this subject, that where a purchaser cannot make out a title but by a deed which leads him

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to another fact, he shall be presumed to have knowledge of that fact." *Story's* Eq. Jur. sec. 400. And it may be contended that the statement in the letter, "I have arranged with my son, William A. Scott, for the transfer to him of my business," of which the defendants Benedict had notice, led them to the fact of the agreement above recited, and that they must therefore be presumed to have had knowledge of it.

I do not think that the expression, "I have arranged with my son William A. Scott for the transfer to him of my business," would be fair notice to a purchaser that "business" included Walter Scott's interest in the property held by Ross & Co., so as to put him upon enquiry and thus affect him with notice of the arrangement for the transfer of the business; neither do I think that the word business, as used in the letter and in the agreements of the 4th of April, includes or was intended to include such interest.

But assuming that it does include it, and that Ross & Co., and the defendants Benedict, all must be held to have had notice of the agreement of the 4th of April, I think then that, looking at this letter and agreement of the 4th of April and treating them both as parts of one transaction, they manifest a clear intention on the part of Walter Scott that he was to have no lien upon the property held by Ross & Co., except for his liability to them, and that he was to look to the agreement of the 4th of April, and to that alone, as his security for the carrying out by William A. Scott of his agreement therein contained.

What could be a plainer manifestation of such intention (short of an express disclaimer,) than his taking the security of the agreement of the 4th of April, and his saying, "settle my liability to Ross & Co., and they will transfer the property held by them as you may desire."

If he had intended to retain a lien on the property held by Ross & Co., for the performance by William A. Scott of his agreement, would he not have so provided by the agreement of the 4th April? And when by that agreement

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he does take security for such performance on other property, does it not clearly shew an abandonment of the property held by Ross & Co. as such security?

Besides, he no doubt knew that William A. Scott would be obliged to obtain advances on the security of this property in order to carry on the business which he had transferred to him, and that a lien upon the property, such as is contended for, would put it out of his power to obtain such advances.

He no doubt also knew that Ross & Co. were continuing to make advances to William A. Scott, as they had previously done to him, upon the security of this property, and was standing by and permitting them to do it, although his alleged lien took precedence of such advances.

The purpose for which this property was to be used also clearly indicates that no lien was to be held upon it by Walter Scott. Such a lien would have prevented its being used at all, when the intention was, that it should be used for the carrying on of the business, and thus paying off the liabilities incurred by Walter Scott himself.

If a lien is to subsist on the property held by Ross & Co. for the performance by William A. Scott of his agreement, for what amount is it to subsist? Not for more than its purchase money? What was that purchase money? What was it valued at over and above Ross & Co.'s claim? What did the business consist of transferred by Walter Scott to William A. Scott? What was it valued at? If it included Walter Scott's interest in the property held by Ross & Co., it must also have included all the plant and chattel property necessary to and ordinarily used in the carrying on of a lumber business. What was the value of the lands which Walter Scott was to convey to William A. Scott on the performance by him of his agreement?

The fact that no separate valuation was put upon these several properties is another indication that it was intended by Walter Scott that no lien should be upon the property held by Ross & Co., except for his liability to them.

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If the defendants Benedict shall be obliged to pay all that William A. Scott was bound to pay by the agreement of the 4th April, they will surely be entitled to the lands, if not to the business mentioned in that agreement, and the plaintiffs do not profess in their pleadings their readiness and willingness or their ability to transfer to them either the one or the other.

I have not forgotten the evidence of notice deposed to by White and Crandall; but in my view it is not important, for I have no doubt the defendants Benedict were aware that William A. Scott was to pay the debts of Walter Scott incurred in connection with this business, and I have as little doubt that they never knew until the filing of this bill that any one claimed that such debts were a lien upon the property held by Ross & Co., and transferred by Ross & Co. to them.

It is difficult to understand how, in a Court of Equity, this alleged lien could be held to prevail over advances made by Ross & Co. for William A. Scott and Walter Scott standing by and being aware that they were being so made under the belief that there was no such lien, and over advances made by the defendants Benedict for William A. Scott and for his assignee, Walter Scott's representatives standing by and knowing that such advances were being so made under the belief that there was no such lien; but I do not rest my decision on this ground, but solely on the ground that it was the manifest intention of Walter Scott that he should have no lien upon the property held by Ross & Co., except only for his liability to them. I refer to *Bolton* v. *Gillespie*, 8 Gr. 223; *Wilson* v. *Daniels*, 9 Gr. 491; *DeGear* v. *Smith*, 11 Gr. 570; *Mathers* v. *Short*, 14 Gr. 254; *Anderson* v. *Trot*, 19 Gr. 619; *Mackreth* v. *Symmons*, 1 W. & T. 289; *In Re Brentwood Brick and Coal Co.*, 4 Chy. D. 562.

CAMERON, J.—I find myself compelled to dissent from the conclusion arrived at by my learned brothers; but in differing from them I do so with the greatest distrust of

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the soundness of my own judgment; not alone because the opinions just expressed are opposed to mine, but also because the practical application in a Court of Equity of the equitable principles involved in the questions to be decided is not familar to me.

The present Chief Justice of Ontario, while Chancellor, decided, in a suit instituted by these plaintiffs against the estate of W. A. Scott, that the plaintiffs had the lien claimed in this suit. If that decision was correct, there is nothing in this case to prevent such lien taking effect against the defendant, unless his title was acquired without notice that any claim existed giving a right to the lien.

My learned brothers have, in the opinions just expressed, held that no lien does exist: that the nature of the transaction and property precludes the view that an intention could have existed on the part of Robert Scott or of W. A. Scott that the property should be looked to as a security to the former for the performance by the latter of his obligations to pay his father's liabilities. I do not find authority to sustain such opinion, which is as I have said opposed to the decision of the learned ex-Chancellor, who was, from his long and great experience as the head of the Court of Chancery, thoroughly familiar with the principles governing the law in relation to a vendor's lien, and the application of these principles in actual practice; and in the absence of clear authority to the contrary, I should hesitate to dissent from any opinion expressed by him upon such a question as this case presents.

I find the general principle to be succinctly stated by Lord Eldon in *Mackreth* v. *Symmons*, 15 Ves. 329, after a review of the authorities to that time. At p. 349: "From all these authorities the inference is, first, that generally speaking there is such a lien; secondly, that in those general cases in which there would be the lien as between vendor and vendee, the vendor will have the lien against a third person who had notice that the purchase money was not paid."

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The lien is therefore to be assumed to exist where the purchase money has not been paid, and it is for the vendee to shew that it was not intended to exist: the burden is cast upon him to displace the presumed right. This may be done by evidence of an express agreement or understanding that no lien should exist, or the nature of the transaction itself may be such as to exclude the lien.

I see nothing in the nature of the transaction in this case to show that it must have been the intention of the parties to look to the personal responsibility of W. A. Scott and not to the land or timber limits. Nothing would seem more equitable or just than that the father who transferred his property and business to his son, upon the condition or understanding that the son would pay the father's liabilities in respect of such property and business, should have a lien upon the property, or upon such portions of it as could in law be made subject to such lien, to secure the performance of the condition and understanding.

A lien may exist in respect of a part of the vendee's obligation, while as to another part it will not. This was held in the case already referred to of *MacKreth* v. *Symmons*.

In *Nives* v. *Nives*, L. R. 15 Chy. D. 649, the action was by the vendor of a business and business premises to enforce specific performance of the contract for sale, and to obtain a declaration that he was entitled to a lien on the business and leasehold premises for the purchase-money, and it was decreed he was entitled to specific performance and to a lien on the leasehold premises. The case is very meagrely reported, perhaps as it was a matter in respect of which there could be no doubt, as Fry, J., made the decree or order without assigning any reason for so doing, just as the learned Chief Justice of Ontario did in the case of the plaintiffs against W. A. Scott, in respect to the property in question.

There is no evidence negativing an intention to claim a lien here.

I feel much more difficulty on the question, as to whether

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the defendant Benedict had such notice of the lien or right of the plaintiffs or their testator as would give the lien priority over the advances made by him to W. A. Scott over and above the payment of Ross's claim.

There is some difficulty in determining the exact status of Benedict, that it is to say, whether his title is to be regarded as legal or merely equitable. If merely equitable, the question of notice may be of little importance by reason of the maxim, that between equities *qui prior est tempore potior est jure.*

Though he has the timber license in his own name, and the title to some of the lands, he is admittedly only a mortgagee, and, subject to the amount paid by him to redeem Ross he is a trustee for W. A. Scott; and in taking a transfer from Ross, he must, I think, as my brother Armour has said, be deemed to have had notice to the extent, at all events, of Ross's claim of the unpaid purchase money, so to designate it.

Then, if he had notice that there was purchase money unpaid, must he not be taken to have notice so as to affect him to the full amount unpaid, though that amount was greater than the amount of which he had actual notice. I think he must, and that the plaintiffs' lien must have priority over the advances made by defendant in excess of the advance made to redeem Ross, but not over those advances made with the consent of the plaintiffs subsequent to the proceedings taken by them to have their lien declared as against the estate of W. A. Scott.

I have not referred to the evidence of Crandall affecting the defendant with notice, nor to the knowledge of Mr. Dennistoun of the transactions between the testator and his son W. A. Scott; but, taking all the circumstances together, I scarcely think it possible that the defendant was not aware of the particulars of the dealing between father and son, and that the consideration for the transfer of the father's interest in the business timber limits and lands, was the payment to be made by the son of the debts and obligations of the business.

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I am, therefore, of opinion that the lien claimed by the plaintiffs, in respect of the unpaid debts and obligations of the testator assumed by his son, is an equity stronger than that arising out of advances made by defendand to W. A. Scott after he acquired Ross's title to the licenses and lands.

I think the language of the Lord Chancellor in *Winter* v. *Lord Anson*, 3 Russ. 492, quoted by Baggallay, J. A., in the case of the *Brentwood Brick and Coal Co.*, L. R. 4 Chy. D. 565, may very appropriately be used in reference to the circumstances of this case. It is: "As in this case there was no agreement for the extinguishment of the lien, and as, in my judgment, there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that such was the intention of the parties, I think it should be declared that the plaintiffs have a lien upon the estate in question for the residue of the purchase money."

In the case *Re Brentwood Brick and Coal Co.* the lien was denied, but the circumstances are in no way analogous to those in this case, and the decision does not militate against the general principle that a lien exists for unpaid purchase money or its equivalent.

In determining the question of notice all the circumstances have to be regarded, and on all these I think it has been made out if necessary to be proved.

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[QUEEN'S BENCH DIVISION.]

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STAR KIDNEY PAD COMPANY AND GEORGE A. WALTON v. GREENWOOD.

Action on note—Partial failure of consideration—Sale of goods—Misrepresentation—Rescission of contract.

K., acting as agent for the plaintiff company, his wife, but which was in reality a trading name for his own business, fraudulently represented that certain goods manufactured by himself possessed curative or medicinal qualities and were saleable, and thereby induced the defendant to buy a quantity and to give his promissory note therefor.

In an action on the note by the plaintiff company, the defendant counterclaimed for part of the amount of the note, which he had been obliged to pay to an innocent holder. The jury found that the articles sold were valueless: that defendant had been induced to purchase by the misrepresentations, and that he had received no consideration for the note, except as to some of the pads, which he had sold.

Held, that the plaintiff could not recover, for the partial failure of consideration, being for an amount capable of definite computation, could be set up as an answer *pro tanto*, and the consideration received had been more than covered by the sum paid.

Held, also, that the defendant was entitled to recover against the plaintiff company the damages sustained, without having previously offered to return the goods.

It was objected that the representation had not been found to be false to the knowledge of the plaintiff company; but *Held*, that the question as put having been assented to by counsel on both sides, as one the finding on which would be decisive, it was too late to take this objection; and the effect of the finding must be taken to be that defendant knew the representation, which was as to goods of his own manufacture, to be false.

ACTION on a promissory note, made by the defendant, dated July 18th, 1882, payable to the plaintiff company, three months after date, for $766, payment thereon of $500 admitted, claim in respect of balance $266.90, and interest from October 21st, 1882.

Defence by defendant, that he never received any value or consideration for the making of the said note: that the plaintiff company approached him to buy a quantity of pads from the plaintiff company, falsely and fraudulently representing that the said pads were a good and saleable article, and that the plaintiff company had sold large quantities of the said pads, whereby the defendant, relying solely upon said representation, was induced to purchase from the plaintiff company a large quantity of said pads, and the defendant gave the said promissory note in payment of the said pads: that after the purchase of the said

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pads the defendant ascertained that the said pads were perfectly valueless and unsaleable; and the defendant had been and still was unable to sell the said pads: that the plaintiff company obtained the said note from the defendant by fraud and misrepresentation, in this, that they represented to the defendant that the said pads were a good and saleable article, well knowing that the same were perfectly valueless and unsaleable, and the defendant would not have made the said note except through the fraud of the plaintiff company.

Counter claim by defendant, that defendant purchased from the plaintiff company a quantity of pads to the amount of $766.90: that plaintiff company at the time of such purchase falsely and fraudulently represented to the defendant that the said pads were a good and saleable article, and the defendant, relying upon said representations, purchased the said pads and gave the promissory note sued on: that after the delivery of the said pads he ascertained that the said pads were perfectly valueless and unsaleable, and still held the same: that after the discovery that the said pads were valueless the defendant offered to return the said pads to the plaintiff company, but they refused to accept the same: that by reason of such false and fraudulent representation the defendant was put to great expense and loss of time, and lost valuable sales which he would have made except for the false and fraudulent representations of the plaintiff company: that the plaintiff company, after the said note was given and before the maturity thereof, pawned and pledged the same to an innocent holder for value, to the amount of $500, and the defendant was compelled to pay the said holder, one George A. Walton, the said sum of $500 and costs, amounting to over $100. The defendant claimed that he should be repaid the said sum of $500 paid to the said George A. Walton and interest thereon, and the sum of $200 for costs and expenses in connection therewith, for loss of time in connection with the same $100, and for sales lost by the defendant $50.

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Issue.

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It appeared shortly before the trial that the company's assets had been transferred to the plaintiff Walton, who was accordingly made a party.

The cause was tried before Galt, J., with a jury, at the last Fall Assizes at Toronto.

The plaintiff company was a married woman, the wife of Arthur E. Kidd, who as agent for the company made the following contract with the defendant :

"ST. CATHARINES, July 18, 1882.

"*To the Star Kidney Pad Co., Toronto, Ont.* :—

"Deliver to American Express Company at Toronto for me, at your convenience, three gross of your kidney pads. You will kindly assort them right, exchanging undesirable sizes for any others I may wish any time, at $24, $16 and $12 per dozen. Terms, four months' note, payable in Toronto, and not otherwise or elsewhere. Also one gross of Dr. Leduc's periodicals, at $4 per dozen, terms same as pads, advertising me in the two papers here, *Hamilton Spectator* and *Canada Christian Advocate*, *Thorold Post* and Welland papers, if, while and when you are using them. I will do the posting at $2, $1, and 40c. per 100, and charge to you ; so send me some of the posters, flyers, circulars, pamphlets, and show cards as many as you can conveniently spare. You are to send me all orders received by you for my disposal, and to advertise me as the sole agent. The above is the entire agreement with Mr. Kidd.

Star Kidney Pad Company. *Per* A. E. K.

"A. J. GREENWOOD."

"P.S.—I have received one special pad on this order, and I will not cancel this order or contract."

The goods referred to in the contract were immediately shipped to the defendant, who, a few days after, thinking he had made a contract for too large a quantity, shipped some of them back, but the plaintiff company refused to receive them. The defendant thereupon and on the 16th August, 1882, sent to the plaintiff company the note sued on, enclosed in the following letter :

"St. Catharines, August 16th, 1882. Gentlemen,—Inclosed you will find note as per contract, the one you sent has been mislaid. You will greatly oblige by having balance of goods returned per steamer 'Picton' and Welland railroad."

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The defendant gave evidence that the plaintiff company's agent canvassed him for the above order: that he shewed him a pamphlet setting forth the virtues of the star kidney pad, with testimonials as to cures effected thereby: that he said they were genuine testimonials: that the pamphlet was read to him and left with him: that he took out one of the pads and shewed it to him, when he said those pads were giving good satisfaction, being a sure cure for all diseases of the kidneys and urinary organs, also saying that the testimonials were genuine. The defendant was asked, "As a result of what he said to you, shewing you the pamphlet, shewing you the testimonials, shewing you his order book, stating that the pad was a curative agent for all the diseases mentioned there: that they were giving good satisfaction: that he had heard no complaint made about them, and that they were going to advertise largely, you gave him the order?" and his answer was, "I gave him the order on those grounds." He also said that it was in September or October that he first discovered that the pads were worthless and unsaleable.

The plaintiff company's agent said the plaintiff company was his wife, and that he was the agent: that it was his money that was in the business, that, in fact, it was his own business. He was asked in direct examination, "Did you, as a matter of fact make any representation to him as to the character of the goods?" His answer was: "I do not think I did, but if the man asked me I would certainly tell him what I knew about it." On his cross-examination the following took place: "You say you cannot recollect whether you made any representations? I am asking you whether you made any representations or not—whether false or not, did you make any representations or not, as to its being a good curative agent?" A. "I do not know as I did in that particular case." Q. "Will you swear you did not?" A. "I will swear I did not; I have thought it over since, and I remember his conversation with me, I will swear and he would not let me."

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Evidence was given on the part of the defendant by a chemist, who had analyzed the contents of the kidney pad, as to what it contained, and by two medical men, of its worthlessness as a curative agent; and evidence was given on the part of the plaintiffs by a number of persons who asserted that they had derived benefit from it.

The learned Judge asked the jury the following questions, which they answered:

1st. Did the defendant receive any value or consideration for the note, except as to the pills, and six or eight pads? No.

2nd. Did the plaintiff's agent by false representations induce the defendant to purchase the pads, and give the note? Yes.

3rd. Does the evidence satisfy you the article is perfectly valueless? Yes.

4th. Did the defendant offer to return the goods to the plaintiffs, that is to say, did he tender them to them after he had determined to repudiate the contract? No.

Upon these findings the learned Judge directed judgment in favour of the defendant, dismissing the action with costs, and directed a judgment in favour of the defendant as against the Star Kidney Pad Company for the sum of $450 on his counter-claim with costs; and he directed that the defendant before issuing execution on the said judgment should return to the plaintiffs the pads received by him from them, less eight pads sold by him, and for which allowance had been made to him in fixing the amount of the judgment on the counter-claim.

December 7th, 1883. *Bethune*, Q. C., obtained an order *nisi* to set aside the verdict on the law, evidence, and weight of evidence, and to enter judgment for the plaintiff Walton, for the amount of the note sued on, and to enter judgment for the plaintiff the Star Kidney Pad Company on the counter claim, the jury not having found that the company were proved to have known the articles were

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worthless, which was necessary in order to maintain the counter-claim, which was an action of deceit.

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February 15, 1884. *Osler*, Q.C., shewed cause, referring to *Clough* v. *London and North Western R. W. Co.*, L. R. 7 Ex. 27; *Morrison* v. *Universal Marine Ins. Co.*, L. R. 8 Ex. 204; *Byles* on Bills, 13th ed., 132.

J. H. Macdonald, contra, cited *Udell* v. *Atherton*, 7 H. & N. 172; *Fraser* v. *McLean*, 46 U. C. R. 302, contending there was no evidence of misrepresentation, and that defendant was not in a position to restore the goods.

March 1, 1884. ARMOUR, J.—At the trial both parties treated the main question, and the one necessarily decisive of the plaintiff's action, to be whether the kidney pad was a valuable or valueless article, considered as a curative agent.

I do not see upon what grounds we can say that the finding by the jury that it was perfectly valueless was contrary to evidence, or so contrary to the weight of evidence that we ought to conclude that it was such a finding as twelve reasonable men ought not to have made.

There was evidence both ways proper to be submitted to the jury, and such evidence was submitted to them with a charge from the learned Judge to which the plaintiffs did not except, and to which they could not have reasonably excepted as being unfavourable to them.

The finding that the kidney pad was perfectly valueless necessarily involved the finding that the defendant did not receive any value or consideration for the note except as to the pills and six or eight pads.

It was contended, however, that there being only a partial failure of the consideration for the note, the plaintiffs were entitled to recover the balance due upon it, and that this latter finding warranted such recovery.

But partial failure of the consideration for a note or bill can always be set up as an answer *pro tanto* to an action upon such note or bill between the immediate parties to it, where the amount of such partial failure of

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consideration is capable of definite computation, (see *Agra and Masterman's Bank* v. *Leighton*, L. R. 2 Ex. 56.) In this case the pads and pills having been sold at a fixed price per dozen, the amount recoverable in respect of the pills and of the six or eight pads used by the defendant was capable of definite computation, and as this amount was much more than covered by the $500 which had already been paid by the defendant on account of the note, the plaintiff's action was properly dismissed.

I do not think that we can, upon any proper grounds, say that the finding that the plaintiffs' agent, by false representations, induced the defendant to purchase the pads and give the note, was contrary to evidence or the weight of evidence.

The counter-claim, as framed, is an action for deceit by the defendant against the plaintiff company to recover damages from the plaintiff company for the false and fraudulent representations made by the plaintiff company upon the sale of the pads to the defendant; and it is contended that this finding did not entitle the defendant to succeed upon his counter-claim, because, first, the plaintiff company was not liable to an action for deceit by reason of the false representation of its agent; secondly, that in order to entitle the defendant to succeed, the representation must not only have been found to be false, but also false to the knowledge of the plaintiff company; and thirdly, that the defendant's action was not maintainable without an offer having first been made by him to return the goods, the subject matter of the representation.

The Star Kidney Pad Company is not a corporation, but merely a name used as a business style by the person carrying on the business of making and vending Star Kidney Pads. Kidd, the so-called agent, said that his wife was registered (under R. S. O. ch. 123, sec. 9, I presume,) as carrying on this business under this name, but that the business was really his. The so-called agent was therefore really the principal, the plaintiff company, and we are not called upon to face the difficulty presented in *Udell* v. *Atherton*, 7 H. & N. 172.

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The question put to the jury, and found by them, was so put with the assent of counsel for both parties, as being a question the finding of which, with the other findings, would be decisive of the defendant's right to recover on his counter-claim; and if the counsel for the plaintiffs desired the question to be put as he now insists it ought to have been put and found, in order to entitle the defendant to recover on his counter-claim, he ought then to have insisted upon the learned Judge so putting it, and I think it is now too late for him to do so. See *Clough* v. *The London and North Western Railway Company*, L. R. 7 Ex., at p. 38.

I think that we must now take the effect of the finding to be that the representation was false to the knowledge of the party making it. Besides, he was the person who made the pads, and knew the ingredients they contained; and it must have been within his own knowledge whether the representations he was making with regard to them were true or false.

When a buyer seeks to recover damages by an action for deceit against the seller of any property by reason of any false representation made by such seller upon the sale to him of such property, it is not necessary for him, in order to maintain such action, to return or offer to return the property so sold, and in respect of which such representation was made. It is only necessary to do so when the buyer disaffirms and seeks to rescind the sale as being altogether void by reason of the false representation, and to recover back the consideration he has paid or given for the property.

The finding, however, as it stands, and the finding that the pads were perfectly valueless, would entitle the defendant to a rescission of the contract so far as the pads are concerned, the contract for the pills and for the pads being severable, and to be repaid the money which he has paid in respect of the pads, he having done nothing after the discovery of the fraud to affirm the contract; and I think the defendant might now be allowed to amend his counter-

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claim by making it a claim for rescission and repayment, and averring (if that be necessary where the pads are proved to be worthless), a readiness and willingness to return the pads and to pay for such of them as he has used. Such an amendment would be what justice would require, and would be only doing by pleading what the learned Judge has already done by his judgment.

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I do not understand that in equity it was a necessary prerequisite to the maintenance of a bill for rescission that that there should have been a previous offer or tender of restitution; but all that was necessary was in the bill to aver a readiness and willingness to restore; but if the defendant answered, submitting to a rescission, the plaintiff might subject himself to the costs of the action by not having previously offered or tendered restitution.

In my opinion the order *nisi* should be discharged, with costs.

HAGARTY, C. J., and CAMERON, J., concurred.

Order nisi discharged, with costs.

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[CHANCERY DIVISION.]

WALLACE V. THE CORPORATION OF THE TOWN OF ORANGEVILLE.

Injunction—Ratepayer—Estoppel—Parties.

On a motion for injunction by W., a ratepayer, against a town corporation, to restrain them from paying for a site for a post-office, it was shown that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by one McA.) should be chosen, that W. had taken an active part in support of the one owned by the corporation, and the majority of ratepayers had voted for the other. It was contended that W. was estopped by his conduct from maintaining the suit, and that McA. and the individual members of the corporation should have been made parties. W. having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given.

Held, that he was not estopped, and, for the purposes of the motion, that although McA. and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties, and the injunction was granted.

THIS was a motion for an *interim* injunction before any pleadings filed, made by one Samuel Wallace, a ratepayer of the town of Orangeville, to restrain the corporation of that town from paying the sum of $1200 to one McAdam, as the price of a site on which the Dominion Government were to build a post office. The other facts appear in the judgment.

The motion was argued before Ferguson, J., on the 18th December, 1883.

E. Meyers, for plaintiff. The evidence establishes the facts. There is no doubt, the action of the corporation and the act sought to be restrained, viz., the payment over of the money, is *ultra vires*, and the plaintiff is entitled to an injunction restraining the defendants: *Municipal Act*, 1883, sec. 482; *Harrison's Municipal Manual*, p. 354, sec. 454; *Edinburgh Life Assurance Co.* v. *St. Catharines*, 10 Gr. 379; *Helm* v. *Port Hope*, 22 Gr. 273; *Wilkie* v. *Clinton*, 18 Gr. 557. The corporation could not hold the land even if they purchased it, *Brown* v. *McNab*, 20 Gr. 179; *Whitby* v. *Liscombe*, 22 Gr. 203; *S. C.* in App., 23 Gr. 1.

McCarthy, Q.C., with him *W. L. Walsh*, for defendants.

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The plaintiff is disqualified by estoppel, or *quasi* estoppel, owing to his being committed to the question of having a post office, and the vote of the ratepayers. Plaintiff agreed the question should be settled by that vote. There was no compulsion to have the voting, plaintiff acquiesced. The suit is not so framed that an injunction of this kind can be granted. The parties who are about to do the alleged wrong are not before the Court. The members of the corporation who voted for the payment of the money, as well as McAdam, and the Attorney-General, should be made parties. The corporation should not be saddled with the acts of individuals. In the *Helm Case*, 22 Gr. 273, the members of the council were made parties: *Burt* v. *The British Nation Life Assurance Association*, 4 DeG. & J. 158; *Fawcett* v. *Laurie*, 1 Dr. & S. 192; *Ferguson* v. *Wilson*, L. R. 2 Ch. 77; *Brice* on *Ultra Vires*, p. 39.

Meyers, in reply. The suit is right against the corporation only, and not the members. The injunction will restrain defendants their servants, or agents. Councillors are agents of the defendants. Even if the suit be not properly constituted, that is a matter of amendment. Facts as to estoppel or acquiescence are not sufficient. Acquiescence is no answer as the interests of others are being affected: *Re Fairbairn and Corporation of Sandwich East*, 32 U.C.R. 573. Plaintiff understood that the Dominion Government was to pay for the site. The resolution, on which the vote was taken makes no reference to any payment; even if members of the corporation could be made to reimburse, that is not enough: *West Gwillimbury* v. *Simcoe*, 20 Gr. 211; *S. C.*, 21 Gr. 68: *McMurray* v. *Northern R. W. Co.*, 22 Gr. 476; *Brogdin* v. *Bank of Upper Canada*, 13 Gr. 544; *St. Vincent* v. *Grier*, 13 Gr. 173; *Blakie* v. *Hamilton*, 25 U.C.R. 469; *Webster* v. *Harwinton*, 32 Conn. 131; *Douglas* v. *Placerville*, 18 Cal. 644; *Strohm* v. *Iowa City*, 47 Iowa 42; *Dillon* on Municipal Corporations, 116.

January 12th, 1884. FERGUSON, J.—The action is brought by Samuel Wallace, a ratepayer of the town of Orangeville,

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who sues on behalf of himself and all others, ratepayers of the same town. There are as yet no pleadings.

This motion is for an injunction to restrain the defendants, the town of Orangeville, from paying over to one Thomas McAdam the sum of $1,200, as the purchase money for a parcel of land, in the town, intended to be the site of a new post office.

It is shewn that McAdam made an offer to sell the land to the town for this sum, and that a resolution was passed by the council accepting the offer, and it is not denied that the defendants intend carrying out the purchase and paying over the money.

It was stated at the bar, and it appears by the evidence, that the Dominion Government had, in their estimates, a sum of money, to be expended in the erection of a post office in the town of Orangeville, provided the town would furnish the site on which to erect it, and that this parcel of land was intended as such site.

Differences of opinion existed amongst the ratepayers of the town as to where the new post office should be erected; some contending that it should be upon certain lands owned by the town and mentioned and spoken of as the "market grounds," and others contending that it should be upon this ground belonging to McAdam.

To arrive at a solution of the difficulty arising by reason of these differences of opinion and contentions, a vote of the ratepayers was had.

It is not contended that this was an authorized vote, that is, authorized by any law, but it was nevertheless, so far as appears by anything that is disclosed, a vote fairly had, and resulted in a majority in favour of the site on the land of McAdam, for which it is alleged the $1,200 is intended to be paid.

The plaintiff contends that the payment of this money for the land to be presented, perhaps conveyed directly, to the government for the purposes of a post office, would be an act beyond the powers of the defendants as a municipal corporation, and so plainly *ultra vires*; and an act against the doing of which the defendants ought to be enjoined.

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Counsel for the defence scarcely contended that the act would not be *ultra vires*, but contended that the plaintiff could not succeed in this motion for several reasons, which, or most of which, are as follows: 1. That the plaintiff, owing to the part that he took in respect to the vote of the ratepayers above mentioned, became disqualified to maintain the suit, and his suing on behalf of himself and the other ratepayers does not help him out of the situation. 2. That McAdam should be a party defendant. 3. That the members of the council of the municipal corporation should also have been made parties defendants. 4. That the Attorney-General should have been made a party, but this last was not insisted upon.

Many affidavits and some long examinations were read, and many authorities referred to on the argument.

As to the first of the above mentioned contentions on the part of the defence. It appears from the evidence, and it was not denied, that the plaintiff took an active part in the matter of the vote of the ratepayers, his exertions being put forth in favour of the site upon the market grounds belonging to the defendants, and in opposition to the site upon the lands of McAdam.

The contention of the defence was, that the plaintiff had referred the matter to that mode of determination, and having been defeated, he could not now be heard to question the propriety of the conclusion arrived at: that he was in a position similar to that of a person who had referred a matter in difference to the award or decision of another or others, and was bound by that decision, and so not in a position to maintain this suit or support this motion.

The plaintiff's reply to this contention was, that what was determined, or intended to be determined, by the vote of the ratepayers was only the locality or site for the intended new post office, and not the matter of the purchase money of the site or the payment of it by the defendants, not admitting, however, that even if this last had been included in what was determined by the vote, he would not for that reason have been in a position to maintain this suit.

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The resolution of the council on which the vote was taken was as follows: "Whereas, the sum of six thousand dollars has been placed in the estimates by the Dominion Government for the erection of the post office and other buildings in the town of Orangeville; and whereas, it is desirable that the site for such buildings should be acceptable to the ratepayers of the said town; and whereas, in order to find out a suitable site, a vote of the said ratepayers should be taken as hereinafter provided.

"It is therefore resolved that the following sites, namely: 1. The market property, 2. The McAdam property, be submitted to the said ratepayers to choose from, and that the site selected by the majority of the ratepayers shall be the site upon which the post office and other buildings are to be erected.

"That for the purpose aforesaid a vote shall be taken of all the ratepayers as appears by the voters' list of 1882, in order to decide upon a site.

"That the said vote shall be taken on the 30th day of July, 1883, and shall be taken by ballot."

Then follows a clause fixing polling places, and appointing returning officers, and another clause providing for the taking of the vote in the same manner, and subject to the same restrictions and provisions, as an election for the members of the council under the Municipal Act.

This resolution of the council on which the vote was had certainly does not state anything respecting the payment by the corporation of the purchase money for the site. It seems to be confined to the selection of one of the two sites mentioned in it.

It was nevertheless contended that the plaintiff was well aware that the payment of the purchase money for the site when chosen was involved in the matter to be determined by the vote, and that in this way and for this reason he is in the same position as if he had referred his rights in this respect, whatever they were, to the determination of this vote, and hence precluded from questioning the propriety of the result.

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The plaintiff positively denies that he had such knowledge, or that he so understood the matter of the vote, and says that he was led to believe that the site would not cost the town anything, and that the Government were to pay for it.

The evidence on the subject is quite too voluminous to give even a synopsis of it here, but after a careful perusal of it I am of the opinion that it does not prove that the plaintiff was, at or before the time that the vote of the ratepayers was taken, aware that the payment by the town of the purchase money for the site was involved in the matter to be determined by the vote.

The resolution upon which the vote was taken does not, as I understand it, show that the payment of the money by the town was any part of the matter to be decided or determined upon by the vote of the ratepayers; and I think the contention of the defendants on this branch of their defence fails.

What the plaintiff asks, is, an interim injunction, restraining the corporation of the town from paying over this money, and I am of the opinion that *for the purposes of this motion*, neither McAdam nor the members of the municipal council are necessary parties; although they might, if joined, not be considered improper parties.

I think the order should go for the issue of such interim injunction. I think the costs of and incidental to this application should be reserved to the trial of the action, to be then disposed of, and there is judgment accordingly.

G. A. B.

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[CHANCERY DIVISION.]

COOK v. NOBLE.

Will—Construction—Executory devise—Legacy.

J. C., by his will, directed his trustees to divide his real estate equally between his sons then living, when his eldest son should attain the age of twenty-five years, when the share coming to his eldest son was to be conveyed to him, and they were to give him $2000 to stock the same. In case any of his sons should die, before attaining the age of twenty-five years, without issue, then the share of the party so dying should be divided equally among the survivors. J. J. C., the eldest son, died under the age of twenty-five, leaving a widow and infant daughter, having made a will making no devise of real estate, but giving his wife his life insurance, then standing in favour of a Loan Company, and directed that so much of his $2000 as was necessary be used to redeem the insurance from the company, and the balance he gave to his wife.

Held, that the devise to the eldest son was a devise in fee simple, subject to an executory limitation over on his dying under twenty-five and without issue, and as issue was left, the infant was entitled to the land, as her father's heiress-at-law subject to her mother's dower.

Held, also, that the $2000 was an absolute bequest, with a direction as to its application, and that the legatee was entitled to the money regardless of the particular mode of its application.

THIS was an action brought for the construction of the will of one John Cook, by Donna Jane Cook, and Sarah Jane Cook, the infant daughter and the widow respectively of John J. Cook, (eldest son of the testator,) against the executors and trustees of the will, and the other parties interested thereunder.

John Cook died on the 22nd of November, 1872, having made and published his last will and testament, dated 8th November, 1872.

By his will he devised all his real and personal estate to three trustees, upon the following trusts, among others, "To divide my real estate equally, due regard being had to the value of the same and the improvements thereon, between my sons then living when my eldest son shall attain the age of twenty-five years, when the share coming to my eldest son is to be conveyed to him by my trustees, and my trustees are to give to my said eldest son the

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sum of $2,000 to stock the same." Then follows provisions for other sons, &c.

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John J. Cook (the eldest son) died on the 21st July, 1882, under the age of 25 years, leaving the plaintiffs Sarah Jane Cook, his widow, and Donna Jane Cook, his infant daughter, him surviving, having first made and published his last will and testament, dated the 19th July, 1882, which contained the following provision, "I give and bequeath to my beloved wife Sarah Jane, the insurance on my life in the Canada Life Insurance Company, now standing in favour of the Canada Permanent Loan Company. I direct that so much of the two thousand dollars, now due me from my father's estate, as is necessary be used to redeem this insurance from the said Loan Company, and pay them the sum I owe them. I also direct that so much of the balance of said money due me as aforesaid as may be necessary be applied to paying my funeral expenses, and the balance, if any, be given to my wife."

The said John J. Cook made no disposition of his real estate.

The plaintiff Sarah Jane Cook claimed the $2,000 under the will of her husband, and the plaintiff Donna Jane Cook claimed the real estate devised to her father by the will of the 8th November, 1872, as his heiress-at-law, and they alleged that they had demanded from the trustees the said legacy and estate, and that the trustees had declined to accede to their request.

The trustees alleged that they had always been ready and willing to give an account of their trusteeship, but that the said will of John Cook, of the 8th November, 1872, was of doubtful construction, and that the plaintiff's rights thereunder were not clearly defined.

The other infants interested under the said will filed the usual statement of defence, submitting their interests to the protection of the Court.

The case came on by way of motion for judgment before Proudfoot, J., on the 28th November, 1883.

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H. Cameron, Q.C., with him *McPhillips*, for plaintiffs.

The devise to John J. Cook was a devise in fee simple, subject to an executory limitation over, which limitation was not to take effect except on the happening of both events, viz: the dying under the age of 25 years, and without issue. The estate vested, and the contingency on which it was to go over did not arise, as he left issue. The infant child was therefore entitled to her father's estate, subject to her mother's dower: *Barlow* v. *Grant*, 1 Vern. 255; *Nevill* v. *Nevill*, 2 Vern. 431; *Barton* v. *Cooke*, 5 Ves. 462; *Parsons* v. *Cook*, 6 W. R. 715; *Palmer* v. *Flower*, L. R. 13 Eq. 250: *Noel* v. *Jones*, 16 Sim. 309, *Roper* on Legacies 645. The $2,000, legacy is an absolute gift and Sarah Jane Cook is entitled to it under her husband's will. *Re Kirkbride's Trusts*, L. R. 2 Eq. 400; *Grey* v. *Pearson*, 6 H. L. C. 61; *Doe dem. Usher* v. *Jessep*, 12 East, 288; *Malcolm* v. *Malcolm*, 21 Beav. 225; *Coates* v. *Hart*, 32 Beav. 349, 3 DeG. & S 504; *Johnson* v. *Simcock*, 6 H. & N. 6, 9 W. R. 895; *Fairfield* v. *Morgan*, 2 B. & P. N. R. 38; *Wilkins* v. *Kemeys*, 9 East 366; *Eastman* v. *Baker*, 1 Taunt 174; *Morris* v. *Morris*, 17 Beav. 198; *Duffield* v. *Duffield*, 3 Bl. N. R. 330, 1 Dow. N. S. 310.

J. Hoskin, Q.C., for infant defendants.

There seems to be no doubt both contingencies did not arise, the estate therefore did not go over, as issue was left The son also took an absolute interest in the $2,000 legacy. *Hawkins* on Wills, 225, 241, *Jarman* on Wills 3rd ed., 770; *Phipps* v. *Williams*, 5 Sim 44. As to marshalling the assets, as the personalty was not sufficient to pay the legacies, see *Williams* on executors, 5th ed., 1589.

Cassels, Q,C., for the executors and trustees, submitted to the direction of the Court.

January 9th 1884. PROUDFOOT, J.—John Cook by his will made on the 8th January, 1872, among other things, directed his trustees to divide his real estate equally between his sons then living, when his eldest son should attain the age of 25 years, when the share coming to his

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eldest son was to be conveyed to him by the trustees, and the trustees were to give his said eldest son $2,000, to stock the same. In case any of his sons should die before attaining the age of 25 years, and without issue, then the share of the party so dying should be divided equally amongst his son, or sons then living, &c.

John J. Cook, the eldest son of the testator, died under the age of 25 years leaving a widow and an infant daughter, who are the plaintiffs in this action; and having made a will making no devise of real estate, but giving to his wife the insurance on his life, then standing in favour of The Canada Permanent Loan Co., and directed that so much of the $2,000 due to him from his father's estate as is necessary be used to redeem the insurance from the Loan Co., &c., * * and the balance of the $2,000 he gave to his wife.

The infant plaintiff claims the land as her father's heiress-at-law.

The devise to the eldest son is a devise in fee simple, subject to an executory limitation over, in the event of his dying under 25 years of age and without issue: *Jarman* on Wills, vol. 2, p. 308, 5th Am. ed.; *Grey* v. *Pearson*, 6 H. L. C. 61.

The limitation over will not take effect unless on the happening of both contingencies, the dying without issue, and before 25. And as in this case the son left issue, the devise over, does not come into operation, and the infant plaintiff is entitled to the land subject to her mother's dower.

The $2,000 is an absolute bequest of that sum to the son with a direction for its application in a particular mode, and in such case, the legatee is entitled to the money regardless of the particular mode directed for its application, 2 *Williams* on Executors, 8th ed., 1293.

It appears that the personal estate is not sufficient to pay the legacies, some of which are charged on the real estate, others not. That, to the eldest son is not, and he would have been entitled to stand in the place of the

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legatees, whose legacies are charged on the land, to be satisfied out of the land.

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Declaration accordingly.

G. A. B.

[CHANCERY DIVISION.]

PETERBOROUGH REAL ESTATE INVESTMENT CO. V. IRETON.

General indemnity—Damages—Judgment recovered—Measure of damages—Evidence—Appeal from Master's report.

The plaintiff company having brought an action against I., on a mortgage, and claiming damages for having made a distress on F., the tenant of the premises at the request of I. On the reference to ascertain what damage the company had properly sustained by reason of such distress, the Master held that the amount of a judgment recovered by F. against the company was the proper measure, and was *conclusive evidence* of the amount, although it was proved before him that an offer had been made by I. to the company to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined shewed that their evidence might materially have affected the verdict.

Held, that the ruling of the Master was erroneous, and that the case must go back to him to revise his report.

This was an appeal from the Report of the Master at Peterborough.

The action was upon a mortgage made by one Henry Ireton, the equity of redemption having by mesne transfers become vested in the defendant, John Ireton.

Besides claiming the money due upon the mortgage, the plaintiffs alleged that at the request of the defendant they distrained upon the lands for recovery by way of rent reserved, as in the case of a demise of the lands for so much of the interest as was then in arrear, pursuant to a distress clause in the mortgage, but by reason of one Foster (a tenant), being in possession the plaintiffs were put to great damage and expense in making the said distress.

The action was tried before Boyd, C., at the Spring Sittings of 1883, at Peterborough, who referred it to the Master there to take the usual mortgage accounts; and

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also to inquire what damages the plaintiffs had properly suffered or been put to by reason of their making the distress, and to add such damages to the plaintiffs' claim under the mortgage.

The Master found these damages to amount to the sum of $461.60, being the amount of a judgment recovered by the tenant, Foster, against the plaintiffs for making the distress; and of which this judgment was the only evidence The defendant, Ireton, was no party to that action.

From this finding the defendant appealed.

Hudspeth, Q.C., for the appeal. The measure of damages against the defendant should not be what was given to the tenant, as the plaintiffs did not inform him of the action being brought, and give him an opportunity of settling or helping to defend it. Defendant offered to assist in the defence and produce witnesses. The offer was not accepted a plaintiffs' manager thought the action was trumped up and easily resisted. The indemnity at most was only an implied one. There was no evidence of damage before the Master, but the judgment. The distress was issued to collect money for the plaintiffs' debt. Issuing the distress was illegal, and the plaintiffs' manager (a solicitor), should have known it. There was no privity between the plaintiffs and defendant. *Betts* v. *Gibbins*, 2 A. & E. 57: *Merryweather* v. *Nixan*, 8 T. R. 186; *Toplis* v. *Grane*, 5 Bing. N. C. 636; *Walker* v. *Hatton*, 10 M. & W. 249; *Dawson* v. *Morgan*, 9 B. & C. 618.

Moss, Q.C., for the plaintiffs. It was to the interest of the defendant to reduce the mortgage debt. Plaintiffs were not bound to give notice to the defendant where there is an indemnity. What the plaintiffs had to pay is the measure of the damages, and the evidence of that is the judgment. *Mayne* on Damages, 2nd ed., pp. 56 57; *Ibbett* v. *De la Salle*, 6 H. & N. 233; *Dugdale* v. *Lovering*, L. R. 10 C. P. 196.

Hudspeth, Q.C., in reply. *Mayne* on Damages is in defendant's favour, as it requires notice to be given. The

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plaintiffs should have availed themselves of the defendant's offer to procure witnesses, and could then have shewn that the tenant sustained no damage.

January 9, 1884. PROUDFOOT, J.—I have ascertained that at the trial the only question in regard to the distress which was discussed was one of fact, viz., whether the defendant had requested the distress to be made; and upon that the learned Chancellor found for the plaintiffs, and although evidence seems to have been given in the Master's office that might, according to the weight to be given to it, render this doubtful, or might disprove it, it is clear that while the decree stands, it is conclusive of the fact and is binding upon me.

It was also contended for the defendant that the measure of damages should not be those given to the tenant, for the plaintiffs did not inform the defendant of the action being brought, so as to enable him to aid in the defence, or give him an opportunity of settling with the tenant. The defendant, however, knew of the action having been brought, for he wrote to plaintiffs' solicitor before the trial, offering to procure witnesses for the defence. The plaintiffs' solicitor took no notice of this offer, the defendant was not present at the trial, nor were the witnesses he could have procured, and whom he has examined in the Master's office, and whose evidence, I cannot doubt, would have materially affected the verdict of the jury. The solicitor for the plaintiffs thought the action a trumped up one, and made no great efforts to resist it.

The defendant also contended that even assuming he had asked the plaintiffs to make the distress they ought not to have done so: that the Court of Appeal in such a case had determined there was no right to distrain, and Poussette, the manager, was also the solicitor of the company and knew of this decision, but did not tell the defendant, an illiterate man, of it. Though this was not argued at the trial, the decree proceeds upon the ground that the defendant was liable to indemnify the plaintiffs for acting upon

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his instructions, and whether right or wrong it is binding upon me in this proceeding.

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I think the cases establish that it is not incumbent on the plaintiffs to give notice to the defendant of the action brought against them: *Duffield* v. *Scott*, 3 T. R. 374; *Jones* v. *Williams*, 7 M. & W. 493.

The effect of want of the notice is to let in proof that the course pursued was not justified under the circumstances: *Smith* v. *Compton*, 3 B. & Ad 408.

In the present case the defendant knew that an action was pending, and was desirous of aiding in the defence, and furnishing evidence to defeat the claim. But his offer was not accepted; he was not aware of the time for trial, so far as I can see, and was not present at it, and had no opportunity given him of producing his witnesses. He cannot then be considered as leaving the defence to the party indemnified and bound by the result.

The general rule is well known, that a judgment with respect to a third person who was neither party nor privy to the proceeding in which it was pronounced is only *res inter alios judicata;* and hence the rule that it does not bind, and is not in general evidence against any one who was not such party or privy. *Best*, on Evidence, vol 2, Am. ed., secs. 590, 592.

The application of this rule in cases between a person indemnifying, or indemnitor, as he seems to be called, and the person indemnified depends in a great measure on the terms of the contract. Where the contract is to indemnify against the result of a litigation to which the covenantor is no party, he must abide the result. But where it is a general agreement to indemnify against claims or suits, the same result does not follow. The American Courts have in some cases held that the judgment is *primâ facie* evidence against the covenantor, and he may be let in to show that the principal had a good defence, that he was not liable in respect of the alleged loss, or not to the amount alleged; and there are English cases to the same effect. They are collected in *Baylies*, on Sureties, p. 140. There appears to

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be great difference of opinion in the American Courts as to the effect of a judgment against the principal in an action against a surety. In some cases it is held to be *primâ facie* evidence, in others conclusive. *Baylies*, p. 399.

In either way of taking it, it is at variance with the general rule.

But, in case of a general indemnity, assuming it to be *primâ facie* evidence, then the finding of the Master was erroneous; as I understand he considered it conclusive. The defendant gave evidence that was worthy of consideration in ascertaining the amount of the damages, and might lead to the conclusion that the plaintiffs had not "properly suffered" them. The effect of the judgment should not be conclusive against the defendant, seeing that he was desirous of furnishing evidence which, if submitted to the jury, might have materially affected the verdict, but he was not given an opportunity of producing it.

I think the case must go back to the Master to revise his report on this ground.

Another ground of appeal was abandoned.

There will therefore be no costs.

I may notice that in the cases cited by Mr. Moss to shew that the damage was the amount the plaintiffs had to pay, the question of the effect of the judgment was not raised, in some, the only question was, as to the liability to pay costs of defending the action, where when the liability was determined there was no difficulty as to the amount. In others it seems to have been assumed that the sums recovered were correct in amount.

G. A. B.

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(QUEEN'S BENCH DIVISION.)

LOCKIE AND THE AMERICAN LUMBER CO. V. TENNANT ET AL.

Third party—Joinder—Relief as against.

The action was upon promissory notes made by the defendants to the order of the B. C. L. Co., and by them endorsed to the plaintiff Co. The defendants claimed indemnity against the B. C. L. Co., and at the trial that company, against the protest of the plaintiffs, was made a third party defendant, and judgment was directed to be entered against them in favour of the defendants to indemnify the defendants against the judgment rendered against them at the suit of the plaintiffs.

Held, reversing the order making the company a third party, and the judgment against them, that third parties should be joined only before trial: that in any case they can be joined only for the purpose of binding them by the judgment against the original defendant; and that in order that the original defendant may obtain indemnity against a third party he must bring a separate action.

ACTION on two promissory notes payable by defendants to the British Canadian Lumber Company or order, endorsed by them to the American Lumber Company.

Defence:

1. On or about the 4th day of August, 1882, defendants entered into an agreement with the British Canadian Lumbering and Timber Company, a duly incorporated company, for the purchase by the said defendants from the said company of a certain quantity of lumber.

2. The terms of said agreement appear in a letter written by the manager of the said company to the defendants, and dated the 4th day of August, 1882, which said letter is in the words and figures following:—"We have accepted your offer for the cut of our new mill at Midland for this year at $12 per thousand feet mill run, mill culls out and all that may be sawn from our long logs at $16 per thousand feet; and we have sold to you all the mill culls, excluding dead culls, at $4.75 per thousand feet; the lumber to be cut and piled to your reasonable order, as at old mill at present of one inch and over in thickness, and subject to no further sorting after piling in the yard, except at your expense; payment to be made net cash as each five thousand dollars worth is shipped; shipment to be

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according to our inspection and measurement; the lumber to be removed by 31st December of this year; if not removed to be paid for then; shipments to be formally completed in any case by the 1st of July, 1883, and to be steadily kept up during the period intervening between this date and the shutting down of the mill, so as not to prevent us in having room in our yards for the convenient piling of the lumber. Should you not desire to pay cash at 31st December next, we retain the option of asking for your promissory note at three or four months, with bank interest added, each $5,000 shipped after 31st December to be paid for and endorsed on this promissory note."

3. The said company were not ready to deliver or ship to the defendants said lumber, or any part thereof, prior to the month of February, 1883, and thereafter lumber was from time to time delivered and shipped by the said company to the defendants under said agreement.

4. The defendants have duly paid to the said company for all lumber delivered or shipped under said agreement, or which became the property of the defendants thereunder, or for which they were liable to pay thereunder.

5. In the month of December, 1882, the defendants, at the request of the said company and under the terms of the said agreement, gave the said company in advance their several promissory notes, amounting in all to upwards of $55,000, for lumber to be thereafter delivered and shipped to the defendants under said agreement. The notes in the statement of claim mentioned are renewals of one or more of the said promissory notes given to the said company as aforesaid.

6. Save as aforesaid, no value or consideration was given by the said company for the said notes, or any of them.

7. The plaintiffs were, from the time of the making of the said agreement, well aware thereof, and upon the terms upon which said notes were given by the defendants, and of the defendants' rights with regard thereto, and of the facts hereinbefore stated, and have always held the notes sued on herein with full knowledge and notice thereof.

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8. All payments made by the defendants to the said company for the said lumber were made with the full knowledge and assent of the plaintiffs, and they fully acquiesced in such payments being made to said company.

9. In addition to the notes sued on herein notes amounting to the sum of $11,000, and which were given by the defendants under said agreement, are still outstanding and in the possession of the plaintiffs or the said company; said notes were given without value or consideration, save as aforesaid, and the plaintiffs were always well aware of the terms upon which said notes were given, and of the defendants' rights in regard thereto.

10. The defendants claim that the said notes sued on herein should be delivered up to be cancelled, and, by way of counter-claim, pray that if the plaintiffs are the holders of said notes for $11,000, the said notes also be delivered up to be cancelled.

The American Lumber Company was a Scotch corporation; the British Canadian Lumber Company was also a joint stock Scottish company, both companies doing business in Ontario.

The organizations of the company were quite distinct; but the plaintiff Lockie, a liquidator or assignee of the American Lumber Company, which was in liquidation, was the financial agent of both companies, each having an office in Toronto.

The defendants were dealers in lumber. The British Canadian Company had lumber mills at Midland, in Ontario, and in 1882 contracted with the defendants to sell them the whole cut of their mill at Midland for that season.

A large quantity of lumber under this agreement was cut and piled at the mill.

By the agreement all should have been removed by the end of the year; a quantity was taken by defendants, but the larger amount remained there, chiefly from difficulties in shipping accommodation at the mill, and heavy snowfalls, &c.

In addition to notes given for the actual lumber delivered

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the defendants gave the notes sued on; in fact up to the end of the season of 1882 defendants had given negotiable paper to the British Canadian Company, amounting to about $50,000, on estimates from time to time furnished of the amount of lumber on hand, which defendants were to take under the contract.

These two notes sued on were endorsed over to the plaintiffs in January, 1883.

The payees wanted money, and the plaintiff company had money disengaged, and apparently advanced the amount in cash to the British Canadian Company, retaining their right against them as endorsers.

In August a large quantity of the lumber, being still not taken away by defendants, lying at the mill was destroyed by fire. In this way the defendants urged that they had never got actual value for these particular notes.

The case was tried at the last Winter Assizes before Armour, J., without a jury.

The learned Judge ordered—against the protest of the plaintiffs—that the British Canadian Company should be added as defendants, considering Mr. Lockie's being present in Court a sufficient representation of the company, of which he was financial manager.

It was objected that a previous application before that had been made to add the company as a defendant and refused.

The learned Judge found that the non-removal of the lumber before the time of the fire was as much the fault of the British Canadian Lumber Company as of the defendants: that the non-removal did not affect the question, upon whom the loss by fire would fall: that the lumber was to be measured and inspected at the time of shipment, and that the lumber that was destroyed by fire never was measured or inspected: that under the construction of the contract the British Canadian Lumber Company must bear the loss of the lumber destroyed by fire: that the defendants, the Tennants, had paid for all the lumber shipped under the contract: that the present plaintiffs

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were entitled to recover against the defendants the amount of the two promissory notes sued for: that the British Canadian Lumber Company were bound to indemnify the defendants against the payment thereof: and that they should so indemnify them against the payment thereof, and against the costs of suit.

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February 16, 1884. *Robinson*, Q. C., and *J. H. Macdonald*, on behalf of the defendants the Tennants, moved to set aside the judgment in favour of the plaintiffs, as the plaintiffs had no higher or greater rights against the said defendants than against the added defendants, who had no cause of action against the said Tennants; and that the plaintiffs acquired no title to the notes in question under the assignment of the American Lumber Company to them; and that the transaction by which the said company became possessed of the said notes was *ultra vires* the said company, which could not therefore, nor could the said plaintiffs, their assignees, sue upon the said notes; and on the law, evidence, and weight of evidence.

The added defendants also moved to set aside the order by which they had been made parties, and the plaintiffs made a similar motion, and to confine the verdict and judgment to the original defendants.

Osler, Q. C., for the plaintiff, on the merits, referred to *Terry* v. *Wheeler*, 25 N. Y. R. 520; *Benjamin* on Sales, Am. ed., p. 336; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; *Castle* v. *Playford*, L. R. 7 Ex. 98; *Simmons* v. *Swift*, 5 B. & C. 857; *Lockhart* v. *Pannell*, 22 C. P. 597; *Gilmour* v. *Supple*, 11 Moo. P. C. 551. On the question of joinder he cited *Treleaven* v. *Bray*, 45 L. J. N. S. Chy. 113; *The Corporation of Dundas* v. *Gilmour*, 2 O. R. 463.

Blackstock, for the defendants, on the point of joinder, referred to O. J. Act Rules 103, 107, 108, 109; *Morris* v. *Beasley*, 2 C. P. D. 80; *Howell* v. *London Omnibus Co.*, 2 Ex. D. 365, *Bower* v. *Hartley*, 1 Q. B. D. 652; *Sheehan* v. *Great Eastern R. W. Co.*, 16 Chy. D. 59.

Robinson, Q.C., and *J. H. Macdonald*, contra, contended

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that the order was justified by Rule 107, Rule 112 restricting the exercise of the right; and that, besides, the plaintiffs were concerned with the question. On the merits, they contended that the delay was more that of the Canada Lumber Company than of the defendants, and referred to *Logan* v. *Le Messurier*, 6 Moo. P. C. 116; *Robertson* v. *Strickland*, 28 U. C. R. 221; *O'Neill* v. *McIlmoyle*, 34 U. C. R. 236; *Cox* v. *Jones*, 24 U. C. R. 81; *Bowman* v. *Van Kurven*, 29 Wis. 219; *Daniell*, on Negotiable Instruments, 3rd ed., secs, 176, 790, 831*a*; *The Bianca*, 48 L. T. N. S. 440; *Corrie* v. *Allen*, Id. 464.

March 8, 1884. HAGARTY, C. J.—With great respect for my learned brother's opinion, I think such an order should not have been made either before or at the trial. He offered to adjourn the trial if the defence were not ready, and it is not now suggested that any material evidence is absent.

The plaintiffs, in my judgment, are *bonâ fide* holders for value of these two notes, and are wholly unaffected by any defence which the defendants might have had as against the payees, the plaintiffs.

I think it impossible, on the evidence before us, to identify the two companies in interest. They had the same financial manager, and through him, I assume, full notice of the origin and consideration of these notes to be given to the plaintiffs when they took them.

When the notes, of which these are renewals, were given in January, 1883, lumber to the full amount of the notes was lying at the mills, sold to defendants, and in their power to deal with at any moment. It was the whole cut of the season sold to them under the agreement. It was theirs to the extent that they could have prevented any disposition of it to another, or application to any other purpose than that declared by the contract.

If the indorsees of such paper could not be considered as holders for value, with full notice of the facts, it would equally seem that bills given at three, six and nine months

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for goods ordered to be delivered at a future time, would not be negotiable to others who knew their origin, if from accident or other cause the goods were not ultimately delivered.

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Here the consideration of all the notes, the timber, was in existence, available for the defendants' use and bound by their contract.

In this view of the facts, I hold that the plaintiffs had nothing whatever to do with the defence set up by the makers.

I further hold that, even if they had been properly added as third party defendants, no judgment could or should have been given or enforced against them in this action, and that the judgment given at the trial against them for indemnity must be set aside.

I think the utmost effect that could be given to the udgment in this action, if they were properly on this record as defendants, would be to conclude them in a future proceeding at defendants' suit, as to the amount and nature of the indemnity.

It was conceded on the argument that no case could be found where third parties against their will had been forced to become defendants *at the trial* of the original action.

The application should, I think, always be made before the trial, and the Court should be asked (see Rule 107) "to make such order as may be proper for having the question so determined."

The great importance of such direction and its necessity will be seen in many of the cases cited.

We might have adopted the judgment of the *Corporation of the Town of Dundas* v. *Gilmour et al.*, 2 O. R. 463, as that of a Court of coordinate jurisdiction, but I think it right more fully to examine some of the authorities.

In *Treleaven* v. *Bray*, 45 L. J. N. S. Chy. 113, before the Court of Appeal, (1876) the head note is: "Service of a notice by defendant on a third party is only for the purpose of binding the third party by the judgment in the

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action as between the plaintiff and the defendant. In order to obtain relief against the third party the defendant must bring an independent action against him."

Plaintiff had filed a bill for specific performance. Defendant by answer stated he was ready to perform it, but was only equitable owner, the legal estate being outstanding in a trustee who refused to join. He moved to be allowed to serve notice under order 16, rule 18, on the trustee, claiming indemnity against the trustee, and also to compel him to join in the conveyance.

Jessel, M. R., refused leave. On appeal the Court held that *with plaintiff's consent*, which was given, he might give notice. Mellish, L. J., says: "The meaning of sec. 24, sub-sec. 3, was very carefully considered by the Judges. We came to the conclusion that it was not advisable to make any rules which would enable one defendant to obtain relief against his co-defendant without an independent action against him. We considered that we had power to do so, but we thought it would be intolerable that a plaintiff who might have a good case against the original defendant should be compelled to wait for his remedy while the defendants were fighting *inter se*. The only object of the rules was to bind the third party conclusively by the judgment given as between the plaintiff and the original defendant. Bnt if he wants to get an indemnity or other relief against the third party, he must bring an action of his own."

Counsel argued that under rule 21 they could get active relief against the trustee, and also that they wished, besides binding the trustee by the judgment in that suit, to file a counter-claim against the trustee.

Blackburn, J.: "There cannot be a counter-claim against a third party between whom and the plaintiff no relation exists."

Mellish, L. J.: "It is a question whether the leave to serve the notice will do you much good, as you cannot have an order on the trustee to execute the conveyance in this suit."

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On plaintiffs' assent leave to serve the notice was given.

In the following year (1877) we find *Norris* v. *Beazley*, 2 C. P. D. 80. Action against acceptor of bill. Defendant sought to add the name of a company as defendant, alleging that the acceptance was given for purchase money of a ship from plaintiff, and that he had acted as trustee for the company, to whom the ship was afterwards conveyed: that the plaintiff made fraudulent representations as to the ship, to induce defendant to purchase, by which he and the company had been put to needless expense; and he made counter-claims against the plaintiff.

The Court refused the application, Lord Coleridge holding "that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any * * and that it was not intended that persons in the position of this company should be added as defendants, merely for the convenience of another defendant between whom and this company there may be questions which will afterwards have to be settled."

I refer also to "The Cartsburn," L. R. 5 P. D. 59 (1880), where it seems by the head note to be held that an order giving a third party liberty to appear and defend did not put matters in train for trying any issue between him and the original defendants.

In *Horwell* v. *London Omnibus Co.*, 2 Ex. D. 365 (1877), the Exchequer Court, in an action of tort for injury sustained by plaintiff through defendants' negligence, allowed an order that third parties, who, it was alleged, through their neglect had caused this injury, should be added as defendants. The Court of Appeal, Cockburn, C. J., Kelly, C. B., and Bramwell, L. J., reversed this decision, Brett, L. J., dissenting. The case turned somewhat on the question as to contribution or indemnity between wrong doers, but the effect of the orders is very fully discussed. The

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Court, in speaking of the order made below, say: "Looking at the matter as merely one of discretion, there was here an absence of the discreet exercise of the authority of the Court, even if they had such authority under Rule 17."

In *Benecke* v. *Frost*, 1 Q. B. D. 419, plaintiff sued defendant for not accepting goods according to contract. Defence: that the goods were not of quality contracted for, and that defendant bought as agent for principals, as plaintiffs knew. Defendant served notice on the principals, claiming to be indemnified by them. The Court directed that the third parties be allowed to appear and defend the action as regards the quality of the goods (there were other questions), and that they be bound by the finding of the jury upon that question, reserving all questions of costs.

Blackburn, J., says: "The object of the Act was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries."

Lush, J., said: "That is precisely the case in which third parties are to be cited, so that they may be bound by the decision in the action."

In the same volume, p. 644, *Swansea Shipping Co.* v. *Duncan*, in appeal from the Queen's Bench, Jessel, Master of the Rolls, discusses the rules as to bringing in third parties.

They were ordered to be brought in, the plaintiff not objecting. The Master of the Rolls says: "If the plaintiff objects * * the Court would consider whether he would be prejudiced in any way or delayed in his action by such proceeding. * * The object of these enactments was to prevent the same question being tried twice over where there is any substantial question common as between the plaintiff and defendant in the action and as between the defendant and a third person; and in such a case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all."

Mellish, J., concurs, saying: "The third parties would

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only be bound as to any question decided in the action to the extent directed by an order of the Judge under Rule 21 of Order 16."

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See also in same volume *Bower* v. *Hartley*, 656.

Warner v. *Twining*, 24 W. R. 536 (1876), was an application for directions as to the notice to be served upon the third party against whom a counterclaim for indemnity was made.

Jessel, M. R., said that no counter-claims could be set up which did not seek relief against the plaintiff: the only purpose for which a third party was brought before the Court under Order 16, rr. 17, 18, was to bind him by the action and preclude him from saying it was not defended.

In *Measures* v. *Thomas* and *Jones*, Weekly Notes, 1875, p. 203, before Lush, J., defendants admitted their liability to plaintiff, and the only question was whether the third party should be estopped from disputing the amount found at the trial to be payable by defendants. Lush, J.: "That is exactly the object of the rule. I will order that the third party, if liable, do not dispute the amount, &c. Then he is bound, when he (the original defendant) brings his action of indemnity, by the amount paid to plaintiff."

I may also refer to such cases as *Wye Valley R. W. Co.* v. *Hawes*, 16 Chy. D. 489, (note); *Piller* v. *Roberts*, 21 Chy. D. 198; *Schneider* v. *Batt*, 8 Q. B. D. 701.

Our Court of Common Pleas, in *Corporation of Dundas* v. *Gilmour*, 2 O. R. 463, expressly held in accordance with the law as laid down by Mellish, L.J., in *Treleaven* v. *Bray*.

There is a very full and careful note on this point in Mr. Maclennan's work, p. 158, *et seq.*

Our rules are those passed under the Imperial Act of 1875. Since then a very great change has taken place by the new rules of last year, which came into force on 24th October, 1883.

In *Wilson's* Judicature Acts, 4th ed., (1883) p. 234, it is said: "Under the rules of 1875 the object of bringing in the third party was not to enable the defendant to obtain any actual present relief against him, but only to secure

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a binding decision with a view to future relief, which had to be obtained in subsequent proceedings by the defendant against the third party"—citing *Treleaven* v. *Bray* and *The Cartsburn*.

Under the present English rules power is given to the Court to give judgment for the defendant against the third party and thus to work out the whole matter in one action

Order 16, Rules 48, 49, 50, 51, 52, 53, 54, 55, covers the whole ground.

After providing for the giving of notice to the third party, provision is made for his appearing or not appearing, and when he does not appear judgment may be entered against him by leave of the Court or Judge under certain restrictions. If he do appear the defendant giving the notice may apply to the Court or Judge for direction as to the trial, &c., with provision for judgment against the third person, &c., &c.

On the whole, I think the judgment against the original defendants must stand, and this motion be discharged with costs, and that the judgment against the third parties added at the trial must be set aside, as well as the order making them parties to the suit.

I think it right to add that even if open to me so to do on this record, I would not feel perfectly satisfied without further enquiry and argument in accepting the trial that has taken place as conclusive between the defendants and the third party defendants.

There cannot be a stronger case illustrative of the wisdom and necessity of obtaining the previous directions of the Court as to the mode of trial, and as to how parties should be bound by the event.

Decisions are multiplying in England under the new rules. See *Pontifex* v. *Foord*, and *Caister* v. *Chapman*, noticed in Law Times of February 9, 1884, at p. 249.

ARMOUR, J.—I would not have added the British Canadian Lumbering Company as a party defendant at the trial, except for the purpose of trying the question,

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which was the cause of the litigation, upon whom the loss of the lumber destroyed by fire should fall, and of doing complete justice between all the parties on the basis of the proper decision of that question; and I then thought that Rule 107 gave me ample power for that purpose.

I have to admit, however, that the weight of authority is against my doing what I did, although the reasoning of the present Master of the Rolls as to the effect of this rule, in *Horwell* v. *The London General Omnibus Co.*, L. R. 2 Ex. 365, does not appear to me to have ever been satisfactorily answered.

My order adding the British Canadian Lumbering Company as a party defendant, and the judgment against that company, ought to be set aside.

I see no ground for changing my opinion that the plaintiffs were entitled to recover against the original defendants. I do not see how I could have properly come to any other conclusion than I did upon the evidence, that the American Lumbering Company were endorsees for value of the notes sued on.

As I understood the argument for the defendants it was this—that the American Lumbering Company took the notes originally with the full knowledge of the agreement under which they were given: that a breach of that agreement had, to their knowledge, been made at the time they took the notes, and that therefore the defendants were entitled to avail themselves, as against the American Lumbering Company, and consequently as against the plaintiffs, of the failure of consideration which arose from that breach. Whatever might be the consequence of such a state of facts, it did not exist here, for at the time the American Lumbering Company took the notes originally there had been no breach of the agreement occasioning any failure of consideration.

The motion of the defendants must be dismissed, with costs.

CAMERON, J., concurred.

Motion dismissed, with costs.

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[QUEEN'S BENCH DIVISION.]

WALTON V. APJOHN.

Ontario Election Act, R. S. O. ch. 10—Algoma Election—Refusing Votes —Liability of Deputy Returning Officer.

At the election of a member of the Legislative Assembly of Ontario, in and for the District of Algoma, six persons tendered their votes and offered to take the necessary oaths required by the Election Act, R. S. O. ch. 10, to entitle them to vote. The Deputy Returning Officer refused the vote of one because he could not produce his title deeds, and of the others because they had no houses on their lands. In an action for penalties for refusing the votes, four of those rejected offered to take the oath prescribed and described the property on which they claimed to vote.

Held, that the duties of a Deputy Returning Officer in taking the votes are ministerial, (save where he suspects personification, want of qualification, &c.; in which case he should exercise his judgment as to administering the oath); and that having refused the tendered votes of those who had sufficiently shewn their right to vote, he had refused to perform an obligation or formality required of him, within sec. 180, and was liable to the penalties prescribed by the Act.

One Anderson, when tendering his vote, was not able to describe his land accurately, but stated that it was in one of three townships which he named. His vote was refused on the ground that he had no house on his land.

Held, HAGARTY, C. J., doubting, that the Deputy Returning Officer was liable for the penalty for refusing this vote.

Held, also that the point as to whether the polling division in question was within Ontario or not, could not be raised by the Deputy Returning Officer acting under a writ for an election in Ontario.

Held, also, that notice of action was not necessary, nor was it necessary to aver or prove notice.

Held, also, that where a foreign commission had been opened before trial for the convenience of parties, it was too late at the trial to object to the mode of its execution.

THE statement of claim was that on September 28th last an election was held in and for the Electoral District of Algoma of a member to serve in the Legislative Assembly for Ontario, at which election the defendant was appointed and acted as a deputy returning officer at the polling place called Rat Portage: that six electors of the said district entitled to vote therein at said election at the said polling place, namely, Jas. Anderson, J. H. Gilmour, A. Monkman, Wm. Murdoch, Jas. F. McCallum, H. J. Clarke, respectively presented themselves to the defendant, as deputy returning officer, within proper hours on said poll-

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ing day, in said polling booth, and respectively tendered their votes and demanded ballot papers from defendant, and offered to take the oath prescribed by the Election Act of Ontario and Amending Acts, but the defendant refused to give either or any of the said electors ballot papers, or to allow them or either or any of them to vote, contrary to the provisions of the said Election Act and Amending Acts, and that the defendant thereby became liable to forfeit, &c., the sum of $1,200 to plaintiff, and was indebted to plaintiff in that sum, under the said statutes.

Defence: Not guilty by statute, with fourteen references to Imperial, Dominion and Provincial statutes.

The case was tried before Cameron, J., and a jury, at Toronto, and the jury found the defendant was deputy returning officer, and that he refused to receive the votes of Anderson, Gilmour, Monkman, Murdoch, and Clarke, who were persons who had the right to vote as in plaintiff's claim alleged; and that defendant was indebted to plaintiff in the penal sum of $200, in respect of the refusal to receive each of said votes, in all $1,000; and that McCallum had no right to vote.

Judgment was given for $1,000 against defendant, with costs, and in default of payment within twelve months defendant to be imprisoned under sec. 182 of ch. 10, R. S. O., in the gaol of Algoma nearest the village of Rat Portage, until the debt and costs were paid.

February 6, 1884. *Bethune*, Q. C., obtained an order *nisi* to set aside the verdict and judgment, and to enter it for the defendant, on the following grounds:

1. That the plaintiff proved no cause of action in respect of which he was entitled to sue.

2. That sec. 180 of R. S. O. ch. 10, did not apply to the rejection of a vote.

3. That the defendant was acting, and that the evidence disclosed that he was acting, as a judicial officer, and that malice must be averred and proved.

4. That the facts proved, even if all true, did not amount

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to a neglect or refusal to discharge an obligation or formality, within the meaning of sec. 180 R. S. O. ch. 10.

5. That no section of the said statute was violated.

6. That it was not shewn that the persons claiming to be voters, referred to in the statement of claim, had the legal qualifications which were necessary to entitle them to vote.

7. That it appeared that the persons who claimed the right to vote as alleged in the statement of claim, did not declare to the deputy returning officer their respective names, places of residence, and occupations or callings, and also the properties in respect of which they severally and respectively claimed to be entitled to vote, and whether they claimed to vote as owners, tenants, or occupants of the said properties; and that therefore the said persons had no legal right to complain of the defendant having rejected their votes.

8. That it appeared that no one of the said persons asked the deputy returning officer to cause the said particulars to be entered on the list of voters, and so there was no default on the part of the said deputy returning officer.

9. That there was no evidence of any poll having been legally established at Rat Portage.

10. That no notice of action was proved to have been given, although the defendant, as the evidence disclosed, was entitled to such notice.

11. Or why a new trial should not be granted for the improper reception of evidence of the title to real estate, in respect of which the said parties claimed to vote, the learned Judge having received parol evidence of title to real estate, instead of requiring the production of the title deeds, or accounting for their nonproduction.

12. And for the rejection of evidence tendered by the defendant to shew that the place at which he is charged with having done the wrongful acts complained of was outside the territorial limits of the Province of Ontario.

13. And on the ground that the evidence taken under the commission, and the return made thereto on which the

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plaintiff relied, was not properly proved as the statute required that it should be proved, and that the said evidence was not duly and properly taken, and should not have been admitted at the trial.

February 15, 1884. *James Maclennan*, Q. C., and *Proctor*, for the motion. The plaintiff proved no cause of action at the trial in respect of which he, as an informer, was entitled to sue. The right of action given by sec. 180 R. S. O. ch. 10, does not apply to the rejection of a vote, that section having reference only to obligations and formalities the performance of which are of a ministerial character. There are no obligations or formalities provided for by the Act which apply to the act of a Deputy Returning Officer in an unorganized district under section 92; and no action for a penalty can arise by implication: the grounds of action must be expressly given by statute. There is a marked distinction between sections 91 and 92. Under the first the officer is guided by the voters' list; under the other there is no list, and the law evidently intended him to use his judgment in deciding who had or had not a right to vote. The duties of deputy returning officers in unorganized districts where, on election day, he is called on to make the voters' list, charges him with the performance of the functions of the assessor, Court of Revision, and County Judge, in the organized districts, in making and revising the lists. In thus determining those who should be on the lists he can in no sense be held to be merely a ministerial officer. His office is judicial as well as ministerial, and therefore it is plain that malice must be alleged and proved, otherwise there can be no recovery of the penalty. The officer acting in good faith would not, under the cases, be responsible for a mistake or error, and therefore the plaintiff having neither alleged nor proved malice, which in such cases is said to be the gist of the action, cannot recover. Suppose any of the persons expressly disqualified under sections 4 or 6 should demand a ballot—as a Judge or a woman—must the officer receive the vote? Or, if he refuse, is he liable to a

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penalty? The action, if maintainable, should be brought by the party whose vote was refused under section 181. The statute does not in express terms make the deputy returning officer liable to a penalty for the rejection of a vote, unless it be under sections 181 and 91, and the liability there is to the party aggrieved by the misfeasance; and section 91 only refers to organized districts. The Court will not extend the statute in favour of an informer, and the recent case of *Bradlaugh* v. *Clarke*, in the House of Lords, L. R. 8, A. Cas. 354, is an authority on that point. If the plaintiff is entitled to bring the action, he has not shewn in any of the cases that the parties had the right to vote, and the onus is on him to do so. Before it could be held that there was a breach of the statute in refusing the parties ballots, it should be shewn by proper legal evidence that the parties rejected were possessed of all the legal qualifications to vote. There is certainly no statutory obligation on the returning officer to give ballots to those not entitled to demand them. The plaintiff is seeking to enforce a penal staute, and should be held strictly to the proof of the violation of the statute. The evidence in this case as to qualification, if it can be called evidence at all, is of the very loosest and vaguest character. There is, further, no evidence of a clear and positive character that any one of the parties declared their names, residence, &c., and the property in respect of which they claimed to vote, as required by secs. 92 and 102 of ch. 10, which is a necessary prerequisite to their demanding a ballot. Anderson could not state where his property was, and did not do so. There is no evidence that Clark gave any description, and no evidence that he had any right to vote. Murdock merely stated the township in which his land was. Monkman and Gilmour gave partial but imperfect descriptions of the property, but not sufficient to identify the lands so that the vote could be struck off on a scrutiny if attacked. The defendant was acting as a public officer in the discharge of a public duty, and therefore entitled to notice of action. The defendant was entitled to shew that the place at which

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the alleged wrongful acts complained of were committed was without the territorial limits of Ontario, and although acting as deputy returning officer, he was not estopped from giving such evidence and was improperly refused the right to give such evidence. No poll was proved to have been legally authorized at Rat Portage under R. S. O. ch 10, sec. 57. The commission under which the evidence was taken at Winnipeg was not properly proved, as required by the R. S. O. ch. 62, sec. 23. The vote of Anderson was clearly bad, as the property in respect of which he claimed the right to vote was patented by another, and he had no deed nor subsequent declaration of trust in his favour, The most he had was an equitable right to call for a division of the proceeds of the land when sold. He had no estate, either legal or equitable, such as would entitle him to vote, and the property being purchased for a speculation would be personal property as between Anderson and the others entitled to share in it. There could be no resulting trust on the patent in favour of Anderson, so as to entitle him to vote. They cited *Ashby* v. *White*, Sm. L. C., vol. 1, p. 321; *Cullen* v. *Morris*, 2 Stark, 577; *Tozer* v. *Child*, 7 E. & B. 377; *Drewe* v. *Coulton*, 1 East 555; *Pryce* v. *Belcher*, 4 C. B. 865; *Maxwell* on Statutes, pp. 371, 2-3; *Couch* v. *Steel*, 3 E. & B. 402; *Stevens* v. *Jeacocke*, 11 Q. B. 746; R. S. O. ch. 9, sec. 30; R. S. O. ch. 10, sec. 168; *Elliott* on Parliamentary Election, pp. 59, 81; *Phillips* v. *Phillips*, 1 M. & K. 649; *Broom* v. *Broom*, 3 M. & K. 443; *Marsh* v. *Boulton*, 4 U. C. R. 354; *Mathers* v. *Lynch*, 28 U. C. R. 354.

Osler, Q. C., and *Meek*, contra. The refusal of a deputy returning officer to give ballots to electors is a *refusal to perform an obligation* imposed by sections 90 and 91 of the Election Act. The obligations and duties of deputy returning officers are the same in unorganized as in organized districts. Section 180 of the Act imposes the penalty and gives the right of action, and section 182 prescribes the mode of procedure and form of such actions. It cannot be argued that sections 90 and 91 do not apply to

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unorganized districts. A consideration of the scope and purpose of the Act, or even a fair interpretation of the sections above referred to, forbid such an argument. These sections must necessarily apply to elections in every part of the Province. The object of the Legislature, as appears by the Act, was to make deputy returning officers merely *ministerial*, and not in any sense *judicial* officers. Sections 180 and 102 shew that *malice* need not be alleged or proved in this action. The *refusal to perform an obligation* gives the right of action, regardless of the motives which actuated such refusal. The right of action given to an informer under section 180 is in the interest and for the protection of the public.

Wilfulness or *malice* is not the groundwork of such actions, which are based on the non-performance of public obligations or duties imposed by statute, and are intended as punishments, not as recompenses or amends to those aggrieved.

When the party aggrieved sues for the penalty given to him under section 181 he must prove that the refusal or other misfeasance was *wilful*. This is not necessary and not intended in actions brought under section 180. The plaintiff, to sustain his action, is not bound to shew that the parties had a right to vote.

The question to be tried was, not whether each of the parties seeking to vote had a right to vote, but whether the defendant refused to perform one of the obligations imposed upon him by the Election Act, viz., to give ballots to persons demanding them. The defendant had no authority or right under the Act, or otherwise, to inquire or decide whether the parties demanding ballots had good votes, and the plaintiff in this action is not bound to prove that each of the rejected voters possessed the necessary qualifications and had a right to vote. The defendant's statutory obligation was to give the ballot or administer the oath to each person offering to vote.

The evidence proves that the parties seeking to vote, in so far as they were allowed or required, gave their names,

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places of residence, occupations, and respective property qualifications, in compliance with section 92 of the Act.

The defendant did not plead or set up as a defence want of notice of action, and did not at the trial prove that no notice of action had been given; and the Revised Statutes of Ontario, ch. 73 (by virtue of which notices of action are required to be given in certain cases), do not apply to actions for penalties, nor to actions brought under the Election Act.

The defendant was an officer appointed under the Ontario Election Act, by the Ontario Government, to perform duties connected with an Ontario election, and having accepted the office and undertaken to perform the duties thereof, he cannot be heard to say that he is not liable for the consequences of his misconduct, because the place where he so acted may have been without the limits of Ontario. This action is brought under the same statute under which the defendant undertook to act, and for violation of the provisions thereof by the defendant. The Courts of this Province have power to try causes, both civil and criminal, arising without the limits of this Province. The defence that the acts complained of were done beyond the boundaries of Ontario is not properly raised by the pleadings. The question as to what are the northern and western boundaries of Ontario, is not a question of fact to be determined by the evidence, but a question of law to be determined by the construction to be placed on certain statutes, maps and documents, none of which were submitted to the Court on the trial. The establishment of a poll at Rat Portage, and the appointment of the defendant to act as deputy returning officer thereat, and the fact that the defendant so acted, were proven by oral testimony and by the return of the returning officer, and the papers and documents connected therewith, and with the holding of the said election produced on the trial by the clerk of the Crown in Chancery

The commission under which part of the evidence used at the trial was taken, and the execution and return thereof, were properly proved, as required by the

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statutes in that behalf and by the rules of Court relating to commissions.

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They cited R. S. O. ch. 62, sec. 38; R. S. O. ch. 10, secs. 90, 91, 92, 93, 102, 109, 110, 111, 180 and 182, Form 22; *Dyer* v. *Best*, L. R. 1 Ex 152; *Milnes* v. *Bale*, L. R. 10 C. P. 691, *Milnes* v. *Lea*, *ib.*; *Price* v. *Belcher*, 4 C. B. 872; *McDougall* v. *Peterson*, 40 U. C. R. 97; R. S. O. ch, 53; *Atkinson* v. *Newcastle Waterworks Co.*, L. R. 6 Ex. 404; *Gorris* v. *Scott*, L. R. 9 Exch. 125; *Ashby* v. *White* Sm. L. C. 321; *Ross* v. *McClay*, 40 U. C. R. 83; *Beard* v. *Steel*, 34 U. C. R. 52; *Heyland* v. *Scott*, 19 C. P. 165.

March 8, 1884. HAGARTY, C. J.—An objection was taken which, if valid, would necessarily defeat the claim, viz., that defendant was a public officer entitled to notice of action.

We think it cannot prevail, even if properly taken in defence.

Under the Act regulating such a defence, R. S. O. ch. 73, sec. 1, it is provided that any action brought against a Justice of the Peace, &c., or against any other officer or person fulfilling any public duty, for any thing done by him in the performance of such duty, whether such duties arise out of common law or are imposed by any statute, &c., shall be an action on the case for a tort requiring the express allegation and proof of malice, and want of reasonable and probable cause, &c.

Now it is clear that the present action could not have been brought under that section.

This is an action for penalties under our Election Act, R S. O. ch. 10, and cannot, as we think, be affected by such an objection.

Section 182 makes the penalty recoverable, with full costs, by any person sueing, by action of debt or information.

The various provisions for the protection of Justices and public officers as to tender of amends, costs, &c., would be wholly inapplicable in the case before us.

This action is brought on section 180: "Any deputy

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returning officer or poll clerk who refuses or neglects to perform any of the obligations or formalities required of him by the Act shall, for each such refusal or neglect, incur a penalty of $200."

The formal proof offered as to the holding the election, and defendant's position as deputy returning officer at Rat Portage, was, we think, fully proved.

It was attempted on defendant's part at the trial and in Term to raise the question of boundary between Ontario and Manitoba, and in effect to urge that the polling place in question was not in Ontario.

We think this could not be listened to when urged by an officer acting under an Ontario writ of election, to say nothing of any other reason.

The defendant offered no evidence at the trial, either of his own or others, to contradict the case made against him, and on the argument before us no further explanation by affidavit was offered.

The defence was rested wholly on legal objections.

The evidence offered on behalf of the plaintiff was that of Anderson, one of the five rejected voters, as to what took place at the poll. Some others present also testified.

Gilmour, Murdoch, and Monkman, three of those rejected, were examined by commission at Winnipeg.

According to plaintiff's witnesses the defendant seems to have taken an unfortunate view of his duties. He declared that he would not accept any vote on property on which there was not a house, and in one case certainly, if not another, he insisted on the voter producing his title deeds as a condition of getting a ballot.

Each of the rejected voters offered to take the oath prescribed by the statute, and asked to have it administered to them. Four of the five specifically stated and described the property on which they claimed to vote. The fifth, Anderson, stated that he could not specifically describe his land by lot or concession, &c. He said it was about Nepigon, in Nepigon, Long, or Striker township; that he had a memorandum of it from one Laycock, who had purchased it He since found it was Nepigon.

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He stated his interest was worth over $200, and he offered to take the oath. Defendant would not allow him, or give him a ballot. He asked Anderson if there was a house on it; he answered there was not, and defendant said he would allow nobody to vote unless there was a house on the land.

As to H. J. Clarke, he was not examined. A witness (Canavan) swore that Clarke presented himself at the poll, stated the property on which he claimed to vote, and offered to take the oath in the statute as to qualification and value.

The defendant would not give him a ballot, but offered him a tendered ballot, which Clarke took and put in, and a witness (Stanton) says he believes he was sworn with the tendered ballot.

There was no proof as to Clarke's qualification beyond his offer and request to be sworn thereto under the statute.

The learned Judge in his charge notices that defendant refused the vote of Anderson, not because of his not giving sufficient description of his property, but on the ground of there not being a house on it.

Monkman, Murdoch, and Gilmour, examined on commission, clearly swear to their legal qualification as voters.

Monkman and Gilmour swear to their rejection on the ground of no house; Murdoch on the absence of his title deeds.

The jury found for the plaintiff for five penalties in respect of these five voters, and against the penalty in McCallum's case, not considering he shewed a right to vote.

Of the thirteen objections taken in this rule No. 9 is disposed of as to the boundary question.

No. 12 is to the same effect.

No. 13 is as to the execution of the commission, the affidavit being taken before a notary. It is admitted that this is as the commission itself directs. It was too late to raise it at the trial. It had been previously opened for convenience of parties.

No. 10 is as to notice of action, already disposed of.

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No. 11 is to the effect that evidence of title to real estate was admitted instead of requiring production of title deeds.

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I hardly think this was seriously argued or relied on. It would introduce a wholly new feature into voting, and I do not propose to discuss it further.

No. 3 is, that defendant was acting as a judicial officer, and malice must be averred, &c.

This may be disposed of at present by saying that unless the action can be maintained on section 180 it fails. On that section we think malice has nothing to do with the matter.

The other objections bring up the main question.

The plaintiff's contention is this: that the duty of the deputy returning officer was wholly ministerial: that on a voter presenting himself declaring his name, residence, and calling, and also the property in respect of which he claimed to be entitled to vote, and whether he claimed as owner, tenant, or occupant of such property, and offering to take the oath No. 22, appended to the Act, the defendant was bound to give him a ballot: that this was an "obligation" imposed on him by sec. 180: that he refused to perform this and has thereby incurred the penalty.

If this be not established the action fails.

Under the Election law, where there are voters' lists, the duty of the returning officer is very plain. Section 90 gives full directions.

There are no voters' lists in Algoma, and section 92 makes provision. Sub-section 1 enacts: "In the distict of Algoma * * the person claiming to be entitled to vote shall declare his name, place of residence, and occupation or calling, and also the property in respect of which such person claims to be entitled to vote, and whether he so claims as owner, tenant, or occupant of such property. And the deputy returning officer shall cause the said particulars to be entered upon a list in the same manner as is prescribed in section 102 of this Act with reference to the tendered votes' list, and the list herein provided for shall be dealt with in the same manner as the tendered votes' list is directed to be dealt with by this Act."

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Sub-section 2: "In said district * * every person who offers to vote at any polling place shall, if required by any candidate, or agent of any candidate, or by the deputy returning officer, take, in lieu of the oath prescribed by section 91 of the Act, the oath or affirmation according to Form 22 in Schedule A to this Act, which the deputy returning officer is hereby empowered to administer."

Section 93 enacts that if the returning officer has reason to know or believe that fraud or violence is practised, &c., or that any voter is not qualified or has already voted, or tenders his vote under a false name, or personates, &c., the deputy returning officer under a penalty of $200 shall administer the oath, whether required to do so or not.

Section 181, following section 180, on which this action rests, declares: "Every officer or clerk who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of this Act, shall, *in addition to any other penalty or liability* to which he may be subject, forfeit to any person aggrieved by such misfeasance, act or omission, a penal sum of $400."

This would apparently not interfere with the common law remedy as in such a case as *Ashby* v. *White*.

In *Wolverhampton Waterworks Co.* v. *Hawkesford*, 28 L. J. C. P. 242, Willes, J., at p. 246, says: "There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy. There, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class which consists of those cases in which a statute has created a liability, but has given no special remedy for it. There the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it * * and as with respect to that class it

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has always been held that the party must adopt the form of remedy given by the statute."

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The notes to *Ashby* v. *White*, 1 Sm. L. C., 6th ed., are very full and instructive.

It is noticed that Lord Holt and the House of Lords held that the office of the returning officer was merely ministerial: "That the officer is only ministerial in this case and not a Judge, nor acting in a judicial capacity, is most plain; his business is only to execute the precept, to assemble the electors, to make the election by receiving their votes, computing their numbers, and returning the persons elected."

It is pointed out that in the previous case of *Barnardiston* v. *Soame* the House of Lords affirmed the judgment of the Exchequer Chamber, holding that an action could not be maintained against a returning officer for falsely and maliciously making a double return. North, C.J., held the officer to be a Judge, and therefore not liable although acting with fraud and malice: "These extremes were avoided by Lord Tenterden in *Cullen* v. *Morris*, 2 Starkie 587": "The returning officer is to a certain extent a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial; they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever, in the admission or rejection of votes. The greatest confusion would prevail if such a discretion were not to be exercised. On the other hand the officer could not discharge his duty without great peril and apprehension if in consequence of a mistake he became liable to an action." This passage was cited with approbation in *Tozer* v. *Child*, 7 E. & B. 377.

Pryce v. *Belcher*, 4 C. B. 880, was an action against the returning officer for wilfully, &c., refusing plaintiff's vote. He was on the register, answered all questions, and offered to take the oath. It appeared, however, that he had ceased to reside within the borough, and became disqualified by residence.

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Under the existing law 6 & 7 Vic. ch. 18, sec. 82, it was declared to be unlawful to require any voter to take any oath, &c.. either in proof of his freehold, residence, age, or other qualification, or to reject any vote tendered by any person whose name was on the register, except by reason of its appearing to the returning officer, upon putting such questions as mentioned in the statute, that the person claiming to vote was not the person on the register, or that he had previously voted, or except by reason of his refusing to answer said questions, or to take said oath, or the oath against bribery, and no scrutiny should be allowed by said returning officer, &c.

The previous section (81) enacted that no enquiry should be permitted as to the right to vote except certain specified questions and a prescribed form of oath.

The jury negatived malice, and found that the plaintiff had no right to vote.

The same Act (sec. 97) gave to every party aggrieved a penalty of £100 against every Sheriff, Returning Officer, &c., Clerk of the Crown, Postmaster, or other person required by the Act to do any matter or thing, for every wilful misfeasance or wilful act of commission or omission, with a proviso that this should not supersede any remedy or action against any returning officer then allowed by law.

Coltman, J., delivered the judgment of Court, that the returning officer, in refusing to admit the vote, had mistaken his duty and acted in contravention of the 82nd section, and might have subjected himself to a criminal prosecution for the breach of a public duty; but that the rejection of the vote under the circumstances could not be made the ground of a civil action at plaintiff's suit. At p. 883, he says: "This restricting of the enquiry to two simple questions, though highly convenient with reference to the general conduct of an election, was incidentally attended with this inconvenience, that it put it in the power of parties who were not entitled to vote to have their names put upon the poll and thereby to influence the elections. But it appears to us that, although a party in

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the situation of the plaintiff has the power in this way to compel the returning officer, under the apprehension of a prosecution, to put his name upon the poll, he has not the right to do so; that in doing so he is acting in direct contravention of the Act, the terms of which are express, that he shall not be entitled to vote" (from non-residence); "and that the rejection of his vote cannot amount to a violation of anything which the law can consider as his right. The foundation of the plaintiff's action is the injury to his right; but we are of opinion, for the reason above given, that he has no right, and consequently that he has suffered no injury."

The argument is very full. It was urged that since the Reform and Registration Acts the returning officer was no longer a judicial but a mere ministerial officer, and it was his duty to record the vote.

Creswell, J., at p. 879, says: "There may be a duty to perform with respect to others, but not a duty to be performed to the party who tenders his vote."

It seems to me to be very clear that if this Imperial Act had any clause like our section 180, the penalty could have been recovered by an informer for refusing the vote of the plaintiff in *Pryce* v. *Belcher*, although he really had no right to vote.

It would have been recoverable, as here sought to be recovered, in the interests of the public to compel returning officers to do what the law prescribes.

Pickering v. *James*, L. R. 8 C. P. 489, may also be referred to, being an action against a presiding officer at a municipal election for breach of duties. The Court held that the duties were wholly ministerial, and malice need not be alleged.

Unless I have totally misconceived the scope and meaning of our Election law, I consider it as plainly, as well as wisely, designed to place as little as possible in the power of returning officers to deviate from the clear directions prescribed for their guidance in the performance of their duties.

The experience of the past shewed the dangers of per-

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mitting such officials to indulge their own fancies in accepting and rejecting votes, instead of rigidly following the plain letter of their instructions.

Our statute, with laborious and minute particularity defines the duty so clearly that nothing but bad faith or the most crass stupidity—nearly as mischievous in its consequences—can make any mistake.

Numerous penalties are provided both for deputy returning officers and poll clerk; *e.g.* under section 61 for neglecting to take the oath or appointment, $100; under section 90, for taking the vote from one who refuses to take the oath, $200; under section 92, for not administering the oath when he knows, &c., that fraud or personation, or want of qualification exists, $200; under section 123, for omitting to attend the returning officer, or refusing to be sworn respecting loss of voters' list, $200 and commitment to gaol. Section 146 is as to violation of secrecy, summary conviction, and imprisonment; section 177, wilful alterations in lists, $2,000; section 178, fraudulent defacing, &c., of ballots, imprisonment.

The Act apparently distinguishes as between wilful default and simple misfeasance or omissions as to the performance of specified duties.

There is a multitude of directions as to doing certain things purely ministerial and perfunctory.

When the deputy returning officer proceeds to the counting of ballots under section 105, and is to decide (sub-sec. 3) any question arising out of objections taken, he may be said to be acting judicially.

In taking the votes at the polling place, I consider his duties are, under the statute, merely ministerial, and that the object of the statute is to prevent them being otherwise.

Under section 93, he is allowed and directed to exercise his judgment as to administering the oath on his own motion when he believes there is fraud, non-qualification, personation, &c., &c.

This would seem to be the limit of his discretionary power on this head.

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In this case the qualifications and the mode of receiving votes in Algoma seem very plainly defined.

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Section 92 has been already given.

The oath clearly shews what the voter has to declare or be sworn to—that he is possessed to his own use and benefit, as owner, of real estate in the electoral district of the value of $200 or upwards; *or* that he is a resident householder, &c., in said district.

It is not easy to understand how any man of ordinary intelligence—any one supposed to be fit to be a deputy returning officer—could in good faith believe that he was authorized to refuse votes except from persons having a house on their land.

This bold view at once would disfranchise, at the pleasure of the officer, all the freeholders who were not householders.

Equally extraordinary appears to be the refusal of a ballot to a voter because he has not his title deeds with him. It is difficult to believe that any one could have acted on such an objection.

If for any reason the defendant believed that the person was not duly qualified, he could, of his own motion, require him to take the oath. Surely that was the statutable limit of his right of interference.

To permit a returning officer to adopt an extraordinary reading of his own of a very plain Act of the Legislature might enable him to disfranchise at his pleasure one-half, or three-fourths of a constituent body.

I think it was expressly designed by the Legislature that the franchise should not be placed at the mercy of such an officer, and that he must obey the clear letter of the law at the peril of liability to the penalties provided.

I think his refusal to give ballots to the persons named was, under the facts proved, an "obligation" required of him by the statute.

Words like these have been used in previous statutes.

12 Vic. ch. 27, sec. 18, says, speaking of a new returning officer appointed in lieu of the first appointee, "and such

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new deputy returning officer shall be bound to perform all the *duties and obligations* of the said office under the same penalties in case of refusal or neglect," &c.

Section 11 speaks of "the obligations of his office" in the case of the election clerk. If the returning officer be sick or die, &c., the poll clerk may act, and shall be bound "to perform all the duties and comply with all the obligations" of his office.

Section 22 uses the words "obligations or formalities."

I think the words used in the existing Act sufficient for the purposes of this case.

I further hold that in the case of Monkman, Murdoch, and Gilmour, the case seems clear against defendant on all grounds, and that, if necessary, they have proved their right to vote.

All the parties, I consider, come under section 198: "Any person applying for a ballot paper under this Act shall be deemed to tender his vote, or to offer or assume to vote." They were ready to answer, and did answer all questions, and stated their qualifications.

H.J.Clarke has not proved his right to vote as the others did, but as he stated his property qualification, and offered and required to take the oath, the defendant was bound to give him his ballot.

The defendant by his conduct incurred the penalty, as far at all events as the plaintiff suing as an informer is concerned.

I think the principles of law laid down in *Pryce* v. *Belcher*, 4 C. B. 880, clearly establish this.

I feel much doubt on the case of Anderson. He offered to take the oath, but was unable to specify his land qualification with any greater precision than that it was in one of three townships, Nepigon, Long, or Striker.

It is quite true that the form of oath does not in terms require more than that he is owner of real estate in this Electoral District of the value, &c.; but under section 92 he is "to declare the property in respect of which he claims to be entitled to vote, and whether he so claims as owner, tenant, or occupant of such property."

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The returning officer shall cause said particulars to be entered upon a list in the same manner as is prescribed in section 102 with reference to the tendered votes' list, &c.

Turning to section 102, we find in the case of a person claiming that his name has been improperly omitted from the voters' list, &c., he may be allowed to mark a tendered ballot, which shall not be counted, &c. *, * "And the deputy returning officer shall enter, or cause to be entered upon the tendered votes' list the name, place of residence, and occupation or calling of such person, and *also a short description of the property in respect of which such person claims* to have been entitled to have been entered on the voters' list, and whether it is as an owner, tenant, or occupant of such property," &c.

This list of tendered ballots is to be retained with the other list of papers.

I have great doubts whether Anderson put himself, on his answers, in a position to demand a ballot, and the deputy returning officer might naturally think that there must be some description to identify the property, so as to enable him to comply with sections 92 and 102.

It is quite true that the defendant told him he would not give him a ballot unless he had a house on his land, but I doubt whether, by his giving an illegal ground for his refusal, he is now prevented from urging that Anderson had been unable to describe or identify his property; and if his so doing were necessary under the statute, he was not in a position legally to demand a ballot.

It seems to me that the intention of the Act must have been, in the absence of a voters' list, to require and preserve an entry of the alleged qualification.

I cannot satisfy myself that to declare that he owns property in one of three named townships, which he had never seen and cannot otherwise describe, is a compliance with the statute.

It would seem from the evidence that the defendant did not ask him for particulars of the property, but asked, was there a house on it? He answered, No, and that he never

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had seen it. Again: "I told him in what township I thought the property was, that it was in Nepigon, Long, or Striker."

I feel much doubt on this point. It seems clear that defendant rejected him on wholly different grounds, and evidently did not understand that the vagueness of the description was an objection, as he offered him a tendered ballot, which course under the statute would have equally involved entering a proper description of the property in the list.

This objection does not affect any of the other cases, as no such disclosure occured in any of them.

I take this view of Anderson's case with much hesitation, chiefly caused by the vagueness of the oath, apparently not requiring specific description.

CAMERON, J.—I am of opinion the order *nisi* should be discharged.

I do not see anything legally sufficient to relieve the defendant from any of the five separate penalties.

His rejection of Anderson's vote was as much a violation of the obligation imposed upon him as the rejection of any of the others. On the evidence Anderson was entitled to vote; but, whether he was or was not, the defendant's duty was purely ministerial, and Anderson being willing to take the oath required by the Act, there was no course legally open to the defendant except to give him a ballot paper, making a note on the list, if the vote was objected to by either of the candidates or his agent. The deputy returning officer must not be permitted to exercise a judgment as to who may or may not vote, if the person tendering his vote is a male and willing to take the oath.

Pryce v. *Belcher*, 4 C.B. 880, appears to me decisive of this.

The learned Chief Justice has fully reviewed the authorities, and I agree in the conclusion he has come to, except in reference to the penalty incurred by the defendant in refusing to allow Anderson to vote. The evidence shews that the defendant's ground for refusing

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to allow him to vote was not that he could not give a description by which the land could be identified, but that there was no house upon it; and he cannot now be permitted to shelter himself from the consequences of his breach of duty to the public by setting up the circumstance that Anderson was not able to give a perfect description of the property entitling him to vote. *Non constat*, if he had raised that objection, that the voter might not have found the means of removing it.

There is nothing in section 92 or 102 that makes it necessary for the person claiming a right to vote to give a precise description of the property in respect of which he claims such right before receiving a ballot paper. A general description of the property is sufficient, and the character in which he assumes to vote, that is, as tenant, owner, or occupant.

This is what is required by section 92, and section 102 requires the deputy returning officer to enter upon the list the name, residence, occupation, and calling of the person, and also a short description of the property in respect of which he claims the right to vote.

It appears to me that it is impossible to say the declaration that he owned 1,400 acres in Nepigon, Long, or Striker, made by Anderson, was not a compliance with this requirement; but whether it was so or not, if he was willing to take the oath, his vote ought not to have been refused.

The oath appears to stand in the place of the voters list, or is the safeguard prescribed by the Act against an unqualified person's voting.

It is infinitely better to run the risk of allowing an unqualified person to give a vote than to permit a deputy returning officer, who may be a violent partizan, to exercise the discretion of saying who may or may not vote.

ARMOUR, J., concurred.

Order nisi discharged, with costs.

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[CHANCERY DIVISION.]

RE L. U. C. TITUS, A SOLICITOR.

Misconduct—Striking off the Rolls.

It was charged against T., a solicitor, that one W. being about to be tried for a criminal offence, was induced by T., as her solicitor, to pay him $200 for the purpose of influencing the jury.

The Court, upon the facts stated below, being satisfied that the charge was proved, an order was made striking him off the rolls.

The petitioner having made a *prima facie* case, and being unable from want of means to proceed with the application, a solicitor was appointed by the Court to take the matter up.

THIS was an application made by one Harriet Camilla Wright, to strike one L. U. C. Titus, a practising solicitor off the rolls, for misconduct.

The petitioner alleged that she was about to be tried on a criminal charge, namely, that of shooting and killing one Henry Ryan, and that Titus, who was her solicitor, and acted as such in her defence on such charge, so worked upon her fears that she believed she was in great danger of conviction and punishment, and while so frightened he led her to believe that her best means of defence would be by bribing the jury: that she paid him in all $320, of which $200 was paid to him in two sums of $100 each, on two different occasions, for the purpose, as he expressed it, of "salting the jury;" and that subsequently, while proceedings were pending for the taxation of his costs as such solicitor, he for his own purposes induced one — Ryan, the father of the deceased, to bring an action against her for civil damages under Lord Campbell's Act, and acted as his solicitor in bringing such action.

The solicitor alleged that the moneys received by him had been paid over to a third party, to obtain his assistance in the petitioner's defence; and he denied that he had had any conversations with her in reference to "bribing" the jury.

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The case was originally brought before the Court by Mr. Marsh for the petitioner, but by reason of the enlargements and from other causes, the matter became so protracted that the petitioner alleged that she would be unable to continue it from want of means, and applied to the Court to appoint a solicitor to carry it on for her. The learned Chancellor considered that a *primâ facie* case had been made out, and under the circumstances directed Mr. J. Hoskin, Q.C., to proceed with the application, which was argued before Boyd, C., on February 7th, 1884.

J. Hoskin, Q.C., for the petitioner. The solicitor had the petitioner under his influence, to do just what he told her. He has obtained large sums of money from her for an improper purpose. He has not shown what he did with it. He has a balance of his client's money in his hands not yet paid over, and is answerable to the jurisdiction. He was employed by petitioner as her solicitor, and while acting as such in proceedings that were pending, he issued a writ for Ryan against her, and acted as solicitor for Ryan. Vol 16 Cent. L. J. 183.

S. H. Blake, Q.C., for the solicitor. No offer was ever made to examine the third party before the Court. The action was brought *bonâ fide* for Ryan. An issue should be ordered to try this question: *Re Patterson* v. *Miller*, 1 U. C. R, 256, 393; *Re Campbell*, 32 U. C. R, 444; *Re Fletcher*, 28 Gr. 413; *Re Bartlett* v. *Meyers*, 1 U.C. R 252; *Re Keys*, *Smith* v. *Henderson*, 13 C. P. 262; *Pulling*, on Attorneys, 463; *Whiteways*, on Solicitors, 14; *Cordery*, on Solicitors, 63, 139.

February 20th, 1884. BOYD, C.—I think it is clearly proved that the solicitor, at the first interview with his client, and speaking of her defence, said, that there were "other ways besides legitimate ways to manage these things." It is proved that $200 was paid by the client to the solicitor for the purpose of a line of defence which was thus referred to at the first interview.

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The variance comes in the evidence when this line of defence is specified. According to the petitioner it was by distributing the money among the jurors, and by challenge securing those for her trial who had been thus approached. The solicitor's explanation is more indefinite. He says, there was a feeling against her, which was being developed by newspaper comments, and that the client suggested the name of a friend, to whom the money was given, with the intention of satisfying him for his trouble and expenses in interesting himself on her behalf. This friend was enveloped in mystery until about the end of the proceedings when two affidavits were procured from him. He is one William Martin, of Brighton, who describes himself as "High Constable," and whose business appears to be to serve jurors with summonses to attend the assizes. He says that the solicitor told him that Miss Wright was anxious to have him interest himself actively in her behalf, and Martin said he would assist if he was well paid for his services, and it was then arranged that he should get $200. which was afterwards paid him in two sums of $100 each, The assistance Martin says he rendered was to explain the case from the standpoint of the defence through the county, and to supply the solicitor with all the information he could obtain as to the rumoured evidence likely to be used against Miss Wright.

The solicitor says that Miss Wright first suggested the name of Martin as a friend who would actively interest himself in her behalf; but the weight of evidence is against this, which rests upon the solicitor's oath alone.

William James Wright, the petitioner's brother, says the first he heard of "jury-bribing," was about the 5th September, at the office of the solicitor, and after the first interview I have referred to. The solicitor then said he wanted some money to salt the jury with. Wright asked how it could be done to get the right jurors. The solicitor said a third party would use the money, (referring to Martin), and that the jury could be challenged until the right ones were got. The solicitor then sent a message to his client

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by the brother that he wanted to see her, and the brother then told her that Titus wanted money to salt the jury, and also told her who was going to attend to it.

Thereupon she, in company with her sister-in-law, saw the solicitor on the 6th September, and asked him how much money would be needed, and he replied that Martin had said that $75 or $100 could be used advantageously.

My view of the evidence is, that Martin was wanted, not because of any alleged friendship for Miss Wright, but because of his official position, and that the suggestion of his name originated with the solicitor.

The chain of evidence is very strong against the solicitor. W. J. Wright swears that Titus broached the salting of the jury to him as I have mentioned, and he told it to his sister as a part of the message from the solicitor to her. Both agree as to that. She, accompanied by Mrs. Wright, goes to see the solicitor, and there the use of the money in this illegitimate way is talked about, in the presence of Mrs. Wright, who corroborates what the petitioner says. A payment of $100 is then made on the 6th September. Later, on about the 19th or 20th September, a message is again sent by the solicitor to the petitioner, by means of the same messenger, (W. J. Wright). The solicitor then told W. J. Wright, that "three jurors had been fixed all right." Pursuant to this request, the petitioner and her sister-in-law again called on the solicitor, and a further sum of $100 is paid, and upon that occasion the solicitor repeats to them what he had told to the brother, that only three jurors had been secured with the first $100. This the sister-in-law corroborates, so that we find three people, (whose credibility is not shaken or impeached) swearing to this matter of detail, which is not satisfactorily denied by the solicitor. The solicitor denies generally conversations relating to jury bribing, but it is clear that the offensive word "bribe" was not used, it was put more euphemistically as "salt." One cannot give credence to the bald sweeping denial of the solicitor, as against these detailed conversations with three witnesses, who agree in substance as to

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the representations and expressions made use of by the solicitor.

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The whole conduct of the solicitor in reference to these $200 during the course of the proceedings before the Master, and in the Court, has been the reverse of candid. Before the Master on the taxation he could give no account of how much money he had received in respect of this secret-service money. When driven to a corner, he put in an affidavit, stating that the moneys (not being able to define the amount) were given to him to be handed to a third person, to secure his assistance in preparing the defence of Miss Wright, whereas it is now made to appear that he had closed a deliberate bargain with Martin, by which he was to pay him $200 for his services, before he had received any of this money from the client. If the transaction was a proper one, it was the solicitor's duty to keep an account of money received from his client, and of its due expenditure. Nothing of the sort was done.

The bargain made between Martin and Titus, if real, was never communicated to the client; if the transaction was a proper one, it was the solicitor's duty to have told his client of the arrangement, and to have protected her against any unnecessary expense. The manner in which the solicitor subsequently obtained the money from his client, and the statements then made by him, repel the conclusion that she was aware of, or was acting upon, any such arrangement as is now put forward at the eleventh hour. If the bargain with Martin was a reality, the solicitor would have told her of it at the outset, but instead of this, he gets $100 on the pretence that it can be advantageously used with the jury, and again after ten days he gets a further sum of $100 on the pretence that only three of the jurymen have been secured by the first payment. What private understandings or arrangements may exist between Martin and the solicitor I know not, nor am I at present concerned therewith. The material point is, upon what representations did the solicitor get the $200 from his client. It is proved in my opinion that he obtained it

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by suggesting that she was in great jeopardy and that to strengthen her defence it would be best to distribute money among the jurymen. It does not matter for the purposes of the disciplinary jurisdiction of the Court, whether he intended to take this step or not, or whether the step was actually taken or not. It is enough to ascertain whether a solicitor has availed himself of his honorable and confidential position for the purpose of taking advantage of and defrauding his client, to justify the Court in withdrawing from him those privileges, and that certificate of character, which are afforded by his being permitted to remain on the roll of solicitors. Per Lord Langdale, in *Re Martin*, 6 Beav. 342.

As the matter is presented to me, the solicitor's oath is contradicted by the testimony of three people. Martin's affidavit is on a point of which people other than Martin and the solicitor may have no means of knowledge, and it casts no light upon the course of dealing by which the solicitor procured these $200 from his client. Having regard to all the circumstances and evidence, and to the course of proceedings during the lengthy investigation of these matters in the Master's office on the taxation, and upon the present petition, I have arrived at the conclusion that the line of defence on the part of the solicitor is not trustworthy, and that he has not successfully vindicated himself from the charge with which I have been dealing. *Re Crossley*, 6 T. R. 701.

The matter is one which affects the Court and the whole profession of which the solicitor is a member and an officer. It was by the action of the Court that he was placed on the rolls, and clothed with the sanction of the Court in the transaction of business affecting the person and the property of his client, and the Court should divest him of that sanction if his conduct shows that he cannot be trusted to discharge those duties with honor and integrity. It is likewise the interest of the profession to maintain their honourable body free of suspicion, so as to retain and deserve respect and confidence, both at the bar of judicial and of public opinion.

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With great regret, and after most anxious consideration, I deem it my duty to direct that an order be made to strike the name of this solicitor off the rolls of the Court.

G. A. B.

[CHANCERY DIVISION.]

CORBETT v. HARPER.

Conveyance—Reservation of timber—Construction.

C. conveyed to H. certain land by a deed which contained the following reservation and covenant: "And the said party of the first part reserves to himself all the standing timber upon the said lands, excepting that which measures eight inches through, and the said party of the second part, covenants with the said party of the first part, to give him five years from the date hereof to take the said timber off the said lands, with the right of entry upon said lands for the purpose of removing said timber."

Held, that C. was entitled to all the timber over eight inches in diameter.

THIS was an action brought by one Elias S. Corbett, against Samuel Harper and Ann Jane Harper.

It appeared that the plaintiff, who was the owner in fee of the south half of lot 23 in the 1st concession of the Township of Manvers, in the County of Durham, had, by indenture dated the 18th November 1875, conveyed the said land to the defendant, Samuel Harper, and the said indenture contained the following reservation and covenant; "And the said party of the first part reserves to himself all the standing timber upon the said lands excepting that which measures eight inches through. And the said party of the second part covenants with the said party of the first part, to give him five years from the date hereof to take the said timber off the said lands, with the right of entry upon said lands for the purpose of removing said timber."

Ann Jane Harper was made a party as Samuel Harper had conveyed the land to her, but it was alleged that she merely held it as a trustee for Samuel Harper.

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The plaintiff alleged that the defendants forcibly prevented him from entering on the said land for the purpose of cutting and removing the trees, and that the defendants had cut down the said trees and converted them to their own use and claimed damages.

The defendants in their statement of defence recited the reservation and covenant in the conveyance from the plaintiff, and claimed that the reservation was void for uncertainty.

The case was tried at Peterborough on October 15th, 1883, before Proudfoot, J., when judgment was given declaring the defendants entitled to all the standing timber of eight inches diameter and upwards.

On December 13th, 1883, the plaintiff moved by way of appeal to the Divisional Court before Boyd, C., and Ferguson, J.

Poussette, for the plaintiff. The exception in the reservation only applies to trees exactly eight inches in diameter, and the plaintiff intended to reserve to himself all, except what was described by that measurement. The covenant allowing him access to the land to remove the timber shews that. If he was not to have the timber, the covenant was needless. Trees under eight inches in diameter are not timber.

Hoyles, contra. The exception includes not only trees precisely eight inches in diameter, but all over that, as well. Trees ten or twelve inches through are eight inches through. The greater includes the lesser. If that is not the meaning, no person can tell what the meaning is, and the reservation is void for uncertainty. *Pearce* v. *Watts*, L. R. 20 Eq. 492.

February 21, 1884. BOYD, C.—We have absolutely nothing to guide us in this case except the words to be found in the conveyance of the 18th November, 1875, which both parties executed.

That is a grant of 100 acres of land, and by the clause

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in dispute the grantor "reserves to himself all the standing timber upon the said lands, excepting that which measures eight inches through."

The grantee covenants to give five years for the removal of this timber with the right of entry on the lands for that purpose. There is thus—*First*, a reservation of all standing timber by the plaintiff, with—*Second*, an exception in favour of the defendant of all that which is eight inches in diameter; or to put it more correctly, there is an *exception* of the standing timber with a saving out of it of such as is eight inches through.

This is therefore in substance equivalent to a grant of so much standing timber by the defendant as grantor to the grantor (the plaintiff) as grantee: *Wilson* v. *Gilmer*, 46 U. C. R. 545; *Doe dem. Douglas* v. *Lock*, 4 Nev. & Man. 807.

The once often-applied maxim, that deeds are to be read most strongly against the grantor, has not much applicability to this instrument, in which both parties appear as grantors, and in which both enter into covenants relating to the timber.

Even in ordinary cases of obscurity and ambiguity one would hesitate to apply that rule of construction as a means of solution after the language of Jessel, M. R., in *Taylor* v. *The Corporation of St. Helens*, 6 Ch. D. 270. The proper modern canon of construction is there thus enunciated, "the true rule * * is to construe the language of the instrument according to its ordinary meaning, giving to technical terms their technical meaning unless we find a context such as to convince the mind that the ordinary rules of construction which would be applied to the original expressions standing alone ought not to be applied. * * I do not see how that maxim" (the ancient maxim of reading a grant most strongly against the grantor) "can be considered as having any force at the present day. The rule is, to find out the meaning of the instrument, according to the ordinary and proper rules of construction. If we can thus find out its meaning, we

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do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said, that the instrument is construed in favour of the grantor, for the grant is annulled."

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To such a case as this I am disposed to apply the same means of interpretation as were employed by the M. R., in *Vincent* v. *Spicer*, 22 Beav. 383, 384, when he says, "the Court will, if it can, give a distinct and sensible meaning to every word in the clause, and will give effect to it," and again, "the ordinary meaning which a person unacquainted with law and legal decisions would put upon it, is the proper meaning."

The only word that can be regarded as at all technical is "*timber*." For the elucidation of this I cannot do better than refer to the judgment of Jessel, M. R. in *Honywood* v. *Honywood*, L. R. 18 Eq. 309. "The question of what timber is, depends, first, on general law, that is, the law of England, and secondly, on the special custom of a locality. By the general law of England, oak, ash, and elm, are timber, provided, they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient according to a text writer, (*a*) to make a good post timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even white-thorn and black-thorn, and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty four years, or even to a later period, I suppose, if necessary; and in other places

(*a*) *Gibbons* on Dilapidations, p. 215.

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the test of when a tree becomes timber is not its age but its girth."www.libtool.com.cn

In this country I apprehend the term "timber" has a wider scope by the general law, and would be properly applicable to whatever trees are used in building or the mechanic arts. Timber primarily means, "wood fit for building." See *Latham's English Dictionary.* In the *Imperial Dictionary* it is described as that sort of wood which is squared, or capable of being squared and fit for being employed in house or ship building or in carpentry, joinery, &c.

In *Nash* v. *Disco,* 51 Maine R. 417, the Court adopt as correct Webster's definition as that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like. And it is there said, that in a contract for the purchase of timber, no title would be acquired by the purchaser to trees not suitable for any purpose but for firewood. Of course young trees which may become timber are not so, while they are yet saplings. See *Campbell* v. *Shields,* 44 U. C. R. 450.

Indeed I am disposed to think the rule of law applies in this province, by which a given tree would require to be of the age of twenty years before it could be called timber.

It is distinctly held by several of the Judges, in *Aubrey* v. *Fisher,* 10 East 446, agreeing apparently with the view of Lord Coke, that when once a particular wood is ascertained to be timber, the rules of common law respecting timber apply, one of which is, that it assumes the denomination of timber at twenty years growth. That case was recognized as law and followed in Ireland in 1872, by the M. R. in *Dunn* v. *Bryan,* 7 Ir. R. Eq., 152.

I am not aware what the average girth of hard wood and soft wood trees would be at the age of twenty years. Much would depend on the soil and other local circumstances.

In the present case the parties were contracting with reference to the size of the trees. Those eight inches

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through were being separated from the other timber trees growing upon the land conveyed.

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Ordinarily you might expect to find in this country on a wooded tract of land, that the most valuable part of the timber would be that which exceeded eight inches in diameter. I suspect that what the parties intended in this case was, that all the trees up to those eight inches through should be retained and go with the land, and that all the timber of larger growth should be taken off and disposed of, by the plaintiff for his own use.

But we have not to determine the rights of the parties, as to what, if anything, is under eight inches. The judgment in appeal complained of, decides that all the standing timber from eight inches through, and upwards, is held by the grantee under the saving out of the exception: that is, in other words, by the exception of all the standing timber except what is eight inches in diameter, the plaintiff (the grantor) gets nothing of value except possibly that line of timber (if any) which may be between a twenty years growth and an eight inch diameter.

I cannot agree that this is the intention of the parties as manifested in and by this instrument. I think any layman reading the deed would say that only timber trees eight inches through are meant to be dealt with, and that the larger timber was not covered by that mode of expression. It would be out of the ordinary course to speak of trees twelve or eighteen inches in diameter as trees which were eight inches in diameter. They are that, of course, but they are more than that.

If one was getting gloves or boots of a given size, it would not serve the purpose to buy them of larger dimensions, on the plea that the size given was embraced in the larger size. We ought not to hold that the less includes the greater, even by implication.

To give effect to the judgment now in appeal would be, in my opinion, not to expound the terms of the deed, but rather to add words to it, and so extend its scope and meaning.

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What is expressed and meant—so far as I am able to interpret the parsimonious language of the conveyanecr (who does not appear to be in this case one of the uncertificated) is, that all timber trees which, at the delivery of the deed, would be called in the usual way of measurement eight inches in diameter—a trifle more or less would be of no moment—being saved from the general exception of all standing timber, became the property of the defendant, and went with the land.

As the parties have fallen into this litigation by the carelessness of the common conveyancer, who should have prepared an agreement that could be readily understood; and as the matter was left to us without any reference to authorities, and as different minds may draw diverse meanings from the meagre language of the deed, my view is to reverse the judgment without costs.

FERGUSON, J., concurred.

G. A. B.

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[CHANCERY DIVISION.]

McEwan v. Milne.

Setting aside a conveyance—Influence—Confidence—Constructive fraud—Onus of proof.

Action to set aside a conveyance obtained from an old woman who was deaf and unable to write, and who had no relatives or friends, by the Reeve of the Township in which she lived, and who was well known as a Justice of the Peace and an active, shrewd business man engaged in many enterprises. The plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him; she however having sworn in her evidence that she never placed any dependence on him. The plaintiff's case was closed, and it was contended that the *onus* was now on the defendant to show that the transaction was a righteous one. The defendant declined to call any witnesses, and plaintiff's action was dismissed.

Held, on motion for a new trial (sustaining the judgment of Proudfoot, J.,) that the *onus* was not on the defendant, and that the plaintiff must prove her case.

Semble, the mere existence of confidence is not enough; influence must be proved, and is not to be presumed from the existence of confidence. *Wallis* v. *Andrews*, 16 Gr. 637 followed.

This was an action brought by Isabella McEwan against John Milne and Barbara Ann Milne, his wife, to set aside a conveyance from the plaintiff to the said John Milne, which the plaintiff alleged had been obtained from her by the defendant, John Milne, under such circumstances as to render it invalid and the said defendant guilty of at least constructive fraud in obtaining it.

The case was tried at Sandwich, before Proudfoot, J., on April 20th, 1883, when the plaintiff was examined.

Her evidence went to show that she was an old woman without relatives or friends, and very deaf and unable to write; and that the defendant, John Milne, who was the Reeve of the municipality and a Justice of the Peace, well known as an active, shrewd business man, and engaged in many business enterprises, had come to her house and obtained the conveyance from her, she however alleging that she never signed it. Part of the defendant's depositions were put in, in which he admitted that the plaintiff put a good deal of confidence in him, but the plaintiff in her examination stated that she never placed any dependence on him.

The plaintiff's counsel rested his case here, giving no

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evidence of undervalue, and contended that he had made out such a *primâ facie* case as to throw upon the defendant, the *onus* of proving that he gave full value for the property, and otherwise that the transaction was a proper one.

Defendant's counsel declined to call any witnesses, and contended that no such *onus* was on the defendant, but the plaintiff must prove her case.

No further evidence being taken the plaintiff's action was dismissed. From this judgment the plaintiff appealed, and the case came on for argument before Boyd, C., and Proudfoot and Ferguson, JJ., on the 21st February, 1884.

R. M. Meredith for appeal. The evidence shews that the defendant, John Milne, was the virtual solicitor of the plaintiff, and that she was unable to act for herself without advice, and that she relied upon him. Even if she executed the deed she did it under such circumstances as amount to constructive fraud on the part of the party obtaining it. The consideration was not near the value of the property, and even the cash payment was not left with her, but was taken away to be invested in one of the defendant's business ventures, a manufacturing company. The *onus* should be on the defendant to show that the transaction was a righteous one: *Prees* v. *Coke*, L. R. 6 Ch. 645; *Pisani* v. *Attorney General*, L. R. 5 P. C. 516. The *onus* is not on the plaintiff: *Baker* v. *Monk*, 10 Jur. N. S. 624; in App. 691, 4 DeG. J. & S. 388; *Macdonald* v. *Worthington*, 7 A. R. 531.

Cassels, Q.C., for defendant. *Macdonald* v. *Worthington* has been reversed in the Supreme Court. In *Baker* v. *Monk* undervalue was affirmatively established. There was no evidence of undervalue in this case, and there is no *onus* on the defendant. This case is the same as that of a voluntary conveyanee.

Meredith, in reply, referred to *Clarke* v. *Hawke*, 11 Gr. 549.

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February 24, 1884. BOYD, C.—The law is well settled that, where in a dealing between two persons a presumption of fraud is raised from the circumstances or conditions of the parties contracting; that is to say, as put by Lord Hardwicke, "Weakness on one side, extortion and advantage taken of that weakness on the other," then the *onus* is on the party likely to control the other to shew that the transaction was fair just and reasonable. Where the relative position of the parties is such as *primâ facie* to raise this presumption the transaction cannot stand, unless such proof is given by the person claiming the benefit of it.

Whether such a presumption is raised depends upon the special circumstances of each case.

Fraud in this sense implies an unconscientious use of the powers arising out of these conditions or circumstances of which undervalue is one indication: *O'Rorke* v. *Bolingbroke*, 26 W. R. 239, L. R. 2 App. Cas. 814.

In the present case, the party complaining of the imposition rested the case upon her own evidence, was seen and heard by the Judge; and upon her own testimony and demeanor he came to the conclusion that though she was aged and somewhat deaf, yet she was shrewd and sufficiently acute to be able to protect herself in matters of business; and finding a failure in proof of the allegations of her claim, he dismissed the action.

It is now urged before us that enough was in evidence at all events to cast on the defendant the duty of proving that he gave the full value for the property. This is mainly put upon the ground that there was a confidential relationship between the parties.

It is true the defendant admits in his examination (part of which is put in) that she placed a good deal of confidence in him. But on the other hand the plaintiff states, that she never placed any dependence on the defendant. Yet assuming that there was confidence, as the defendant puts it, that does not advance the matter so as to reverse the ordinary rule that the plaintiff has to substantiate his case. The very point is thus dealt with by Spragge, V. C., in

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Wallis v. *Andrews*, 16 Gr. 637, "The mere *existence* of confidence is not enough: its proved existence indeed would be an ingredient in proving influence; but influence, I apprehend, is not to be *presumed* from the *existence* of confidence. It would be strange and unreasonable to shift the burthen of proof from the party impeaching the conveyance to the party sustaining it, merely upon proof that the party making the conveyance entertained a strong feeling of confidence in the person to whom he made it."

The evidence of the plaintiff is sufficient to indicate an execution of the deed in question, the receipt by her of the $500 down payment, and of the mortgage for the balance of $3,500; her direction to invest the $500 so that it should yield eight per cent. interest; and the acceptance on her part of the security of the manufacturing company by which that investment was effected. Her evidence also indicates that she estimated the value of the land at about $4000, and that its condition was such as to render a sale of it a very reasonable step on her part. *Holmes* v. *Howes*, 20 W. R. 310, (Romilly, M. R.)

All these circumstances differ the case from *Baker* v. *Monk*, 4 DeG. J. & S. 388. There the old lady was in such a state of imbecility or weakness, that though she was brought into Court she could not be examined, (see 33 Beav. 422); there the sale was in consideration of a life annuity; a manner of selling which the Judge deemed utterly incomprehensible by the plaintiff, and it was also proved affirmatively that the price was inadequate.

I fail to see any sufficient reason in this case for interfering with the judgment.

FERGUSON, J., concurred.

G. A. B.

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[CHANCERY DIVISION.]

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MOOREHOUSE v. BOSTWICK.

Dissolution of partnership—Assignment of interest by one partner to continuing partner—Priority of partnership and separate creditors.

W. M. J., dissolved partnership with L. A. M., and assigned all his interest in the business to him, taking a covenant that he would pay off the creditors of the firm. L. A. M. subsequently became insolvent and made an assignment of all his estate and effects to the defendant in trust for creditors. L. A. M. never made himself separately or exclusively liable to the creditors of the partnership nor did they in anyway agree to look to him alone. Defendant being about to distribute the estate ratably between both partnership and separate creditors, the plaintiff, a separate creditor, on behalf of himself and the other separate creditors, brought this action to compel the defendant to give priority to the separate creditors.

Held, that the assignment by W. J. M. to L. A. M. of his interest in the business, without the consent of the partnership creditors or without their agreeing to look to L. A. M. for payment, or his making himself separately liable to pay them, made such business his separate estate and that his separate creditors were entitled to priority over the partnership creditors and only the surplus after payment of the separate creditors should go towards paying the partnership creditors.

THIS was a motion for an injunction, made by one Henry A. Moorehouse, on his own behalf as well as on behalf of the separate creditors of one L. A. Morrison, to restrain one George F. Bostwick, who was the assignee of Morrison, from distributing the proceeds of the estate assigned among the joint creditors until the separate creditors of Morrison were paid in full.

It appeared that Morrison had been carrying on business in partnership with his brother, W. J. Morrison, under the firm name of "Morrison Brothers."

This partnership was dissolved on the 16th of February, 1883, W. J. Morrison going out of the firm, and assigning all his interest in it and the assets to L. A. Morrison, who covenanted to pay off all the firm debts. This was not assented to by the firm's creditors, and nothing passed between them and L. A. Morrison by which he made himself exclusively liable to them, or they agreed to look to him alone.

L. A. Morrison shortly afterwards became insolvent, and on the 18th April, 1883, made an assignment to the defendant in trust for creditors.

Two classes of creditors, viz., (1) the creditors of the firm,

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before the dissolution; and (2) the creditors of L. A Morrison proved their claims before the assignee, and he being about to distribute ratably among them all, this motion was made by the plaintiff, one of the separate creditors, to restrain the assignee from distributing the estate among any but the separate creditors.

By consent of counsel engaged, the motion for injunction was turned into a motion for judgment.

Moss, Q.C., for plaintiff. By the assignment made by W. J. Morrison to L. A. Morrison on the dissolution of the firm, all his interest in it and the assets became the the separate estate of L. A. Morrison. The joint creditors cannot elect to prove on his separate estate: *Ex parte Freeman*, *Buck's Reports*, 471. The separate claims must rank on the separate estate, and have precedence over the partnership claims: *Re Walker*, 6 A. R. 169. Partnership creditors have no equity to prevent partners from transferring their property to each other, or changing its character from joint to separate property, provided it is done in good faith: see *Kent's Com.* Vol. 3, 12th ed., 65 n. 1. Preference on the separate estate could not be given to the partnership creditors, even if the debtor wished: *Mills* v. *Kerr*, 32 C. P. 68.

J. H. Macdonald for defendant, A creditor has no equity except through his debtor. He has no right to any particular assets, nor has he any right with regard to the assets, except the right to have them dealt with according to the interest of the debtor in them: *Ex parte Hayman*, L. R. 8 Ch. D. 23. The effect of the deed of the 16th February, 1883, was to convert the assets of the firm of Morrison Brothers into the assets of L. A. Morrison, free from any claims of the firm creditors as against them, in priority to the claims of the creditors of L. A. Morrison. He had then but one estate: *Re Ruffin*, 6 Ves. 119. Having but one estate at the time of the assignment in trust on April 18th 1883, there can be no ranking as between

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creditors. There must be a separate estate and a joint estate, before any question as to ranking can arise.

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January 19th, 1884. PROUDFOOT, J.—This action is brought by the plaintiff for himself, and on behalf of the separate creditors of L. A. Morrison, against the defendant as trustee under a deed of assignment in trust for creditors made by L. A. Morrison to him; and the plaintiff claims priority over the joint creditors of L. A. Morrison and one W. J. Morrison, formerly trading under the style of Morrison Brothers.

A motion was made by the plaintiff for an injunction to restrain the defendant from distributing the proceeds of the separate estate of L. A. Morrison until the hearing; but by the consent of counsel it was turned into a motion for judgment.

The partnership of Morrison Brothers was dissolved on the 16th February, 1883, and W. J. Morrison, one of the partners, assigned all his share in the business to L. A. Morrison, the latter covenanting, I am told, for the deed has not been left with me, to pay off the creditors of the firm.

L. A. Morrison became insolvent, and on the 18th April, 1883, made an assignment to the defendant in trust for creditors. This deed has not been left with me, and I take the statement of its contents from what counsel said.

There are creditors of the partnership who are still unpaid, and who have proved their claims before the assignee, and who claim to be paid ratably and proportionately with the separate creditors of L. A. Morrison, who have also filed their claims with the defendant.

L. A. Morrison never made himself separately or exclusively liable to the creditors of the partnership.

The money and estate in the hands of the defendant consists in part of the assets belonging to the partnership which were assigned to L. A. Morrison on the dissolution partly of assets of the business carried on by L. A. Morrison after the dissolution until he assigned to the defend-

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ant, and partly of L. A. Morrison's separate and private estate owned by him, and not assets either of the partnership or the subsequent business.

In *Davidson* v. *Papps*, 28 Gr. 91, I had occasion to refer to some of the cases cited to me in this case, and the effect of them is, that under such an assignment as was made by W. J. Morrison to L. A. Morrison, the joint estate was converted into the separate estate of L. A. Morrison. But this by no means determines that the creditors of the firm are entitled to rank *pari passu* with the separate creditors.

It is true there is only one estate, but that is the separate estate of the insolvent. The natural result of that would be, to give his separate creditors priority over the whole estate, whether it consisted of that originally separate, or the assigned partnership estate.

Upon the dissolution of the partnership, the creditors of the firm might have accepted the remaining partner as their debtor, and if so they would have become separate creditors, and entitled to share ratably on the separate estate. But they did not do so; the assignment on the dissolution was not made with their assent, and nothing has been done since to effect a novation. And the acceptance by the joint creditors of the remaining partner as their debtor comes too late after he has become insolvent, and has made an assignment in trust for his creditors.

If any such arrangement had been made between the joint creditors and the remaining partner after the assignment to the defendant, it could not have affected the legal operation of the deed; but none such was made, and it is in evidence that the remaining partner has done nothing to render himself exclusively liable to the joint creditors: *Ex parte Freeman*, Buck 471.

Re Walker, 6 A. R. 169, shows the effect of such an assignment on the dissolution of partnership in this country in insolvency: that while the debtor *owes* on several and on joint account, the separate estate goes first to satisfy the separate creditors, and only the surplus goes to the creditors of the partnership.

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I cannot follow the reasoning in that case however, that where a retiring partner assigns his share, which requires neither a deed nor a writing,—*Lindley* on Partnership, 3rd ed. 674,—and the continuing partner assumes the liabilities, that the joint creditors can have any claim to follow the joint assets, and have priority over the separate creditors.

The cases referred to of *Ex parte Ruffin*, 6 Ves. 119, and *Ex parte Walker*, 4 DeG. F. & J. 509, and *Ex parte Freeman*, Buck 471, and many others show that by such an assignment the property is converted into separate estate, and all the consequences must follow that the separate creditors have a prior claim to it,

Ex parte Morley, L. R. 8 Ch. 1026, and *Ex parte Dear*, 1 Ch. D. 514, are exceptions to the rule, depending upon special circumstances, which shewed that no conversion had taken place. In the former case as expressed by Mellish, L. J. at page 1034, "it was the fair and reasonable construction of the deed, that it was only intended to vest the assets in the father's representative, subject to the payment of the debts * * that it does not prevent the assets, which were the joint assets of the two when the father died, continuing to be joint assets."

And in the latter case, Dear had no share in the capital, but was to be paid for his services by a share in the profits. Nothing was said as to a sale of the assets; they were to continue in the surviving partner, who was to continue the business with them. Dear had then a right to say to the survivor, you may continue the business, but you must pay the debts. And, Mellish L. J., says "the executors of a deceased partner may if they please sell their interest in the assets to the surviving partner. If they do so, and take, instead of their right to be indemnified out of the assets, a simple covenant to indemnify them against the debts, the assets cease to be joint assets."

In re Simpson, L. R. 9 Ch. D. 572, is an affirmance of the general rule; the articles provided that on the death of any of the partners, the partnership should not thereby be dissolved. This was held to mean that the survivors

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should continue to be partners, and might deal with the assets in any way they pleased, for the purpose of continuing the business; and two out of four partners having died, it was held that the creditors of the four had no right to have the joint assets of the four, which remained in specie applied first in payment of their debts.

It is possible however, that in *Re Walker*, 6 A. R. 169, the retiring partner, may have assigned subject to the payment of the debts, in which case he would have retained an equity to have the creditors of the firm paid out of the joint estate.

But in the present case the assignment, I understand, was absolute; the retiring partner taking a covenant from the continuing partner to pay the liabilities of the firm In the present case there is a solvent partner, and the rule in England would therefore be the same.

I do not think it makes any difference in the application of the rules deduced from the cited cases, that they were decisions under a bankrupt or an insolvent law.

The mode of administering insolvent estates is the same in equity as in insolvency: *Lodge* v. *Prichard*, 4 DeG. J & S. 613; *Baker* v. *Dawbarn*, 19 Gr. 113.

It is of little moment to inquire whether the rules were derived from the insolvent law or from the practice in equity, since they are identical. Turner, L. J., in *Lodge* v. *Prichard*, says, "The jurisdiction in bankruptcy is equitable as well as legal. The rights of creditors, therefore, as settled in bankruptcy, must be taken to be settled with reference to their equitable as well as to their legal rights; and this being so, these rules must be held to apply no less to cases in which estates fall to be administered in equity than to cases in which they fall to be administered in bankruptcy."

The plaintiff here seeks to have the insolvent's estate disposed of according to equitable rules, and these rules are perfectly clear, that the joint estate must be first applied in payment of the joint creditors, and the separate estate in payment of the separate creditors, and

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that only the surplus of each estate is to be applied in satisfaction of the other class of creditors.

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The plaintiff is entitled to judgment for an account of the estate, and for a declaration that he and the separate creditors of L. A. Morrison are entitled to priority over the creditors of the partnership; with costs.

G. A. B.

[CHANCERY DIVISION.]

SUMMERS ET AL. v. SUMMERS ET AL.

Will—Construction—Devisee of land not owned by the testator—Evidence of intention—Extrinsic evidence.

Where a testator devised lot 14, con. 10, in the township of A. to his two nephews, and, after certain pecuniary bequests, directed as follows: "The balance of my estate that may remain after paying the above bequests, to be paid to my relatives as my executors may think advisable;" and the evidence showed that the testator did not and never had owned that lot; but that he did own lot 21, con. 10, in the township A., which was not specifically devised by the will:

Held, that evidence of the testator's intention to devise lot 21, in con. 10 to his nephews was inadmissible.

Held, further, that the Court would not authorize the executors to convey lot 24, in con. 10 to the nephews under the residuary clause in the will.

THIS was an action to have a certain clause in a will reformed so as to express the alleged true meaning of the testator, under circumstances fully set out in the judgment.

The case came up by way of motion for judgment, on May 3rd, 1882, before Ferguson, J.

George Macdonald, for the plaintiffs, referred to *Davidson* v. *Boomer*, 15 Gr. 218; *Lowry* v. *Grant*, 7 U. C. R. 125; *Ruthven* v. *Ruthven*, 25 Gr. 534.

The defendants were not represented.

December 9th, 1882, FERGUSON, J.—This case came on by way of motion for judgment. No one appeared on

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behalf of the defendants or any of them, though duly served with process, and where necessary the service allowed in chambers. The plaintiffs are John Summers and William Summers, nephews of the testator hereafter mentioned, and the defendants are all the other heirs at law of the testator, and the executors of his last will.

The plaintiffs, by their statement of claim, allege that Culbert Summers, in his lifetime of the township of Escott, in the county of Leeds, was seized in fee or otherwise well entitled to lot 21, in the 14th concession of the township of Artemesia, in the county of Grey, excepting thereout three acres off the north-west corner: that he duly made and published his will, setting it forth, and appointed the defendants John Franklin, the younger, Culbert Summers, and Ira Mallony, his executors: that the testator died on or about April 7th, 1881: that the will was proved by the executors on April 29th, 1881: that the testator was not, at the time of the making of his will, nor at the time of his death, and never was the owner of or interested in lot No. 14, in the 10th concession of Artemesia, which by the will appears to be devised to the plaintiffs: that the testator did not intend to devise lot 14 to the plaintiffs, but did intend to devise to them lot 21, and was only prevented from so doing by his forgetfulness of the number of the lot: that the testator thought at the time of the making of the will, and thereafter till the time of his death, that he had devised lot 21 to the plaintiffs. And the plaintiffs ask to have the clause in the will "reformed" so as to express the alleged true intention of the testator, and made to read as a clause giving to the plaintiff John Summers the east half, and to the plaintiff William Summers the west half of lot 21, in the 14th concession of Artemesia, excepting thereout the said three acres off the north-west corner of the same; or that the residuary clause in the will may be so construed as to vest any undisposed of property of the testator absolutely in the executors, and that they be authorized to convey lot 21 to the plaintiffs in equal proportions.

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The probate of the will is produced. By the first clause of the will the testator directs that his funeral expenses and his debts be paid by his executors out of his personal estate. Then he says that the residue of his estate and property which shall not be required for the payment of his debts and funeral expenses, and the administration of his estate he gives and disposes of as follows: Then follows a gift of the homestead farm to the testator's nephew, Culbert Summers. There is then a gift to the testator's nephew James Summers, of the parts of lots 19 and 20, in the 10th concession of Artemesia, then owned by the testator. Then follows the gift to the plaintiffs, which is the one in question, and it is in these words: "I give and bequeath to my nephew John Summers, the east half, and to my nephew William Summers the west half of lot No. 14, in the 10th concession of the township of Artemesia, in the county of Grey. To have and to hold the same to them and their heirs and assigns forever." Then follows a gift to the ministers of the Lyn circuit of $200, and ten dollars for the superannuated fund; then a gift of $1,000 to William Summers, to be equally divided amongst his children, and one to his brother, James Summers, $500; the sum of $500 to Eliza Summers, and $1000 to one James Summers; $100 to Margaret Jane Foley; $100 to Eliza Franklin; the testator directing that these bequests be paid by his executors when the funds should be collected out of his estate. The testator then says: "And the balance of said estate that may remain after paying the above bequests to be paid to my relatives as my executors may think advisable, after paying them a fair remuneration for their time and expenses." Then follows the clause appointing the executors and the will concludes.

The testator in this case expressed his intention of devising and bequeathing all his property. The will, however, contains a residuary gift, so that whether the plaintiffs succeed in their contention or not the lot of land in question will not be undisposed of by the will. Evidence of two kinds is adduced by affidavits. First, to show the

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circumstances that surrounded the testator at the time he made his will, the leading one of which is that he did not own and never had owned the one lot, and that he did own the other; and secondly, evidence of the *intention* of the testator in regard to the subjects and the objects of gifts. The former kind of evidence is, I think, admissible. The latter, I think, is not. In *Wigram* on Wills, 4th ed., at p. 65, it is stated that "for the purpose of determining the object of a testator's bounty or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by the will. The same is true of every other disputed point, *respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words.*" And again, *ib.*, at p. 94, "Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases) will be void for uncertainty." And again, *ib.*, at p. 109, "Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by the material facts of the case, are insufficient to determine the testator's meaning, Courts in certain special cases admit extrinsic evidence of *intention* to make certain the person or thing intended where the description in the will is insufficient for the purpose. These cases may be thus defined: Where the object of a testator's bounty, or the subject of disposition (*i. e.* the person or thing intended), is described in terms which are applicable indifferently to more than one person or

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thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

Following this rule, it is plain, I think, that evidence of the testator's *intention* cannot be received at all, and it is equally plain, I think, that evidence of extrinsic facts can only be received for the purposes of the right interpretation of the testator's words. The words of the gift in question are plainly nothing more or less than a gift of one lot of land. Can they, even with the aid of the evidence of those extrinsic facts, be so interpreted as to mean a gift of another and a different lot without contradicting, varying, adding to or subtracting from the contents of the will?

It is said in *Jarman* on Wills, 3rd ed., at p. 379 that, "as the law requires wills, both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, vary, add to, or subtract from the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition, for it would have been of little avail to require that a will *ab origine* be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected from extrinsic sources."

It must be borne in mind that the matter here is one of interpretation, and not one of reformation of the will, as if it were an agreement or deed, as seems to have been assumed; and after having examined a great many authorities I am quite unable to interpret this devise as the plaintiffs desire that I should. If the testator had used a general description comprehending the lands claimed by the plaintiffs under the will, and only made a mistake in a particular description of them (a state of things that appears in some of the cases), the matter might

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have been very different, but such is not the fact. There is no description of any character of the lands that are claimed to have passed under the will, and there is no method of interpretation that I have found that enables me to do as the plaintiffs desire in regard to the gift in question, and I find myself equally unable to give effect to the plaintiffs' alternative claim in regard to the "*residuary* clause" in the will.

The authorities that I have examined are: *Jarman* on Wills, 4th ed., p. 422, and cases there cited; *Ib.* p. 430 *et seq.*; *Lowry* v. *Grant*, 7 U. C. R. 125; *Ruthven* v. *Ruthven*, 25 Gr. 534; *Newman* v. *Piercy*, 4 Ch. D. 41; *Harman* v. *Gurner*, 35 Beav. 478; *Anstee* v. *Nelms*, 1 H. & N. 225; *Kean* v. *Drope*, 35 U. C. R. 415, and many of the cases there referred to by Mr. Justice Morrison, *Lawrence* v. *Ketchum*, 4 A. R. 92; *Greenleaf* on Evidence, 12th ed., vol. i., p. 324 *et seq.*; *Davidson* v. *Boomer*, 15 Gr. 218; *Ex parte Lyons*, 32 Ch. Ch. 357, and necessarily some others referred to in these.

The motion is refused.(*a*)

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(*a*) See *Re Shaver*, 20 C. L. J. 149.

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[CHANCERY DIVISION.]

BARKER v. WESTOVER ET AL.

Husband and wife—Tort—Joint liability—Separate estate.

Where the plaintiff proved a joint wrongful occupation and conversion of the rents and profits of his land by a husband and wife.

Held, that the husband and wife were jointly liable to the plaintiff, and the plaintiff was entitled to recover against the separate property of the wife, for it could not be inferred that the latter was acting under the direction or coercion of her husband so as to exempt her from liability.

THIS was a petition by the plaintiff in this suit, praying that the defendant Mary Ann Westover might be ordered forthwith to pay over the amount found due to the plaintiff by the Master's report, under the following circumstances.

The suit was brought by Eliza Barker against William Westover, Frederick Stuckey, Mary Ann Westover, and Richard Joice, to recover possession of certain lands, to which she alleged herself and the defendant Richard Joice entitled, and which the defendants the Westovers were wrongfully in possession of, by themselves and the defendant Stuckey. The plaintiff stated that by prior proceedings in this Court she had established her right to a reconveyance of the said lands from one Leeson, in whom the legal estate was, but that prior to the filing of the bill in that cause Leeson, though well aware that he had no sufficient title thereto, caused part of the lands to be laid out into village lots, and caused a plan of the same to be prepared and duly registered. She then proceeded to allege as follows :—

7. "Sometime during the year 1874, the defendants, the Westovers, entered upon and took possession of lot 4 in block 4, as set out upon the said plan, and though well aware they have not and never had any title thereto, caused to be erected a dwelling house and out-buildings upon the said lot, and the same still remain thereupon. Before entering upon the said lot, and before erecting such buildings, the said defendants the Westovers were fre

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quently warned not to enter or build and received full and actual notice of the plaintiff's title to the said lot.

8. "The defendants, the Westovers, ever since taking possession as aforesaid, have remained in possession of the said lot continuously and are now in actual personal occupation of the same, and have since the said date collected the rents, issues, and profits thereof, and converted the same to their own use, and refused to account to the plaintiff for the same, and the defendants the Westovers now hold actual adverse possession of the said lot against the plaintiff, claiming to possess the sole title thereto, and the said defendants deny the plaintiff's title thereto and refuse to quit such possession, though notified so to do, and refuse to account to the plaintiff for the rents and profits of the said lot.

9. "The defendants, the Westovers, entered upon the said lot and continued in possession thereof, notwithstanding repeated protest and notices as aforesaid given before such possession, or before any interest of the said defendants, the Westovers, if any there be, was acquired; and the defendants, the Westovers, forcibly ejected the plaintiff from the possession thereof, and have kept her so ejected since the day of the date of the said sale, and during such period have taken and received to their own use all the issues and profits, and the beneficial use and occupation, of the said lot and dwelling, whereby the plaintiff during all such period has lost and been deprived of the issues and profits, and the beneficial use and occupation thereof, and has been prevented from letting the same, and has been and is now put to expense and loss in connection therewith.

10. "The defendants the Westovers pretend that they have some claim or title to the said lot and buildings thereon, and that they have a right to withhold the possession thereof from the plaintiff, and to continue to collect and receive the rents, issues, and profits thereof, and apply and convert the same to their own use, and to refuse to pay over or account to the plaintiff for the same; but the plain-

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tiff charges, as the fact is, that the defendant William Westover has no registered title nor has he any conveyance of the said premises made by any one competent to convey, but unlawfully confederated with others to deprive the plaintiff of her just rights in the premises, and that he has not nor has he ever had any just claim or title to the said property whatever.

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11. "The defendant Mary Ann Westover claims title to the said premises under a certain pretended conveyance from the said Leeson to her, dated January 2nd, 1877, and registered on the 27th day of the same month, but the plaintiff charges, as the fact is, that the said Mary Ann Westover gave no consideration whatever for such pretended conveyance, but took the same with full knowledge and actual notice of the plaintiff's claim and the facts as in this case are set out, and furthermore that the said Leeson had no title to convey to her, and any conveyance by him, if any were made, was made in fraud of the plaintiffs right."

And the plaintiff prayed that the conveyance from Leeson to Mary Ann Westover might be declared void, and cancelled: that she and the defendant Joice might be declared entitled to the lands in question; and the erections thereon, and to an account of the rents and profits received by the Westovers or by the defendant Stuckey, and payment to her of the same by them: that the Westovers and Stuckey might be ordered forthwith to deliver up possession; costs of suit, and general relief.

The Westovers put in separate answers, but these were subsequently struck out by order of the Master in Chambers.

On May 31st, 1882, a judgment was given declaring the plaintiff and Joice entitled to the land, and cancelling the deed from Leeson to Mary Ann Westover, and referring it to the Master to take an account of the rents and profits received, as aforesaid, by the Westovers and Stuckey, and to fix a proper occupation rent to be paid by them, and ordering that W. Westover and F. Stuckey should pay the

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plaintiff forthwith the amount which the Master should find due from them respectively and that the judgment should be without prejudice to any application which the plaintiff might be advised to make as against Mary Ann Westover in respect of what should be found due by her.

By his report, dated June 27th, 1882, the Master found $203.53 due from the Westovers to the plaintiff.

The plaintiff now petitioned that Mary Ann Westover might be forthwith ordered to pay the $204.53, and interest, and costs of the petition, or that in default certain lands of which she alleged Mary Ann Westover, who was the wife of the defendant W. Westover, having been married to him in 1865, was possessed in her own right, as her separate estate, free from the control of any other person might be sold, and the proceeds applied in liquidation of the amount.

The fifth clause of the petition was as follows:—

"The said Mary Ann Westover having been by the judgment in this action found guilty of a tort in entering upon and committing trespass upon the lands of the plaintiff, and in receiving the rents and moneys of the plaintiff, should be ordered to pay the plaintiff forthwith the amount of the rents so found to have been collected by her as well as damages for her said tort, she having acted in no wise as agent for her husband or for any other person, but being herself solely responsible."

The rest of the facts of the case appear from the judgment.

The petition was heard on December 19th, 1882, before Boyd, C.

J. Bain, for the petitioner. The defendant, Mary Ann Westover, is liable, as for a tort, for *mesne* profits: *Addison* on Torts, 4th ed., p. 314; *Addison* on contracts, 7th ed., p. 567; *Cole's* Law and Practice in Ejectment, p. 388; *Bullen & Leake's* Prec., 3rd ed., p. 422; *Amer* v. *Rogers*, 31 C. P. 195; *The Consolidated Bank of Canada* v. *Henderson*, 29 C. P. 449; *Stone* v. *Knapp*, 29 C. P. 605.

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T. Langton, for the defendant, Mary Ann Westover. If R. S. O. ch. 125, sec. 6 applies, then these proceedings are unnecessary. But the fact is, there was no tort here, and the rules as to contracts must be applied. The respondent is chargeable only on an implied contract to pay money received to the plaintiff's use. Her marriage having taken place in 1865, R. S. O. 128, sec. 3 applies, and this does not abolish the joint estate of the husband during coverture: *Emrick* v. *Sullivan* 25 U. C. R. 105. The respondent is not possessed of an estate in which the husband has no interest. It is only a married woman who has separate estate, who can be made liable for torts. I refer also to R. S. O. ch. 125, sec. 4; *Godfrey* v. *Harrison*, 8 P. R. 272; *Furness* v. *Mitchell*, 3 App. 510; *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454; *Clarke* v. *Creighton*, 45 U. C. R. 514; *Field* v. *McArthur*, 27 C. P. 15; *Wainford* v. *Heyl*, L. R. 20 Eq. 321.

J. Bain, in reply, referred to *Adams* v. *Loomis*, 24 Gr. 262; *Kerr* v. *Stripp*, *ib.* 198.

December 23rd, 1882. BOYD, C.—The matters complained of in this suit, as against the Westovers, husband and wife, are set forth in the 7th, 8th, 9th, 10th, and 11th paragraphs of the bill. It is alleged that they, in 1874, entered on the lands of the plaintiff, and took possession, having notice of the plaintiff's title thereto, and collected and converted to their own use the rents, issues, and profits, and refuse to give up possession, or to account for what they have received. The prayer is for possession, and that the two Westovers may account for and pay to the plaintiff the rents and profits received. The bill in substance shews a trespass and wrongful occupation of the plaintiff's land by these defendants, and a wrongful conversion of the profits to their own use, and it charges those acts as being done by the husband and wife jointly. The answers of both defendants were struck out by order of the Master in Chambers, and judgment was obtained upon the plaintiff's bill for possession, referring it to the Master of the

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Supreme Court to take an account of the rents and profits received by the two Westovers, and to fix a proper occupation rent to be paid by them, and the judgment was without prejudice to any application the plaintiff might make as against Mrs. Westover in respect of what might be found due by her. The Master reported that the defendants the Westovers had filed an account of the rents received by them, and finds due to the plaintiff for rents and profits $204.53, and also reports that these defendants did not attend upon the taking of the account, though duly notified.

Upon this state of facts, I must take the case most strongly against the defentants, as one in which there has been charged and proved a joint taking possession and conversion of rents and profits, and a joint liability therefor to the plaintiff as by the report found.

It cannot be inferred that the wife was acting under the direction or coercion of the husband so as to be exempt from liability. This might have been set up as a defence, and established if it be the fact. The claim of the plaintiff is based upon a tort of the wife, as appears from the bill, and from the fact that no allegation is contained therein as to her having separate estate, which would be required if the matter rested in contract.

That this is a *tort* committed by the wife jointly with the husband is now established by the proceedings before me. In such a case both husband and wife may be proceeded against, and both are liable; *Hyde* v. *S* ——, 12 Mod. 246, (case 421); *Keyworth* v. *Hill*, 3 B. & Ald. 685. As put by Bayley, J., in the last case, the claim here consists not so much in the acquisition of property by the defendant as in the deprivation of property to the plaintiff. *Vine* v. *Saunders*, 4 Bing, N. C., 96, *S. C.*, 5 Scott 359; *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Ex. at p. 937, per Parke, B.

The plaintiff is entitled to judgment for payment as against the wife, upon which the usual executions can be sued out and under which I apprehend the land in ques-

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tion can be seized and sold: *Re Hilliker*, 3 Chy. Ch. 72; R. S. O. ch. 125, secs. 6, and 20; *Amer* v. *Rogers*, 31 C. P. 195. The judgment should be with costs to be levied in like manner.

A. H. F. L.

[CHANCERY DIVISION.]

THE MERCHANTS BANK OF CANADA v. MOFFATT.

Deed—Misrepresentation.

Where it appeared that the defendant, a man of education and well acquainted with commercial business, had executed a certain agreement and bond to pay certain sums of money in certain events to the plaintiffs; but he alleged that they had been executed by him under a misunderstanding as to their effect, and relying on misrepresentations made to him as to this, not by the plaintiffs but by one of his joint obligors and parties to the agreement, and made, moreover, a month before execution of the documents, which he executed without reading them over, or taking any legal advice thereon; but the plaintiffs had not, either by themselves or any agent, made any representations to the defendant as to the effect or contents of the said documents:

Held, after a review of the authorities, that the defendant was bound by the execution of the documents, and was liable upon them, according to their term and purport.

THIS was an action brought by the Merchants Bank of Canada against George Moffatt to recover a sum of $10,000 alleged to be due from the defendant to them under a certain agreement and bond, and under the circumstances set out in the judgment.

The action was tried on February 16th and 17th, 1882, before Ferguson, J.

C. Robinson, Q. C., and *J. F. Smith*, for the plaintiffs There was no misrepresentation, and no representation of any kind made by the plaintiffs. Moreover, if there ever was a case in which explanation was unnecessary it is this, for the defendant is a merchant and man of business of high standing. The only representations were a month before the signing of the document, and these were only as to what the document was to be, not

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what it was. There is great danger in relying on parol evidence after a long lapse of time. We refer to *Dominion Bank* v. *Blair*, 30 C. P. 591; *Foster* v. *McKinnon*, L. R. 4 C. P. 704; *Hunter* v. *Walters*, L. R. 7 Ch. 84; *Harris* v. *Great Western R. W. Co.*, L. R. 1 Q. B. D. 530; *Campbell* v. *Edwards*, 24 Gr. 175; *Superior Savings and Loan Society* v. *Lucas*, 44 U. C. R. 106; *Rice* v. *Dwight Manufacturing Co.*, 2 Cush. 80; *Grace* v. *Adams*, 100 Mass. 507; *Addison* on Contracts, 8th ed., p. 118; *Pollock* on Contracts, 3rd ed., p. 405; *Bigelow* on Fraud, p. 81; and to *Cameron* v. *Kerr*, 7 P. R. 265; *S. C.*, in App. 3 A. R. 30.

Dalton McCarthy, Q.C., and *J. H. Ferguson*, for the defendants: *Cameron* v. *Kerr*, *supra*, does not bind the Court in this case, nor is it in point. As to lapse of time, the defendant was right in assuming that the bond was as he thought it was. The whole case must stand or fall upon the actual agreement, because there was no agreement but the one. The misapprehension here was not one of the law, as to the effect of the document, but clearly one of fact. The case of a promissory note, such as *Foster* v. *McKinnon*, L. R. 4 C. P. 704, is quite different; for that comes under the law merchant. Then the doctrine of negligence is not applicable to deeds, in the same way as to negotiable instruments. The present is not a case where the interest of a third party can intervene; it is a question between the original parties alone; and there has been no negligence here which the plaintiffs can avail themselves of against the defendant. The words of the agreement should be cut down in the way the defendant contends for. He says, merely, that he did not consent to the contract sued on. We refer to *Thoroughgood's Case*, 2 Co. Rep. 9*b*; *Burrows* v. *Leavens*, 29 Gr. 475; *Swan* v. *North British Australasian Co.*, 2 H. & C. 175; *Kennedy* v. *Green*, 3 M. & K. 699; *Commercial Bank* v. *Bank of Upper Canada*, 7 Gr. 423; *Royal Canadian Bank* v. *Cummer and Mason*, 15 Gr. 627; *Pollock*, on Contracts, 3rd ed., p. 475; *Ib* p. 454; *Silver-*

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thorne v. *Hunter*, 26 Gr. 390; *S. C.*, in App. 5 A. R. 157; *Clark* v. *Girdwood*, L. R. 7 Ch. D. 9; *Corley* v. *Lord Stafford*, 1 DeG. & J. 238; *Saunders* on Negligence, p. 49; *Shearman and Redfield* on Negligence, 3rd ed., sec. 6.

C. Robinson, Q.C., in reply. It is impossible to rescind or alter a contract with reference to the negotiations that precede it. And moreover, in this case it is clear the negotiations were not complete, and it was not known what would be wanted. As to *Foster* v. *McKinnon*, *supra*, there is no pretence for saying that it applies to notes and bills only. If the defendant was defrauded into executing a bond he should have come promptly. The money was advanced on the faith of the bond. The bargain was put into writing, and, once in writing, is the bargain. The defendant was bound to know what he was signing. I refer to *Mackenzie* v. *Coulson*, L. R. 8 Eq. 368; *Wythes* v. *Labouchere*, 3 DeG. & J. 593; *Pasley* v. *Freeman*, Sm. L. C., 8th ed., vol. 2, p. 66.

April 26th, 1883. FERGUSON, J.—On and prior to the 26th day of January, 1874, the commercial firm of Moffatt Bros. & Co., being composed of Lewis Moffatt, Kenneth McKenzie Moffatt, and Lewis Henry Moffatt, were largely indebted to the plaintiffs for advances made, and the plaintiffs held the commercial paper of the customers of the firm for such advances, this being the kind of paper upon which the advances had been made; and the firm then applied to the plaintiffs for additional advances for a limited period, and it was agreed that such additional advances should be made upon the plaintiffs receiving security for the indebtedness of the firm, which was $153,011. In pursuance of this agreement, a mortgage upon certain lands and premises was executed by the members of the firm. The proviso in the mortgage, so far as material here, was as follows: Provided this mortgage to be void on payment of $153,011, in nine months from the date thereof (January 26th, 1874), and all bills of exchange, promissory notes, drafts, and other paper on which the said firm of Moffatt Bros. & Co.

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were liable to the plaintiffs on the 31st day of December last, together with all renewals, substitutions, and alterations thereof, and all indebtedness of the firm to the plaintiffs in respect of the same. And it was in the proviso stated that the mortgage was intended to be a continuing security to the plaintiffs for the amount, notwithstanding any change in the membership of the firm, either by death, retirement therefrom, or addition thereto; and that the mortgage was also intended to secure and cover any sum due or to become due in respect of interest, commission upon the notes or renewals, or other commercial paper. This mortgage was in favour of Archibald Cameron, who was a trustee for the plaintiffs.

On the same day (January 26th, 1874), an agreement was executed between Lewis Moffatt, of the first part; Kenneth McKenzie Moffatt, of the second part, the defendant, of the third part, and the plaintiffs, of the fourth part. This agreement recited the facts of the indebtedness; that the plaintiffs had refused to make further advances to the firm, and had threatened to close the account and compel immediate payment thereof unless they received additional security for the advances; and that the mortgage bearing even date with the agreement had been executed. The agreement further recited that, in consideration of the security, the plaintiffs had agreed to make further advances to the firm, *and that the agreement was executed to secure the plaintiffs in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in the mortgage, and to secure the plaintiffs from ultimate loss*, and contained a covenant by the parties thereto of the first and second parts that the capital of the party of the second part, then invested in and forming part of the assets of the firm, should not be withdrawn therefrom until the mortgage should be fully paid and satisfied, unless with the consent of the plaintiffs: also a covenant by the parties to the agreement of the first, second, and third parts, in consideration of the premises, and of the acceptance by the plaintiffs of the mortgage, and the agreement, to pay

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to the plaintiffs, and the covenantors thereby declared themselves jointly and severally indebted to the plaintiffs; their successors and assigns, in the sum of $10,000, to be well and truly paid in nine months from the date of the agreement, as secured by a money bond bearing even date therewith. The agreement also contained a proviso, that if the party of the second part thereto should not withdraw his capital from the firm until the indebtedness of the firm to the plaintiffs should be paid and satisfied; and that, *if the firm should well and truly pay their indebtedness to the plaintiffs, then* the bond and agreement should become wholly void. The agreement also provided that the plaintiffs should be at liberty to deal with the firm or their successors, and to make such business arrangements as they might deem just and proper, and that nothing thereby done should alter, impair, diminish, or render void the liability of the parties to the mortgage, bond, or agreement, and that the doctrines of law and equity in favour of a surety should not apply to the prejudice of the plaintiffs in consequence of any act done, committed, or suffered by them, unless the parties, or some one of them, should have previously notified the plaintiff of their objection thereto.

On the same day a money bond in the penal sum of $20,000, in favour of the plaintiffs, was executed by Lewis Moffatt, Kenneth McKenzie Moffatt, and the defendant. The condition of this bond was that if the obligors and each of their heirs, &c., should jointly and severally well and truly pay or caused to be paid to the plaintiffs, their successors and assigns, the just and full sum of $10,000 in nine months from the date thereof, without any deduction, &c., then the bond to be void, otherwise to remain in full force and virtue.

Tho plaintiffs bring this suit upon the said agreement and bond against George Moffatt, as a sole defendant, alleging that the indebtedness of the firm, Moffatt Bros. & Co., to them, the plaintiffs, continued from the date of the time of the giving of the securities as aforesaid, to the time of an assignment in insolvency of the said firm, on

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the 12th day of August, 1875, and that it has continued to a large extent thence hitherto. And the plaintiffs allege and charge that the said firm did not well and truly pay their indebtedness to the plaintiffs, and that there is a deficiency in the assets of the firm and in the value of the property mortgaged to the extent of $50,000, and that they, the plaintiffs, are entitled to be paid the sum of $10,000 and interest by the defendant George Moffatt; and ask that it may be declared that the sum of $10,000 is due and payable by the defendant under and by virtue of the said agreement and bond, and that the defendant may be ordered to pay the same and interest, and the costs of this suit.

The defendant in his defence says that shortly before the execution of the documents that have been before mentioned, he was informed by Lewis Moffatt that at the request of the plaintiffs he had agreed to execute a mortgage upon certain real estate to secure the then indebtedness of the firm to the plaintiffs, and that the property to be comprised in the mortgage had been by him represented to the plaintiffs as being of the value of $50,000, and that he was desirous that the execution of this mortgage should not become known through the registration thereof, and so impair the credit of the firm; and that he and the plaintiffs had agreed that they should refrain from registering the mortgage, and also from having a valuation made of the property; and that he, Lewis Moffatt, on the same occasion stated that the plaintiffs were willing to agree to the foregoing, provided he could give them security against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any overvaluation of the property embraced in the mortgage, and that upon these representations, he the defendant consented to become surety for such purposes, and not otherwise, and that Lewis Moffatt thereupon presented certain documents to him, the defendant, for execution, at the same time informing him that they had been prepared in accordance with the understanding before

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mentioned as to the nature and extent of the intended suretyship, by his solicitors, who were also the solicitors for the plaintiffs; and that relying on the assurance of the said Lewis Moffatt and the said solicitors, through him that the documents correctly expressed and were strictly in accordance with the nature and extent of the suretyship which he had agreed to enter into, he executed the documents without reading them, or examining their contents, and without consulting a legal adviser, or obtaining any advice respecting them, and that if he, the defendant, had known that the tenor and effect of the documents were in any respect different from, or could be construed to increase the liability that he had, as aforesaid, consented to assume, he would not have executed them. The defendant also says that he never agreed to become in any way liable as surety for any deficiency in the assets of the said firm, and that the documents sued on cannot, nor can either of them, be held to so operate.

He also says that the mortgage was agreed to be given, and was given, and was intended to secure the plaintiffs against any loss, and none other, that they might sustain upon the commercial paper of the customers of the said firm held by the plaintiffs on the 31st day of December, 1873, and the then existing indebtedness of the said firm to the plaintiffs as represented by the said commercial paper, and all renewals alterations, or substitutions thereof; and that the said indebtedness so secured had long before this suit been extinguished and ceased to exist; and this the defendant says is an effectual bar to the plaintiffs' claim. The defendant contends that the mortgage was not a continuing security for any amount of indebtedness up to the sum of $153,011, but only a continuing security for the due payment of the bills and promissory notes in existence and under discount on the 31st day of December, 1873, and any renewals, alterations, and substitutions of the same, and that he cannot be made liable as surety otherwise; and he alleges that all such bills and notes had been paid and satisfied before this suit.

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The defence also alleges that large portions of the said $153,011 were not at the time—December 31st, 1873—debts contracted to the plaintiffs, nor for which the plaintiffs could legally take and hold the mortgage as additional security, and that as to debts not contracted at the time of the giving of the mortgage and all renewals and substitutions therefor, the mortgage was and is null and void; and the defendant sets up, and relies upon, the plaintiffs' charter and the General Banking Acts.

The defendant pleaded by way of supplemental answer stating the transactions somewhat but not, I think, materially differently; and in this supplemental answer he alleges that the agreement and bond sued upon were given for the purposes of guaranteeing and securing the plaintiffs that the property contained in and covered by the mortgage was not overvalued on the estimate of value placed upon it by the firm, and that the same was of the value of $50,000, and for no other purpose: and that the bond and agreement, so far as they purport to contain any further or other guarantee, do not express the true intention, object, and agreement of the parties: and that they were executed by mutual mistake: and that the property was of the value of $50,000; and that no breach of the agreement and bond occurred. And the defendant asks that these documents should be rectified so as to express the true agreement between the parties to them.

At the close of the evidence, however, defendants' counsel, by leave, amended the supplemental answer, by striking out the seventh and eighth paragraphs of it, so as to abandon any claim to have the documents reformed.

It is admitted by the defendant that the documents sued on cannot be reformed. It is, I think, equally plain that they cannot be rescinded. In the case *Campbell* v. *Edwards*, in Appeal, 24 Gr. 171, Mr. Justice Strong, who delivered the judgment of the Court said: "But to entitle a party to this relief of rescission it must appear that no agreement was in fact ever arrived at, for if there was a contract then the proper relief is not to rescind the instru-

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ment altogether, but to rectify it in such a way as to make it express the real meaning of those who executed it; and it must also be shewn that the instrument in its original form has not been so acted upon as to make it impossible for the Court to restore the parties to their original position." And in the same case, the same learned Judge says: "When a party assents intentionally to a contract, but under a mistake as to the effect and construction of the terms in which it is expressed, he can have no relief in equity, for in such a case there cannot be said to be any mistake in the instrument. Neither can a party to a contract insist upon its rescission because he assented to it through carelessness, for a Court of equity respects the solemnity of a contract once really assented to as much as Courts of law."

It was not contended here that the contracts sued on had not been acted upon, or that the plaintiffs could be restored to their original position.

What the defence contends for seems to be not for a reformation of the documents nor for their rescission; but that they are not binding upon him. *Thoroughood's Case*, 2 Co. Rep. 9 b, is referred to. This case is referred to in *Pollock* on Contracts, 3rd ed. at p. 428, where it is stated that in this case the plaintiff, who was a layman, and unlettered, had a deed tendered to him which he was told was a release for arrears of rent only. The deed was not read to him. To this he said: "If it be no otherwise I am content," and so delivered the deed. It was in fact a general release of all claims. Under these circumstances, it was adjudged that the instrument so executed was not the plaintiff's deed. The effect of the case is said to be, "that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, it is nevertheless not his deed."

On the same page of Pollock it is said that it was also resolved that "it is all one in law to read it in other words and to declare the effect thereof in other manner than is contained in the writing," but that a party executing

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a deed without requiring it to be read or to have its effect explained, would be bound. And, in the note: *i. e.*, "to this extent, that he could not say it was not his deed apart from any question of fraud or the like."

In *Foster* v. *Mackinnon*, a case in Keilwey's Reports, is referred to (*a*), in which one of the Judges said that it made no difference whether the party was lettered or unlettered; but that, it is said, was a case in which the grantee himself was the defrauding party.

In *Edwards* v. *Brown*, 1 C. & J. at 312, Bayley, B., said: "I agree with my brother Russell that whatever shews that the bond was never the deed of the defendant may be given in evidence upon *non est factum*. But if the party actually executes it and was competent at the time to execute it, and was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond *by stating that he was so misled*, it nevertheless became by the execution the deed of the defendant, and he is not at liberty, upon the plea of *non est factum*, to say it is not."

In *Hunter* v. *Walters*, L. R. 7 Ch. at p. 87, Sir G. Mellish, L. J., says: "Now, in my opinion it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts on the faith of the deed being valid, and who accepts an estate under it. I do not think the case of *Swan* v. *North British Australasian Co.*, 7 H. & N. p. 603, is really a direct authority upon that question." And, on p. 88, the same Judge says: "When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told that it is

(*a*) Keilw. 70 B. pl. 6.

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a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, though it may be voidable upon the ground of fraud, is not a void deed."

In *Wythes* v. *Labouchere*, 3 DeG. & J. 593, it is laid down by Lord Chelmsford that a man of business who executes an instrument of a short and intelligible description cannot be permitted to allege that he executed it in blind ignorance of its real character. In *Pollock* on Contracts, 3rd. ed. at p. 433, it is, however, said: "But probably this is to be taken as an inference of fact, rather than a statement of law; meaning not that the party is estopped in law from offering evidence to this effect, but that under such conditions his own evidence is practically worth nothing."

In Pollock, at p. 430, it is said: "The existence of a fundamental error of this sort, not merely as to particulars, but as to the nature and substance of the transactions, comes very seldom, if ever, to be considered by a Court of Equity except in connection with questions of fraud, from which it is not always practicable to disentangle the previous question, Was there any consenting mind at all? There is enough however to shew that the same principles are applied."

In the case of *Rice* v. *Dwight Manufacturing Co.*, 2 Cush. 80-87, it is said that: "When a party enters into a written contract, in the absence of fraud or imposition, he is conclusively presumed to understand the terms and legal effect of it, and to assent to them."

Grace v. *Adams*, 100 Mass. 507, was the case of a carrier's receipt delivered as the contract of the defendants. The plaintiff did not read the contract but it was held that "the acceptance of it by the plaintiff at the time of the delivery of this package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff."

In the case, *Harris* v. *Great Western R. W. Co.*, L. R. 1 Q. B. D. 515, which was a case of a railway receipt or ticket for luggage, Blackburn, J., at page 530. says: "And

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though one of the parties may not have read the writing, yet, in general, he is bound to the other by its terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acqainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in *Freeman* v. *Cooke*, 2 Ex., at p. 663, S. C. 18 L. J. (Ex.) at p. 119, that is, if he means his representation to be acted upon, and it is acted upon accordingly; or if, whatever a man's real intention may be, he so conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true."

In the case *Dominion Bank* v. *Blair*, 30 C. P. at p. 608, the learned Judge, in delivering a judgment concurred in by the other members of the Court, said: "It appears to me that before a man can claim relief from the effect of any instrument signed and sealed by him, he must show that his signature was obtained by fraud and misrepresentation." And in the same case, the view expressed in *Foster* v. *Mackinnon*, that one of the conditions necessary to relieve the defendant from liability "that he was not guilty of any negligence in signing the instrument," was adopted.

I have examined all the authorities referred to by counsel during the arguments, and I do not see that they reflect any light on the subject beyond what appears by the cases and authorities already referred to.

By the evidence, it appears that the defendant is not an unlettered person, but, on the contrary, a gentleman of education and well accustomed to commercial business, having been for many years a member of a promi-

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nent commercial firm who carried on their business in Montreal; and that he had been a director in several business corporations for long periods. In his evidence, which was taken under a commission, he says he was asked verbally to become a party to the documents by his brother Lewis Moffatt, during some of his visits to Montreal, where the defendant resided, he, Lewis Moffatt, stating that he was going to give the plaintiffs a mortgage upon his property as security for $50,000, that the property was worth more, but to prevent publicity by valuation by experts he wished to know if he, the defendant, would guarantee his bond for $10,000 that the valuation of the property at $50,000 was not in excess of its value, which he thought would satisfy the bank, the plaintiffs, and prevent them having it valued; and further on he says that he understood that the bond and agreement were drawn up to carry out this arrangement, and that the same bound him to the extent of $10,000, in case the property had been overvalued when he represented it to the plaintiffs to be at the time worth $50,000; and that he did not consider his liability amounted to anything, as he believed the property to be worth much more than that amount; and that he would not have executed the documents if he had understood them to be as the plaintiffs now assert they were. When asked who presented the bond and agreement to him for execution when and where they were executed, &c., he says: "I cannot say, but most likely they were handed to me by my brother, or sent to me by him or Mr. Covert, or I was notified by the bank that they were at the banking house in Montreal. They were signed by me, I think, at the office of the bank, and, my impression is, in presence of Jackson Rae and Ogilvie Moffatt." He says he was not asked to become liable to the plaintiffs in case of ultimate loss on the account of Moffatt Bros. & Co.; and that he did not read any of the documents, nor, to his recollection, were any of them read to him, and that his impression is that Lewis Moffatt was not present when he signed the documents. When asked upon what representation he relied as

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affording him a defence to this suit, he said: "I rely upon my brother Lewis's representation to me, that it was only against the overvaluation of the property mortgaged to the bank to the extent of $10,000, and upon my understanding and belief, when I signed the documents, that they were strictly in accordance with the arrangement made with him; also upon the representation to me that they had been drawn up by the solicitor of the bank in accordance with the arrangement made with him; and also on the grounds set forth in my answer to the bill of complaint. I was under the impression that the solicitors to the bank were also my brother Lewis's solicitors. My understanding and belief, as referred to in this answer, is derived from my brother Lewis Moffatt." He says that *there was no representation made to him on the part of the plaintiffs that he is aware of.* He says again: "I understood I was becoming security to the bank that the property had not been overvalued by my brother when he stated it at the time to be worth $50,000, and should it afterwards appear that he had then overvalued and misrepresented it, I was to become liable to the bank for any loss it might sustain by such overvaluation to the extent of $10,000."

Jackson Rae, who was the plaintiffs' manager at Montreal, and whose evidence was also taken under a commission, says: "The special conditions referred to in my last answer consisted of the requirement of collateral security of a satisfactory character, and the bank preferred to exact personal security. This, however, the firm could not find, but offered instead mortgages covering real estate in the city of Toronto, and elsewhere. After much negotiation the bank at length consented, provided it could be offered in such shape and of such value as would be satisfactory. The proposed security when defined was valued by the firm at $75,000 or over, and the firm urged the bank to waive a formal valuation by some independent party, and as an inducement offered to give the bank personal security to the extent of $10,000, to protect it from loss consequent upon over estimate. Subsequently it was further urged

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upon the bank to waive registration of the mortgage deeds, and that personal security to the amount of $50,000 would be furnished to secure the bank against any injury that might be suffered in consequence of the non-registration. After much negotiation it was ultimately agreed that if satisfactory personal security were given for the said $50,000, to cover non-registration, and to the extent of $10,000 to cover any possible *ultimate loss* there might be on the account, the bank would comply with their request to waive registration and special valuation."

The evidence of Mr. Rae, the solicitor, who acted for the plaintiffs, is very positive as to the arrangement being in fact as it is stated in the agrement. He appears to have no doubt on the subject. His letter of December 30th, 1873, to the plaintiffs' then manager at Montreal, speaks of the $10,000 as being in addition to the other security. The recollection of Mr. Lewis Moffatt appeared to be very imperfect regarding many of the particulars of the transaction. Both he and the defendant appeared to be under a mistake as to the amount of the valuation of the property embraced in the mortgage about which so much was said, and he had entirely forgotten that he had taken the documents to Montreal at the time of their execution.

I think it a fair conclusion upon the evidence, and that I must find, that the transaction or arrangement made between him and the plaintiffs was as stated in the documents. The bank, the plaintiffs, did not make any representation whatever to the defendant. Mr. Lewis Moffatt was not the agent of the plaintiffs, I think, as was contended. His representations were not, I think, in any sense representations of the plaintiffs. It is not shewn that any representation was made to the defendant after the 21st of December, 1873, which was nearly a month before the execution of the papers: none was made to him at the time of their execution; and I am of the opinion that the weight of authority binding upon me shows that the defendant by executing the documents

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sued on under the circumstances disclosed in the case became liable upon them according to their tenor and effect. I think the language of Blackburn, J., in *Harris* v. *The Great Western R. W. Co.*, L. R. 1 Q. B. D. at p. 530, (although the case was very different from this one,) applicable, and that any reasonable person circumstanced as the plaintiffs were would have received and acted upon the documents as papers that had been read and understood by the parties who had executed them. The bond is the ordinary money bond. The agreement says, over the signature and seal of the defendant, that it is executed to secure the plaintiffs in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in the mortgage, and to secure the plaintiffs from ultimate loss. The proviso or condition is, that if the firm should well and truly pay their indebtedness to the plaintiffs, their successors and assigns, the bond and agreement should become wholly void. It was admitted at the trial that there was an indebtedness of the firm to the plaintiffs which is unpaid to over $10,000, and the evidence shews that there is such an indebtedness to a much larger sum, (some fifty or sixty thousand dollars,) and it was also shewn that the assets of the firm had been all realized.

For the defence it was contended that the indebtedness mentioned in the documents had been paid and satisfied (extinguished) by the manner in which the business between the plaintiffs and the firm had been done, and in which the payments that were made had been applied that is to say, that the moneys paid from time to time by the firm had extinguished the indebtedness in respect of which the securities were, and also that the transactions were in violation of the provisions of the Banking Acts. For the plaintiffs it was in turn argued that these questions were disposed of by the case, *Cameron* v. *Kerr*, 7 P. R. 265, *S. C.* 3 A. R. 30. In that case the suit was brought upon the mortgage for the $153,011 by Cameron, the trustee for the present plaintiffs. The defendant there was Mr. Kerr, the assignee of the firm of Moffatt, Bros. &

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Co. Both these questions were raised by the defence. They were not only raised in the Master's office, but, as appears by the pleadings enrolled in the Court, were made matter of defence from the beginning. The finding of the Master was in favour of the then defendant's contention as to the extinguishment of the debt. This was reversed on an appeal by Blake, V. C., from whose judgment was the appeal to the Court of Appeal. The reports of the case shew, I think, that the evidence there material to these questions was substantially the same as the evidence here.

It was, however, argued for the defence, that there was a difference, because the witness Cameron said in this case, that "there was no agreement as to substitution," that is as to substituting notes, &c., coming in for those that were retired, and that there was no such evidence in the case *Cameron* v. *Kerr*. By the report of the case in the Practice Reports it appears the bank manager said: "The particular notes mentioned in the account filed on June 7th, (the account filed in the Master's office,) were not in existence at the time of the insolvency. None of the notes at that time were in existence at the time of the mortgage. These were substitutions. I cannot show any now. The books don't show." And further on he says: "The course of dealing was, by fresh discounts funds were provided, for the check of the firm used to relieve the notes falling due on any particular day." The statement on page 34 (of the report of the case in appeal) shews what were considered to be the facts on which the judgment proceeded. It is this: "From time to time notes were sent in by the Moffatts for discount. These were discounted without any regard to the amount of notes falling due. The proceeds of the discounts and the cash deposits they made were all carried to their credit in one open current account. Against this they drew checks as the exigencies of their business required. As the notes held by the bank on December 31st, 1873, matured, checks were drawn to retire them: the checks were charged against the Moffatts in the

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current account against the fund to their credit in the bank, made up from the proceeds of fresh discounts and from cash deposits, and the notes were delivered up to the Moffatts."

In the present case the manager said: "These notes had been paid or retired in some way before the insolvency in August, 1875. There may have been renewals in the meantime. There were no renewals of these notes or any of them in hand in August, 1875, at the insolvency. There were notes substituted in this way, other notes were brought in and discounted, by which some of these notes were taken up, and so on. There was nothing different from the ordinary way of doing business. There was not any previous agreement that certain notes should be taken in lieu of certain other notes falling due. The business was simply done in this way."

The evidence is too long to be repeated here; but after considering the matter as well as I can, I do not see that there is, in this respect, any substantial difference between the facts to be considered by me and those that were considered by the Court of Appeal.

It was argued on behalf of the defendant that his liability being upon the agreement and not upon the mortgage, it was confined to the indebtedness, and that the indebtedness had long been extinguished. The agreement does provide that if the firm, Moffatt Bros. & Co., shall and will well and truly pay their indebtedness to the plaintiffs, &c., then the bond and agreement should become wholly void, but I think the former part of the agreement, that I have before referred to, stating the purposes for which it was entered into, must be looked at as well to ascertain what was really meant by the use of the word "indebtedness" *here*, and when this is done, and the matter looked at in the light afforded by the decision *Cameron* v. *Kerr*, I think the argument cannot succeed.

It is plainly stated by the Court in *Cameron* v. *Kerr*, that there was no ground for the argument that the taking of the security was in violation of the provisions of the Banking Acts.

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On the whole case, I am of the opinion that the plaintiffs are entitled to succeed, and to judgment for the $10,000 and interest, and their costs of suit. At present I do not see any reason for computing the interest from a period earlier than the commencement of the suit, but should there be any difference as to this, I will hear what may be said by the parties.

A. H. F. L.

[CHANCERY DIVISION.]

CLARKE ET AL. v. DARRAUGH ET AL.

Will—Construction—Vesting—Void condition—Parent and child—Restraint on a devisee residing with his father—Infant.

A testator left all his estate to his executors "in trust for the benefit of G. H. till he arrives at the full age of twenty-one, at which time I direct my said executors to give to G. H. all the said property" subject to the condition that, "should the said G. H. at any time before coming of age go to live with his father W. H., he is to be disinherited of the whole or any portion of my estate. And the said estate so forfeited is to be then given to my son J. D., his heirs and assigns." The testater died in 1875. In 1876, while G. H. was still a minor, being only eleven years old, J. D. and W. H. entered into an agreement under seal, whereby it was agreed that J. D. should support the widow of the testator, who was his mother and the mother-in-law of W. H., during her life, and should convert into money the estate of the testator, to which he was or should be entitled under the will, and pay a moiety of the proceeds to W. H. in trust for the support of G. H., till he should attain twenty-one, the residue to be then paid by W. H. to G. H. Pursuant to this agreement G. H. forthwith resided with W. H. till he was seventeen years of age, when this action was brought by the executors for a declaration of the rights of G. H., J. D., and W. H. under the will.

Held, that G. H. took a vested interest in the property under the will; that the condition was a condition subsequent, and was void as being "against law;" and G. H. was entitled to all the estate given to him by the will, notwithstanding the agreement of 1876, which could not be regarded as a family compromise, or for the benefit of the infant.

THIS was an action brought by William John Clark and Robert Thompson, the executors of the will of James Darraugh, for the construction thereof, and other relief, as mentioned in the judgment, in which the terms of the will and the circumstances of the case are set out. The defendants to the action were James Darraugh, William Hodgins, and George Hodgins, an infant.

The action was tried at the Chancery Sittings at London, on May 22nd and 23rd, 1882, before Ferguson, J.

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W. P. R. Street, for the plaintiffs, submitted to do as the Court should direct, and asked that the plaintiffs might be permitted to pay the money into Court, the property being in money and mortgages chiefly, and for the executors' costs out of the estate.

W. R. Meredith, Q.C., for the infant defendant. The gift to the infant in the will was vested, and the condition subsequent is void: *Roberts* v. *Hall*, 18 C. L. J. 177, (*a*); *Mitchell* v. *Reynolds*, 1 P. Wms. 181. A condition to omit the doing of something which is a duty is a void condition, and here the duty of the child was to live with the father; the father could take the child. See *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604; *Davis* v. *McCaffrey*, 21 Gr. 554; *Lyons* v. *Blankin*, Jacob 245. Again, the condition is void, because so indefinite and uncertain: *Fillingham* v. *Bromley*, 1 Turn. & R. 530. Again, there cannot be a forfeiture, since there has been no act of the will of the child: *Doe dem. Shaw* v. *Steward*, 1 A. & E. 300. At any rate James Darraugh cannot enforce it, for he was an actor in respect to the breach of the condition. If, however, the Court should be against us as regards the question of forfeiture, then the agreement of December 23rd, 1876, should be held good, because there was a good consideration for it, viz: the consent of William Hodgins to support the infant, and relieve the grandmother from so doing, and this although there was no legal obligation on him so to do. I refer, also, to *Hamilton* v. *McKellar*, 26 Gr. 110.

W. Cassels and *F. P. Betts*, for James Darraugh. As to the agreement of December 23rd, 1876, being void, the infant is bound by his pleading, in the same way as an adult would be. The father was asserting his right to take the child, and James Darraugh being a party to the agreement makes no difference. The gift to the infant is not a vested one. As to the condition, there is no public duty cast upon a child to live with his father, and the condition is not void: *Earls* v. *McAlpine*, 6 A. R. 145; *Blake* v. *Lee*,

(*a*) Since reported 1 O. R. 388.

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Ambler 306; *Colston* v. *Morris*, Jacob 257, n.; *Hill* v. *Gomme*, 1 Beav. 540. The testator had the right to impose the condition he has imposed, and the Court has nothing to do with it. Then, as the infant has distinctly repudiated the agreement, he must stand solely on the will; he can not rest his rights on an alternative between the will and the agreement, because as soon as he disaffirms the compromise, he removes the consideration to James Darraugh for the agreement. We also refer to *Leith's* Blackstone, 1st ed., p. 103; *Potts* v. *Norton*, 2 P. Wms. 109, n.

T. G. Meredith, for William Hodgins. My client is bound by the agreement of December 23rd, 1876, and is entitled to the benefit of it, so as to get the interest of half the estate to stand against the support of George.

W. R. Meredith, Q.C., in reply. The agreement of December 23rd, 1876, does not stand in the position of a compromise. The infant had done nothing to forfeit his rights under the will. It is competent to the Court to say on view of the whole case that the agreement is for the infant's benefit, and to have it carried out. The Court must look at the whole case. As to James Darraugh's rights under the agreement, he cannot take advantage of his own wrong. The agreement that William Hodgins should take the infant was the same as if James Darraugh had committed the breach of the condition himself. We refer also to *In re Agar Ellis, Agar Ellis* v. *Lascelles*, L. R. 10 Ch. D. 49.

June 23rd, 1883. FERGUSON, J.—THE action is brought by the executors asking for the construction of the last will of the late James Darraugh, in his lifetime of the township of Biddulph, in the county of Middlesex, who, on November 28th, 1874, made and published his will, and departed this life on or about December 12th, 1875.

The material parts of the will are as follows:—

"I appoint William John Clarke and Robert Thompson to be the executors of this my last will and testament, directing my said executors after my decease to take into

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their possession all my real and personal estate of which I may be possessed, and the same to hold in trust for the benefit of my grandson, George Hodgins, until he arrives at the full age of twenty-one years, at which time I direct my said executors to give to my said grandson the whole of the said property, as there may be, subject nevertheless to all provisions hereinafter mentioned: First, At the time of the said George Hodgins coming of age, should my wife be still living, I direct that proper provision be made for her during her life and her funeral when dead; Second, I direct my executors after my decease to pay all my just debts and funeral expenses out of my said estate; Third, *Should the said George Hodgins at any time before coming of age go to live with his father, William Hodgins, he is to be disinherited of the whole or any portion of my estate. And the said estate so forfeited is to be then given to my son, James Darraugh, his heirs and assigns.*"

The value of the estate is made appear by the evidence of one of the plaintiffs (Clarke) who said:

"I am one of the executors. The testator left about an acre of land, which has not yet been sold. The value of the personal property is, promissory notes, $1700, of which $300 could not be collected. The value of the land was between $80 and $100. It is about of the same value now."

The defendant William Hodgins, the father of the infant defendant, was the son-in-law of the testator. There had been differences between him and his wife, and on February 18th, 1871, a separation deed had been executed between him and her. To this deed the testator was a party. From the contents of this deed it appears that the infant defendant and his mother were then and had been living with the testator, her father, for it promised that the testator should make no claim or demand against the defendant William Hodgins, his estate, &c., for any expense theretofore incurred for or by reason of the support or maintenance of the infant defendant or his mother, *and that it should be optional with the testator*

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whether he should retain possession of the child; but if he did retain possession from and after the date of the deed, he should continue to do so at his own expense.

The infant defendant is about 17 years old. His mother died before the death of the testator. His father William Hodgins has married again. An attempt was made to show that during the life-time of his former wife he had been guilty of adulterous conduct, and that he has since been living an improper life, but at the close of the case I found that the evidence had entirely failed in this respect, and refused an amendment of the record which was asked.

The will strangely enough does not expressly make any provision for the support and maintenance of the testator's widow after his death and before the infant defendant's coming of age. She and the infant were living together after the testator's death, and, as the evidence shows, she was in very poor circumstances indeed. It may, upon the evidence, be said that she was living upon the bounty of neighbours and friends.

After the separation deed, the defendant William Hodgins resided for a number of years in the United States, but he is now living in this country.

On December 23rd, 1876, an agreement under seal was entered into between the defendant James Darraugh of the first part, his wife, apparently for the sole purpose of barring dower in the lands charged by her husband, of the second part, and the defendant William Hodgins, of the third part, whereby, after reciting the will, the relationship of the parties, that the infant was then eleven years old and had resided with the testator a long time previously to his decease, and had after that time continuously resided with and been supported by the widow of the testator, that no provision had been made by the will for the support and maintenance of the infant until he attained the age of 21 years, or for the support and maintenance of the widow, who was then 75 years of age, except her dower out of the real estate, that the testator's widow and the infant defendant were then living together

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in straitened circumstances and wholly dependent on the generosity of neighbours and friends, and that on account of the inability of the widow by reason of her age and bodily infirmities, and the aversion of the parties to take any legal proceedings to obtain for the infant a suitable allowance for his support till he should attain the age of 21 years, it had been agreed by and between the parties that the defendant James Darraugh should provide the widow of the testator with a suitable support during the remainder of her life, and that the defendant William Hodgins should take the infant defendant, George Hodgins, into his own care and custody, aud provide him with a maintenance, support and education suitable to his station in life until he should attain his majority, and that the defendant, James Darraugh, should, out of the real and personal estate devolving upon him under the will, pay or cause the executors to pay one moiety of the same to the defendant William Hodgins, his executors &c., in trust for the infant defendant his son—the defendant James Darraugh covenanted with the defendant William Hodgins to support the widow during her life: that he would forthwith, or as soon as conveniently might be, call in, collect, compel payment of and receive or cause the executors so to do, all the real and personal estate and effects which he (James Darraugh) was or should be entitled to under the will of the testator, and that he should as soon as conveniently might be, and without delay, sell and dispose of and convert into money such parts thereof as should not be in money, including securities for money, for the best price that could be reasonably obtained, or cause the executors so to do, and out of the moneys so to arise, when and so often as the same should amount to or exceed the sum of $100, in his hands, or in the hands of the executors, pay the costs and expenses of sale, &c., and in the next place pay or cause the executors to pay to the defendant William Hodgins, his executors, &c., one moiety of the balance that might then remain, in trust for the support, maintenance and education of the infant defendant until he should attain the

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age of 21 years, the residue to be paid over by the defendant William Hodgins to the infant defendant upon his attaining the said age. He also covenanted to furnish accounts and for further assurances, and charged the payment of the said moiety, and, as the document states it, the performance of the agreement, upon lot No. 7 in the 20th concession of the township of McGillivray. By this agreement the wife of James Darraugh barred her dower in this lot for the purpose of the agreement only, and the defendant William Hodgins covenanted with the defendant James Darraugh to support, maintain, and educate the infant defendant till he should attain full age, and then to pay to him the residue of the said moiety, after deducting thereout the costs of such maintenance, support, and education. And on the same day, (December 23rd, 1876), the defendant James Darraugh executed to the defendant William Hodgins a power of attorney, expressed to be for the better carrying out of the said agreement, whereby he constituted the defendant William Hodgins his attorney to ask and demand from the executors the said moiety. This power of attorney is a document of some length, but it seems unnecessary further to refer to it here.

Immediately after the execution of this agreement and power of attorney, the defendant William Hodgins took the infant defendant, George Hodgins, to his own house, and he has ever since resided with and been supported and maintained by him.

The plaintiffs say that they have realized out of the property of the testator, the sum of about $1200, and that the same, together with the accrued and accumulated interest thereon, remains in their hands. They allege that the defendant James Darraugh has applied to them for payment to him of the whole of the estate, claiming to be entitled to it under the provisions of the will, owing to the fact that the infant defendant has gone to reside with his father: that he threatens to take proceedings against them for the recovery of the whole estate, and that the

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defendant William Hodgins claims and insists that in any event he is entitled to receive one half of the estate, under the said agreement, as trustee for the infant defendant: that they are advised that they cannot safely make any disposition of the estate, unless under an order or decree of the Court; and they ask that the rights of the defendants under the will, agreement, and power of attorney may be ascertained and declared, and that, if necessary, an administration of the estate may take place. They also ask for general relief, and offer to bring the money into Court.

The defendant James Darraugh, in his defence, claims the whole of the property under the will, on the ground of forfeiture of all right by the infant defendant by reason of a breach of the condition attached to the gift to him. Failing this, he claims to be entitled to a moiety of the estate, under the agreement, which he says is in the nature of a family compromise made for the purpose of avoiding litigation amongst the members of the family, alleging that it was fair and reasonable and for the benefit of the infant defendant, who, he says, was represented there by his natural guardian, his father. He also says the parties have acted on the same agreement, relying upon its being valid, and have changed their positions, and submits that it is a proper agreement in the interest of the infant defendant, and should be sanctioned by the Court. He says that relying upon the validity of the agreement he became bound to support his mother during her life, and has hitherto since supported her; and contends that there is the manifest intention on the face of the will that she should be supported out of the estate of the testator; and in the event of its being held that the infant defendant is entitled under the will, notwithstanding the alleged breach by him of the condition, he claims to be entitled to be re-imbursed out of the estate for the maintenance of his mother, the widow of the testator; and in the event of its being held that the will does not by implication or otherwise charge the estate with the support and maintenance

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of the widow prior to the attaining of 21 years by the infant, when he claims to be re-imbursed out of her interest as dowress, and to have an account taken of arrears of dower. The proceedings show that the defendant James Darraugh served notice upon the widow, making her a party to the action, but no counsel appeared for her and I know nothing of what her contention might be.

The defendant William Hodgins, by his defence, claims that the condition imposed by the will of the testator is void as being too uncertain, and also as being contrary to public policy, and otherwise, and that the infant defendant took and holds the provision made for him by the will free from any condition whatever.

The infant defendant, by his pleading, claims that the condition imposed by the testator is void, and that he takes the property in question free from any condition, and that if it should be held to be good, the violation of it was procured by the defendant James Darraugh in fraud of his rights and for his own purposes, and that the defendant James Darraugh should not be allowed to take advantage of his own wrong. He also pleads that the agreement is not binding upon him. He sets up his infancy as a reason, amongst others, why the condition is void, and submits his rights to the protection of the Court.

Issue was joined on the statement of defence.

The gift in question was to the executors *in trust* to hold for the infant defendant until he should attain the age of 21 years, at which period they were directed to give him the property, (which was for the greater part personalty) subject to the provisions and conditions that followed. The interest taken by the infant defendant was, I think, a vested interest. The cases referred to in *Theobald* on Wills, 1st ed. at p. 276, seems to me to show this somewhat clearly, and I think the direction to give the property to him on his attaining 21, had reference only to what is, at least sometimes, called "vesting in possession;" and, I think the condition, that if the infant defendant at any time before coming of age went to live with his father he should be

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"disinherited," (to use the words of the will) "of the whole or any part of the estate," is clearly a *condition subsequent;* and after having examined the cases referred to on the argument and many more, I am of the opinion that this condition is void.

It is not shown that the father of the infant did anything to deprive himself of the right to the custody and control of his child, which, as James, L. J., said in delivering the judgment of the Court in the case *Agar-Ellis* v. *Lascelles*, L. R. 10 Ch. D., at p. 71-72, is one of the most sacred of rights. As I have already said the evidence in regard to his supposed misconduct failed to prove anything of an immoral character against him. What is contained in the separation deed does not amount to a contract on the subject of the care and custody of the child, even if such a contract would be binding upon him. He did not accept or receive any gift from the testator, nor was any made to him. No provision was made by the testator having special reference to the custody and education of the infant, (as in some of the cases) and I think there was not any sufficient reason to say (as was argued) that the father had not a perfect right to take the custody and control of the child at any time. It is, I think, a condition imposed upon one who is not the person who must really perform it. It was right, in the eye of the law, that the child should live with his father, he was by law compellable by the father so to do; and I think to live with his father, when the father so desired, was the duty of the infant, so far as a duty can by law be cast upon an infant, and, assuming this to be so, the condition is void, as being "against law," as is said in *Mitchell* v. *Reynolds*, 1 P. Wms. 181, quoted in *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604.

I do not see any ground for saying that the agreement made between the adult defendants is in the position of a family compromise. At the time it was made there was no pretence for saying that there had been a breach of the condition, as the infant had not gone to live with his father

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but was living (apparently in poverty) with the widow of the testator. His father, seeing this, was no doubt desirous that a change should take place, and his uncle James Darraugh was desirous of getting the property or a share of it. They enter into a contract on the subject, whereby an estate then belonging to the infant is divided into moieties, each taking one of the moieties, the father taking his in trust for his son. They deliberately bargain that the condition shall be broken by an infant, who was then only eleven years old, they believing that upon the breach a forfeiture would take place, whereby the estate would go to the defendant James Darraugh under the "gift over" in the will, and in pursuance of this agreement the infant defendant went to live with his father. I cannot see that this can be called a compromise. I am asked to say that this agreement was for the benefit of the infant defendant, but I am not of this opinion. The agreement provided that a moiety of the estate should go to the father in trust for the child, leaving nothing to the child but the covenant of his father.

It is true that there are some points of similarity between this case and the case of *Lyons* v. *Blankin*, Jacob 245, and other cases more or less analogous to it, but I do not think the facts proved bring it within that class of cases and I am of opinion that the infant defendant is still entitled to all the estate that was given to him by the will.

As to the contention of the defendant James Darraugh, that there is the manifest intention on the face of the will that his mother should be supported out of the estate, and that he should be re-imbursed out of the estate for her support, with the strongest desire to discover such "manifest intention," I am unable to find it on the face of the will. The testator did apparently contemplate a period of time after his death and before the infant defendant should attain full age, and it is strange indeed that he did not make some provision for the maintenance of the widow during that contemplated period; but I am unable

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to discover from the will that he did do so, either expressly or by any reasonable implication from the words that are employed. As to his claim to be re-imbursed out of the interest of the widow as dowress, the value of the land is is said to be between $70 and $100, and the dower out of this must be a very small matter indeed. This land, according to the view I have taken of the case, is the property of the infant defendant, held in trust for him, and unless it is necessary to sell it for the payment of debts of the testator, (which does not appear to be the case) I do not see how it can be sold, as no case has been shown to warrant the sale under the statute of lands of an infant, and without a sale it may be difficult to make this small interest available for the purpose claimed. The matter of the right to dower was not discussed at the trial.

I do not see that there is any necessity for an administration of the estate, or that there is any sufficient reason for putting the estate to that expense. It does not appear that there are any debts of the testator unpaid. No fault has been found with the management of the estate by the executors and trustees. They are the persons chosen to hold the estate for the infant defendant, and to see that the provision for the widow is carried into effect, should she be living when the infant attains 21. I do not see that under such circumstances an administration of the estate would be proper.

The defendant James Darraugh is, I think, strictly entitled to a reference to ascertain and state whether or not the widow is entitled to dower, and if so as to arrears of dower, and as to the value of the maintenance that he has given her, so that if a proper case is made her interest may be made available to satisfy his demand. The value of the dower, however, appears to be so small I can scarcely think he will be advised to accept such a reference.

The costs of the plaintiffs and of the infant defendant should, I think, be paid out of the estate, and I think that neither the defendant James Darraugh, nor the defendant William Hodgins should get any costs. The widow does not appear to have incurred any costs.

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As to the administration of the estate, this was a matter little discussed at the trial, and if counsel think it necessary I will hear what may be urged as to it.

A. H. F. L.

[CHANCERY DIVISION.]

HARPER v. CULBERT ET AL.

Assignment of judgment—Champerty and maintenance—Principal and surety — Sale under mortgage — Payment over of surplus—Owner of equity of redemption—Voidable instrument—27 Eliz., ch. 4—R. S. O. ch. 116, sec. 3.

Where one having obtained an assignment of a judgment against a mortgagor, brought action in his own name against the mortgagee, who had sold under the power of sale, to make him account for certain surplus moneys left in his hands after such sale:

Held that the plaintiff was entitled so to sue, and that such assignment of judgment was not in contravention of the law respecting champerty and maintenance.

Where one brought action against the maker of a note, and an endorser thereon, and recovered judgment with costs, which the endorser paid, and took an assignment of the judgment:

Held that the latter was entitled, under R. S. O., ch. 116, sec. 3, to recover from the principal debtor the whole of the judgment, including the costs.

Where a mortgagee, who had sold under the power in the mortgage, paid over the surplus on the order of I. J., the apparent owner of the equity of redemption.

Held that, even if the deed under which I. J. claimed was voidable, nevertheless the mortgagee was entitled to act on her order, especially as he had served a notice of sale on those who now impeached his conduct, while they had done nothing to assert their claim, until after the surplus was so paid over, and as also a suit which had been theretofore commenced to set aside the deed from I. J. as void had been abandoned.

A voluntary or covinous conveyance under 27 Eliz., ch. 4 is voidable only, and is good and valid until avoided.

THIS was an action brought by Mitchell A. Harper, plaintiff, against George Culbert, John Glennie, Edward J. Jackson, Isabella Jackson, and Isaac Irwin, defendants, claiming that the defendant Culbert, upon a certain sale of the lands in the pleadings mentioned, under a power of sale in a certain mortgage, became a trustee for the plaintiff and for certain execution creditors of the defendant Edward J. Jackson, of the proceeds of the said sale after satisfaction thereout of his own claim under the said mortgage for debt and costs of sale, and that he thereupon became and

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then was liable to account to him, the plaintiff, for the whole of the said surplus; and that the defendant John Glennie should be ordered to repay to the defendant, Culbert, or to him, the plaintiff, the money paid him as aforesaid in excess of the amount properly payable to him with interest; and the plaintiff also claimed general relief

The facts of the case are fully set out in the judgment. It was taken *pro confesso* against the defendants other than Culbert and Glennie.

The case was heard at Toronto before Ferguson, J., on February 7th and 8th, 1882.

Joseph Macdougall, for the plaintiff. As to the costs of the suit brought by Mitchell against Jackson and Glennie, Glennie had no right to be paid these: *DeCollyar* on Guarantees, p. 251; *Short* v. *Kalloway*, 11 A. & E. 29; *Ronneberg* v. *Falkland Island Co.*, 17 C. B. N. S. 1; *Godwin* v. *Francis*, L. R. 5 C. P. 306; *Pow* v. *Davis*, 1 B. & S. 220; *Pierce* v. *Williams*, 23 L. J. Ex. 322. As to the surplus sum of $82 left in the mortgagee's hands, the plaintiff was entitled to be paid that. The conveyances from E. J. Jackson to Irwin, and from Irwin to Isabella Jackson, were void both at law and in equity. See *Kerr* v. *Bain*, 11 Gr. 423; *May* on Fraud. Con., p. 158. The sheriff is bound to sell notwithstanding a fraudulent assignment: *Ib.* p. 160-1. All parties concerned in the payment of the moneys had notice of the facts, and that the plaintiff had a *fi. fa.* against lands in full force at the time of the mortgage sale. Even if there was not a lien by virtue of the writ of execution, yet the payment over with notice was a fraud, and the plaintiff can recover.

Seton Gordon, on the same side. The trust with regard to surplus mortgage moneys is not one to be treated lightly: *Jones* on Mortgages, Vol. 2, secs. 1928-1935. The mortgagee must determine who are entitled to the surplus in his hands. Culbert was a trustee upon distinct trusts which he could not ignore; nor could he pay over the balance to the simple contract creditor in the face of the plaintiff's

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execution, even upon the order of the mortgagors. If the accounts had been taken by the Court, the money would have been paid according to the priorities of the writs in the sheriff's hands, and the plaintiff would have been paid next after Ruder's claim.

A. Hudspeth, for the defendant Culbert. The Mercantile Amendment Act, R. S. O., ch. 116, settles the question as to the $75, the costs of the suit brought by Mitchell. As to the $43 costs of the discontinued suit brought by Glennie, the plaintiff is blowing hot and cold as to this. He is getting advantage of what was done, and still wants the costs of doing it disallowed. As to the $82 balance, the mortgagee simply obeyed the trust declared by the Act respecting short forms of mortgages. The sheriff could not have sold the lands under the *fi. fa.* against E. J. Jackson, until the deeds to Irwin and Isabella Jackson were first set aside. Then again, the plaintiff did not attend the sale. If the matter had been in the Master's office, default in attending on the return of the notice T. would have barred the claim. If the plaintiff had attended the sale, and bid up the property to cover his claim, his conduct would have been better. As a fact, the mortgagee had no notice of the plaintiff's claim. The action must fail as against the defendant Culbert. The Court will not encourage a plaintiff who purchases litigation, quite independently of any question of champerty and maintenance.

W. Cassels, for the defendant Glennie. What was purchased by the plaintiff in this case was the right to sue the trustee, or mortgagee, on the chance of recovering from him. There was nothing substantial bought. The plaintiff has been clearly guilty of champerty: *Little* v. *Hawkins*, 19 Gr. 267. Culbert as mortgagee was not bound to search for executions. If an execution creditor wishes to protect himself, he must notify the mortgagee. The fact that the mortgagee served notice of sale on the plaintiff, and that the latter did nothing, ends the matter, I refer to *Morphy* v. *Wilson*, 27 Gr. 1. Supposing Isabella Jackson had sold to an innocent purchaser, he would not

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have been bound to search for writs against her husband There was no charge on the land by reason of the plaintiff's writ of *fi. fa.*, until the conveyances to Irwin and Isabella Jackson were set aside. I refer also to *Totten* v. *Douglas*, 18 Gr. 344.

Seton Gordon, in reply. The plaintiff was not called upon to attend the sale. If Cuthbert had no notice of the plaintiff's claim, why did he serve notice of the sale on the plaintiff? See *Fisher* on Mortg., 2nd ed., Vol. 1, p. 508.

After the argument, Mr. Macdougall, by leave of the learned Judge, put in, in writing, the following written argument to show that the assignment of the judgment and the litigation arising in this action was not of a champertous character.

The plaintiff here is assignee of the judgment; he is the absolute purchaser thereof; it is not a case of assignment for a nominal consideration, or any advantage to the assignor which is dependent on the result of this litigation. Lee & Co., the assignors, retain no interest whatever in the subject matter of the suit.

While it is true that the assignment of a bare right to file a bill in equity for a fraud committed on an assignor cannot be upheld under *Prosser* v. *Edmunds*, 1 Y. & C. Ex. 481; yet, from the circumstances of this case, it must appear that it is an interest in a *bonâ fide* transfer of a right which is already ascertained by reason of the judgment.

We contend that it is no objection to the absolute sale or transfer of a right that it may require the entering upon or even continuance of litigation to make it available; as, if such were the case, the purchase and sale of judgments or other rights would be seriously hampered and interfered with.

In this case, too, the whole interest is assigned and transferred, not a portion only, and the plaintiff stands in the room and place of Lee & Co.; the interest of Lee & Co. has become the interest of the plaintiff, and the former have no interest in the result.

The assignment of a judgment *per se* is no assignment of the right that is being litigated for here, but these proceedings are part of the relief which the original judgment creditor might have obtained; and, therefore, under R. S. O., ch. 116, sec. 7, his assignee is entitled to all the relief that he himself could have sought for or obtained by any proceedings.

We contend, whatever may have been the former doctrines of the Courts with reference to limiting the rights of assignees, that such limi-

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tations have been entirely done away with by the express language of the statute just cited; and the whole question to be decided here, we submit, is, whether the relief sought could have been obtained by Lee & Co. had they brought the action in their own name before assigning their judgment.

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We think the case of *Little* v. *Hawkins*, 19 Gr. 267, cited by Mr. Cassels, is clearly distinguishable. In that case the heir-at-law was unwilling to litigate, and assigned to the plaintiff; the consideration also was depending only upon the success of the suit, and it was therefore, in every sense of the word, a purely speculative purchase. Chancellor Spragge, in his judgment, called particular attention to the fact that it was only in the event of success that anything was to be paid, and bases his decision largely upon this fact, and the fact that the assignor was unwilling to litigate.

Hill v. *Boyle*, L. R. 4 Eq. 260 was not a case of a judgment or of an ascertained debt, but simply a naked right to call trustees to account, and the bill was very properly dismissed by Sir John Stuart on the ground that the plaintiff was the assignee of nothing but a right to sue a trustee on the chance of recovering from him interest or profits of certain trust funds which, for a certain period, had been in his hands. *The consideration also was merely nominal.*

DeHoghton v. *Money*, L. R. 2 Chy. 164, was a case in which it was simply held that a right to complain of a fraud is not a marketable commodity and it appeared in that case that the agreement for purchase had been entered into for the purpose of acquiring such a right, and the plaintiff was asking the Court to enforce specific performance of such an agreement.

Should it be decided that the assignee of a judgment is unable to pursue all the remedies open to the assignor, a very serious injury would be done to every owner of a judgment by reason of taking away the pecuniary and marketable value thereof.

The assignment of a judgment, we contend, implies the right to bring suit, if necessary, to enforce it. If the judgment were realized, it would not be assigned; if not realized, the assignment necessarily implies liberty to the assignee to pursue all remedies that may be open to him; and surely it cannot be argued that the validity of the assignment is to depend upon whether the judgment debtor, or others who may be held liable under it, choose to resist litigation rather than pay.

The judgment was sold for what it would bring; it was bought by the plaintiff absolutely, and paid for at the time, and it cannot be said that $60 was a purely nominal consideration, keeping in view the fact that Lee & Co. were giving up business in that part of the country, that the plaintiff was continually travelling there, and was in a much better position to realize anything that could be made out of the judgment, that Lee & Co. probably considered the judgment worthless, and were glad to

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get rid of it at almost any price, and very likely thought themselves well paid when receiving the $60.

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The assignors swear it was a *bona fide* transaction, and that the note of the plaintiff, in their opinion, is perfectly good, and that it will be paid: that there was no secret understanding between themselves and the plaintiff that the assignors should receive any further benefit, no matter what might be the result of this litigation.

The plaintiff is not the nominal litigant, or an instrument in the hands of others: *Forrest* v. *Manchester, Lincolnshire, and Sheffield R. W. Co.*, 9 W. R. 818. It is not argued that Lee & Co. could not have succeeded in this action had they brought the suit, nor is it argued that there is any secret agreement or trust to share the profits of successful litigation with the plaintiff.

We submit, then, unless the argument includes either one or the other of these allegations, that the effect of our statute entitles the plaintiff to the relief asked for, if he is entitled to recover on other grounds. And that the arrangement is not champertous within the meaning of any of the decisions heretofore given on the subject, or cited at the hearing: *Cale* v. *Bank of Montreal*, 39 U. C. R. 59; *Stanley* v. *Jones*, 7 Bing. 377; *Wood* v. *Griffith*, 1 Swanst. 56; *Elborough* v. *Ayres*, L. R. 10 Eq 367; *Tapp* on Maintenance and Champerty, pp. 102-3.

June 25th, 1883. FERGUSON, J.—The defendant E. J., Jackson, by an indenture bearing date November 11th, 1874, mortgaged certain lands in the village of Little Briton, in the Township of Mariposa, to the defendant Culbert. Default having been made by Jackson, the lands were sold by Culbert under a power of sale contained in the mortgage. This sale took place in March 1880. The amount realized at the sale for the land was $960. The amount due the mortgagee, Culbert, has been said to be about $405, and his costs of and incidental to the sale. It is not disputed there was a balance after satisfying Culbert's claim. Nor is it disputed that one Ruder, an execution creditor of Jackson, was entitled to the sum paid to him by Culbert, about $101.37, and there was also a balance after paying this sum.

On April 19th, 1879, a certain firm of Lee and Caudell obtained a judgment against Jackson for $270.20. On April 28th, 1879, they placed an execution against goods in the hands of the sheriff of the county in which Jackson

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resided, and in which were the lands that he had mortgaged to Culbert, and on May 2nd, 1879, they placed in the hands of the same sheriff to be executed an execution against the lands of Jackson; and it is not disputed that this execution against lands was in the hands of the sheriff in full force, at and after the time of the sale of the lands by Culbert. On September 1st, 1881, Lee and Caudell assigned and transferred their judgment and all costs, &c., to the plaintiff for the consideration of $60, for which the plaintiff gave them his note. On November 28th, 1878, Jackson conveyed his interest in the lands to one Irwin, his brother-in-law, for the expressed consideration of $2,000; and on February 17th, 1879, Irwin, for the same expressed consideration, conveyed the lands to Jackson's wife, the defendant Isabella Jackson, but it is quite clear that there was no consideration for either of these conveyances.

On March 1st, 1879, one Mitchell obtained a judgment against Jackson and the defendant Glennie, the suit being upon a promissory note made by Jackson and endorsed by Glennie. On September 9th, 1879, Glennie paid the amount of this judgment to Mitchell the sum being about $254, including the costs of the suit, which are said to have been somewhere about $75, although one does not well see how they were so much, for the note is said to have been for $201.69. A suit had been brought by Glennie for the purpose of setting aside the conveyances from Jackson to Irwin, and from Irwin to Isabella Jackson, as being fraudulent, and void as against him and the other creditors of Jackson, he, Glennie, having a writ against lands, issued upon the judgment which had been assigned to him by Mitchell, in the hands of the sheriff to be executed, but learning that the lands were about being sold under the power of sale by Culbert, he abandoned or ceased to prosecute the suit and attended the sale, as he says, for the purpose of bidding upon the lands, and seeing that they sold for a sufficient amount above the moneys owing upon the mortgage to cover his claim,

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which he did. In the suit, however, that he ceased to prosecute there had been incurred costs amounting to some $43. The mortgagor Jackson owed Glennie a further sum of money on a claim which had not been reduced to a judgment, and he, Glennie, obtained an order from Isabella Jackson, the apparent owner of the equity of redemption, upon Culbert, for the payment of a balance in his hands, which is said to have been $82. This sum, the above sum of $43 costs, and the costs embraced in the judgment obtained by Mitchell and assigned to Glennie, were all paid by the mortgagee Culbert, leaving nothing to satisfy the plaintiff's claim upon his judgment and execution; and of this the plaintiff complains, alleging that these three sums of money should have been applied by the mortgagee, Culbert, in satisfaction or part satisfaction of his claim, and he brings this suit, stating, amongst other things, that the conveyances from Jackson to Irwin and from Irwin to Isabella Jackson were void as against him, &c., and that of this and of the existence of his execution in the hands of the sheriff Culbert had notice and knowledge, and charging that Culbert, upon the sale of the lands, became a trustee for him, (the plaintiff,) and the other execution creditors of Jackson, in respect of the proceeds of the sale after satisfying his own claim under the mortgage for debt and costs, and that Culbert became and is liable to account to him, (the plaintiff,) in respect of the same; and charging also, that Glennie should be ordered to repay to Culbert, or to him, (the plaintiff,) the moneys that he, (as the plaintiff says,) received in excess of the amount properly payable to him.

Culbert's defence is, that after satisfying his own claim and costs of sale, he paid the surplus upon the order of the defendant Isabella Jackson to the defendant Glennie, that he had no knowledge of the alleged fraudulent conveyances, and that he paid the surplus money to the order of the person who was entitled to it, she being the owner of the equity of redemption.

The defendant Glennie in his defence says, that he and

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Ruder attended the sale for the purpose before stated, and that he procured from the defendant Isabella Jackson, a consent to a settlement of his claim out of the purchase money, provided that he stopped the proceedings in his suit; and that the suit being stopped she, Isabella Jackson, was entitled, as the owner of the equity of redemption, to any surplus there was from the sale of the lands.

Culbert, the mortgagee, served the persons through whom the plaintiff claims with the usual notice of the intended sale of the lands under the power. They did not, however, attend the sale or take any step to protect their interest thereat as Glennie did, nor did it appear that the plaintiff, or those through whom he claims, did at any time before the money was all paid over notify the mortgagee of his claim or require from him payment of it.

At the trial the defendant Culbert was permitted to set up champerty and maintenance as a defence. I have examined all the authorities referred to in respect of this defence, and many others upon the subject, and I am of the opinion that it cannot be sustained. What the plaintiff purchased and obtained an assignment of was not the bare right to litigate, (to call upon a trustee to account or to bring a suit in respect of an alleged fraud). What was assigned to him was a judgment with all the rights upon it. This was a *chose in action*, and a thing assignable under the statute so as to enable the assignor to sue in his own name in respect of it. In seeking his remedies upon this judgment, the plaintiff was not confined to any particular one. He had all the remedies of a judgment creditor. It is true that the consideration for the judgment was comparatively small, but it was shown by evidence that was not contradicted that there was no secret trust between the assignor and the assignee, and that the consideration was to be paid in any event. I do not think any of the cases show that such a transaction is bad, as being in contravention of the law respecting champerty and maintenance, certainly none that I have been referred to, or that I have seen.

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As to the costs of the suit Mitchell against Jackson and Glennie, I think the contention of Mr. Hudspeth is correct. It is conceded by the plaintiffs that Glennie was entitled to be paid the amount of the debt. The provision contained in R. S. O. Ch. 116, puts the surety who pays the claim and takes an assignment of the security from the creditor substantially in the position of the creditor, and I think the effect is, that Glennie was as well entitled to be paid these costs as Mitchell would have been had he been the one claiming them. I think he had the same right to the amount of those costs as he had to be paid the amount of the debt, and this last was not disputed; and I am of the opinion that the authorities cited by counsel for the plaintiff on this branch of his case do not apply.

Then there are left the respective sums of $43, and $82. These were paid upon the order of Mrs. Jackson, who was apparently the owner of the equity of redemption. It does not clearly appear that there was a formal order for the payment of the $43, but I think the effect of the evidence is, that the payment was made with her approval, and I think the two sums may be placed in the same position for the purpose of disposing of this case.

The plaintiff contended that by reason of their writ of execution in the hands of the sheriff, his assignors had a charge upon this land or the equity of redemption in it. This writ was against the lands of Jackson, and not those of Isabella Jackson. This writ was not placed in the hands of the sheriff till after the conveyances from Jackson to Irwin, and from Irwin to Isabella Jackson. In the case of *Totten* v. *Douglas*, (in appeal), 18 Gr. 344, it is said: "It is plain that a voluntary or covinous conveyance within the statute 27 Eliz., is voidable only, and that it is good and valid until avoided." The plaintiff's assignors may have had a good cause of action to set aside these conveyances, but they did not avail themselves of the right if they had it.

Leaving out of the case certain letters written by the solicitors for the mortgagee, to which reference will here-

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after be made, there does not appear to be any difficulty. In *Jones* on Mortgages, sec. 1930, it is said: "Notice of the claims to the surplus money must be given to the mortgagee, or he must have actual notice of the incumbrances on which such claims may be founded, or he will not be responsible for not applying the surplus in payment of them." In this case it is not shown that any such notice was given. It is said that the mortgagee must have had actual notice of the alleged incumbrance in favour of the plaintiff's assignors, because he gave them notice of his intended sale, and it is said that he had notice of the alleged fraud in respect of the conveyances to Irwin and from him to Isabella Jackson. Now, even assuming that the mortgagee had notice of the writ in the hands of the sheriff on which the plaintiff's claim is founded, this was against the lands of Jackson. If the statement of the law in *Totten* v. *Douglas*, *supra*, to which I have referred is correct these conveyances were good and valid till avoided. A suit had been brought to avoid them, and this suit had been abandoned. The mortgagee gave notice of the intended sale to the plaintiff's assignors, and they simply did nothing. They did not answer asserting any claim upon any surplus or supposed surplus. It does not appear that they answered at all till after the surplus was paid over. The writ being against the lands of Jackson, the conveyances being valid till avoided, a suit being necessary to avoid them, one such suit having been brought and abandoned, the plaintiff's assignors remaining silent after having been served with the usual notice, and an order from the apparent owner, (for the time being the actual owner,) of the equity of redemption being presented, I cannot avoid being of the opinion that the mortgagee was justified as against the plaintiff's assignors in paying upon this order.

I cannot perceive that the letters to which I have above referred can make any difference in the result. The earliest of them is on April 13th, 1880 (*a*), giving to the

(*a*) This was a letter written by Mr. Hudspeth to Mr. Macdougall.

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solicitors who were then acting, as I assume, for the plaintiff's assignors, an account, and so far as has appeared an accurate account of the application of the moneys arising upon the sale. The next is dated July 16th, 1880 (*a*). The writer of it appears to have had no accurate, knowledge of the facts, for he assumed that the money had been paid upon Jackson's order, and he simply asked that nothing be done till he should have had an opportunity of corresponding with the parties concerned or some of them. The next was a letter of August 30th, 1880 (*b*), the writer being apparently still under the impression that the money had been paid upon the order of Jackson, saying that the solicitor who had attended to the matter was away, that his attention would be called to it when he returned, and it was thought that he would bring an action against Glennie for the money paid him through oversight. The next and last of these letters bears date December 22nd, 1880 (*c*), saying that Glennie had taken no notice of the letters sent him, and that proceedings would be instituted against him to collect the money. These solicitors appear to have been the solicitors of the mortgagee. It does not appear that they were acting for Glennie, and I fail to see how these letters written as they were after the transaction was completed can alter the case as against these defendants or either of them, and I think the plaintiff's action must be dismissed, and with costs.

A. H. F. L.

(*a*) This was a letter written by Messrs. Hudspeth, Barron and Jackson to Messrs McDougall and Gordon, saying, "We to-day wrote to the party to whom the money was paid by Jackson's order requiring him to refund it, and we have no doubt he will do so. Kindly do nothing until we have an opportunity of hearing from him."

(*b*) This was a letter from the same to the same, and stated; "Our Mr. Hudspeth, who attends to this matter, is at present out of town * * On receipt of your letter of the 21st of June last, we wrote to Mr. Glennie to whom the sum you require was paid by the order of Jackson, but never received anything from him in reply. We will call Mr Hudspeth's attention to the matter immediately on his return, when we think he will remit the money to you, and take proceedings against Mr. Glennie for the money paid him through oversight."

(*c*) This was also from the same, to the same.

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[QUEEN'S BENCH DIVISION.]

MURCAR ET AL. V. BOLTON ET AL.

Partition—Sate of life estate—Prohibition—R. S. O. ch. 101.

The Crown, by letters patent, granted land to F. B. for life, with remainder to her children, the petitioners as tenants in common in fee simple. On a petition presented to the Judge of the County Court under R. S. O. ch. 101, for partition or sale, a sale was ordered. A motion for a prohibition was made on behalf of F. B. the tenant for life.

Held, ARMOUR, J., dissenting, that the case did not come within the Partition Acts, and that there was no power to compel a sale of the lands as against the tenant for life. A prohibition was therefore ordered.

THE plaintiffs, by their petition to the Judge of the County Court of the county of Bruce, alleged that on the 10th March, 1875, the Crown granted the land in question to the defendant Flora Bolton, for life, with remainder to the said Catherine Murcar, and to the remaining defendants, other than John Bolton and Alexander Rose, in fee: that on the same day the Crown granted certain other land to the said Catherine Murcar, and the said defendants, Alexander Beaton, Janet Rose, and Johanna Beaton in fee: that the said Catherine Murcar, Alexander Beaton, Janet Rose and Johanna Beaton were the children of the defendant Flora Bolton by John Beaton, deceased, her former husband: that the said John Murcar was the husband of said Catherine Murcar: that said John Bolton was then the husband of said Flora Bolton: that said Alexander Rose was the husband of said Janet Rose: that said Johanna Beaton was an infant under the age of twenty-one years, and the other said children were all of the age of twenty-one years, &c.; and they prayed a partition or sale, and the learned Judge ordered a sale to be made.

On 30th November, 1883, a motion was made on behalf of the defendants to the presiding Judge in Chambers for a writ of prohibition to the said learned Judge, on the ground of want of jurisdiction, which motion was dismissed.

On 11th February, 1884, *McMichael*, Q. C., on behalf of

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the defendants, appealed against this decision, on the ground of want of jurisdiction, contending that none of the property came under the Act, which was intended to meet the case of a person dying intestate, and referring to *Evans* v. *Bagshawe*, L. R. 5 Chy. 340; *Bennett* v. *Bennett*, 6 P. R. 145.

Clement, contra, contended that the petitioners had a *locus standi* under section 2 of the Act (R. S. O. ch. 101); and that the decision of the County Court Judge could not be reviewed on motion for prohibition, but that recourse must be had to the Court of Appeal under section 6, citing *Blakeley* v. *Calder*, 15 N. Y. 623; *Abel* v. *Weir*, 24 Grant 464. He also contended that the statute applied to this case, section 4 shewing who were compellable to make or submit to partition.

March 5, 1884. ARMOUR, J.—The sole question for our determination is, whether the Judge of the County Court had power to direct the sale of the life estate of Flora Bolton against her will, and the answer to it is to be derived solely from R. S. O, ch. 101, and 42 Vict. ch. 22, sec. 5 (O).

2 Will. IV. ch. 35, provided that all joint tenants, tenants in common, and co-parceners of any estate or estates in land might be compelled to make or suffer partition of such estate or estates, and where such estate or estates was or might be situated in two or more districts the proceedings should be in the Court of King's Bench, and where in one district only in the District Court or Court of King's Bench: that any such person, or the executor, administrator, guardian or agent of any such person, might file his petition in either of said Courts as the case might require, praying that partition of such estate or estates might be made, which petition should set forth the nature of the title or claim of the demandant, the tract or tracts of land, and the name and residence of each joint tenant, co-parcener, and tenant in common, with such demandant, and if it should appear that the demandant had a good and legal title to any part or proportion of such estate or

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estates, the Court should proceed to order and direct a partition, and should issue their writ to the sheriff of the district in which the estate or estates should or might lie, commanding him, by the oath of three judicious and disinterested freeholders, to set off and divide the said lands; and that if the freeholders who were directed to make such partition should be of opinion that the estate or estates could not be divided without prejudice to or spoiling the whole, they should then make and return to the Court a true valuation and appraisement of such estate or estates and the Court might thereupon direct a sale of the said estate or estates: that when the facts alleged in any such petition were controverted by any of the tenants in common, co-parceners or joint tenants, the answer or objection to the petition should be made in writing in the form of a plea, to which the petitioner might reply or demur, to the end that the matter in dispute might be reduced to an issue in law or fact, and receive a determination by the Court or a jury in the manner other issues were determined.

By 4 Will. IV. ch. 1, sec. 39, the writ of partition, except such as was or should be authorized by any statute of this Province, was forbidden to be brought after the 1st of July, 1835, and thereupon the only mode by which partition could be had was under the provisions of 2 Will. IV ch. 35.

Under 2 Will. IV. ch. 35, joint tenants, tenants in common and coparceners in reversion or remainder of lands, subject to a life estate still subsisting in the whole of such lands, could be compelled to make or suffer partition of such lands, subject to such life estate: See *Scoville* v. *Hilliard*, 48 Ill. 413, *S. C.* 52 Ill. 449.

Neither at law nor in equity in England could such persons so holding, subject to a life estate, be compelled to make or suffer partition: See *Evans* v. *Bagshawe*, L. R. 5 Chy. 340.

By 20 Vict. ch. 65, entitled, "An Act to amend the Act to abolish the rights of primogeniture, and to afford relief

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to parties succeeding to the real estate of persons dying intestate in certain cases in Upper Canada,"—after reciting that it frequently happened in cases of persons dying intestate leaving real estate in Upper Canada, that by reason of the absence therefrom or of the minority of some of the parties entitled to participate in the succession to such real estate, no title could be made to the same without great delay, expense, and inconvenience, and it was desirable to provide some remedy therefor—it was provided, section 1, that the Judge of the Surrogate Court in each county should be the "real representative" for the real property within such county in respect of or to which any person being seised of or entitled to an estate in fee simple therein should die intestate. Section 2 provided that from and after the expiration of six months from the death of any person dying intestate seised of or entitled to such real estate, it should be lawful for any one or more persons entitled to a share or interest in such estate, and the immediate possession thereof, being of full age, to apply to either of the Superior Courts of law or equity, or to the County Court of the county in which such estate was situate, for a division or partition thereof, or for a sale thereof, if such sale should by such Court be considered more advantageous to the parties interested. Section 3 provided that such application should particularly describe the premises sought to be divided or sold, and should set forth the interest of the petitioner, and the rights and titles of all persons interested therein, so far as the same were known to the petitioner, including the interest of any tenant for years, for life, by the curtesy or in dower; or in case any one or more of such parties, or the share or quantity of interest of any of the parties should be unknown to the petitioner, the same should be set forth in such petition. Section 4—that any person having any such interest might be made a party to such petition. Section 11—that any party appearing might plead that the petitioners, or any of them, at the time of presenting the petition, were not entititled to or in possession of

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the premises, or any part thereof. Section 14, that if judgment should be entered against any of the defendants by default for want of a plea, the Court should still require the petitioners to exhibit proof of their title, and from such proofs, or from the confession by plea of the parties if they appeared, or from the verdict of a jury by which any issue of fact had been tried, the Court should declare the rights, title, and interest of the parties to such proceedings, plaintiffs as well as defendants, and should determine the rights of the parties in such estate, and give judgment that such partition be made between such of them as had any rights therein according to such rights, but not so as to affect any parties whose rights had not been ascertained. Section 15—that thereupon the Court should order the real representative to make the partition so adjudged according to the respective rights and interests of the parties, as the same were ascertained and determined by such Court, and the real representative should forthwith proceed to make such partition according to the judgment of the Court, unless it should appear to him that partition could not be made without prejudice to the owners of the estate, in which case he should make a report of such fact to the Court in writing under his hand. Section 16—that the real representative should in making partition divide the said real estate, and allot the several portions and shares thereof to the respective parties as adjudged by the Court, and should report to the Court in writing the manner in which he had divided the said estate, and the share allotted to each party. Section 18—that upon the return of such report judgment should thereupon be given that such report was confirmed, and such judgment should be binding and conclusive on all known parties named in the said petition, and all unknown parties where publication as provided by the said Act had been made, and all persons claiming from or through them; but such judgment should not affect any persons having claims as tenants in dower, by curtesy, or for life, to the whole of the premises which should be the subject of such

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partition, nor any person not named in the petition, either originally or by amendment, nor any unknown person when there has been no such publication as aforesaid. Section 19—that if upon the report of the real representative the Court should see fit to order sale of the estate, it should be lawful for the Court so to do. Section 21—that before making any order for sale, where the creditors having specific liens had not been made parties, the Court should direct the petitioner to amend his petition by making every creditor having a specific lien on the whole estate, or on the undivided interest or estate of any of the parties by mortgage, judgment or otherwise, a party to the proceedings; and should direct the clerk of the Court to ascertain and report whether the shares or interests in the premises of the parties in such suit, or any of them, was subject to any general lien or incumbrance by judgment or decree, and the clerk should give notice requiring all persons having any general lien or incumbrance on the estate, or any undivided interest or share therein by mortgage, judgment, decree or otherwise, to come in and prove the same, and the clerk should report with all convenient speed the names of the creditors, the nature of the incumbrances, the dates thereof, and the several amounts appearing to be due thereon, and thereupon the Court should order the real representative to bring into Court and pay to the clerk the whole purchase money, if the lien be on the whole estate, or the portion thereof arising from the sale of the part charged with the lien, after deducting the portion of the costs, charges, and expenses to which it should be liable. Section 24. That whenever the estate of any tenant in dower to the whole or part of such estate, or of any tenant by curtesy or for life to any part of the estate, had been admitted by the parties or ascertained by the Court to have been existing at the time of the order for such sale, and the person entitled to such estate had been made a party to the proceedings, the Court should first determine whether such estate ought to be exempted from the sale, or whether the same should be sold, and in making such determination

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regard should be had to the interest of all the parties, and if a sale should be ordered including such estate, all the estate and interest of every such tenant should pass thereby, and the purchaser, his heirs and assigns, should hold such premises free and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same should be to any undivided share or to the whole or any part of the premises sold, and the Court should direct the payment of such sum in gross out of the purchase money to the person entitled to such dower or estate by curtesy or for life, as should be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such estate. Section 26. That the real representative should execute deeds pursuant to the sales, and that such deeds so executed should be a bar both in law and equity against all parties interested in the premises who had been named in such proceedings as parties, and against all unknown parties where notice had been published as required, and against all persons claiming under or through them, and also against incumbrancers where the notice thereinbefore mentioned had been given to them.

One of the effects of the Act to abolish the rights of primogeniture was, that if a person died intestate, seised of or entitled to an estate in fee simple in land, such death might produce a person entitled to dower therein, or a tenant by the curtesy, or a tenant for life of the whole of the said land; and I think it clear that under the provisions of the Act, 20 Vic. ch. 65, the estates of such dowresses, tenants by the curtesy and for life, so produced, might be ordered to be sold, and also the like estates produced by the death of any tenant in common who became such by the death of the person intestate who was seised of or entitled to an estate in fee simple in the land.

It may be argued, however, that it was only such estates so produced that could be ordered by the Court to be sold under the provisions of this Act; and that if a person died intestate seised of or entitled to an estate in fee simple in land, subject to a life estate, such life estate could not be ordered by the Court to be sold under its provisions.

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I think, however, that such life estate, as well as the life estates so produced, as above mentioned, could be ordered by the Court to be sold under its provisions.

The provision of section 3, that the petitioner, besides setting out his own interest, is to set out the rights and titles of all persons interested in the premises sought to be divided or sold, including the interest of any tenant for years, for life, by the curtesy or in dower; the provision of section 4, that all such persons may be made parties; the provision of section 14, that the Court shall declare the rights, title and interest of the parties to the proceedings, plaintiffs as well as defendants, and shall determine the rights of the parties in such estate, and give judgment that such partition be made between such of them as have any rights therein according to such rights, but not so as to affect any parties whose rights have not been ascertained; the provision of section 18, that the judgment confirming the report of the partition, made by the real representative, shall not affect any persons having claims as tenants in dower, by curtesy, or for life, to the whole of the premises which shall be the subject of such partition; the provision of section 21, respecting specific liens upon the whole estate; the provision of section 26, that the deeds to be executed of the lands sold shall be a bar both at law and in equity against all parties interested in the premises who shall have been named in such proceedings as parties;—all show that all such estates might be ordered by the Court to be sold.

The provision of the first part of section 24, that whenever the estate of any tenant in dower to the whole or part of such estate, or of any tenant by the curtesy, or for life, to any part of the estate has been admitted by the parties, or ascertained by the Court to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the Court shall first determine whether such estate ought to be exempted from the sale, or whether the same should be sold, would seem to shew that only such life estates as had been produced by the death of any tenant in common,

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who became such by the death of a person intestate who was seised of or entitled to an estate in fee simple in the land, could be ordered by the Court to be sold; but the provision of the second part of section 24, that the purchaser, his heirs and assigns, shall hold such premises free and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same be to any undivided share or to the whole or any part of the premises sold, construes the first part of the section, and clearly shews that all life estates in the whole or any part of the land, however created or produced, could be ordered by the Court to be sold.

The provisions of sections 2 and 11 are quite reconcilable with this view. Section 2 does not require that the party therein named should be entitled to a share or interest in such estate, and should be in possession of the land, but only that he should be entitled to a share or interest in such estate, and to the immediate possession of such a share or interest; and the word premises, in section 11, clearly means such share or interest; and the words used in the second section are satisfied by any person who "has a vested remainder or reversion" in such estate.

Any other construction that might be put upon the words in these sections would do violence to and render insensible many of the provisions of the Act; but this construction is in harmony with them all. See the judgment of Denio, C. J., in *Blakeley* v. *Calder*, 15 N. Y. 623, as to the words used in section 1, Partition Act of the State of New York, from which Act the Act 20 Vic. ch. 65, is largely transcribed.

The Statutes 2 Will. IV., ch. 35, and 20 Vic. ch. 65, appear in the Consolidated Statutes of Upper Canada as ch. 86, and by the Consolidated Act the real representative, which by the way is a mere legislative alias for the Judge of the Surrogate Court, is made to take the place of the sheriff and freeholders as to the duties to be performed by them under 2 Will. IV., ch. 35; and the provision is that the Judge of the Surrogate Court in each county in

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Upper Canada shall be the real representative for all real property within such county in respect of or to which any person being seised of or entitled to an estate in fee simple therein dies intestate, *and for all other purposes hereinafter mentioned;* and by section 30 of the Consolidated Act the first part of section 24 of 20 Vic. ch. 65, is made to conform with the second part of it, and to read that "whenever the estate of any tenant in dower, or of any tenant by the curtesy or for life to the whole or to any part of the estate," &c.; and I think that this revision of section 24 shews that those who consolidated the statutes were of opinion that under 20 Vic. ch. 65 all life estates in the whole or any part of the land, however created or produced, could be ordered by the Court to be sold, and that it was clearly the intention of the Legislature that under the Consolidated Act all such life estates could be ordered by the Court to be sold.

The Consolidated Statute U. C. ch. 86, was repealed by 32 Vic. ch. 33, which, however, comprised all the provisions of the repealed Act, and amended and extended them; and this latter Act was amended by 36 Vic. ch. 16, 37 Vic. ch. 7, and 40 Vic. ch. 7, which four last mentioned Acts appear in R. S. O. as ch. 101.

R. S. O. ch. 101, sec. 4, provides that "all joint tenants tenants in common, and coparceners, all dowresses and parties entitled to dower, tenants by the curtesy, mortgagees, or other creditors having liens on, and all parties whosoever interested in, to or out of any lands in Ontario, may be compelled to make or suffer partition or sale of the said lands, or any part or parts thereof as hereinafter provided."

I think that under this section the defendant Flora Bolton was properly compellable to suffer partition or sale of the lands in question, as a party interested therein as a tenant for life. Section 8 provides that "any party interested in any land in this Province, or the duly authorized agent of any such party, or the guardian (duly appointed by any Surrogate Court) of any infant entitled

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to the immediate possession of any estate therein, may file a petition in any of the Courts aforesaid praying that partition of such lands may be made, or that the same may be sold under the directions of the Court wherein the proceedings are taken, or any Judge thereof, provided that such sale be considered by the said Court or Judge more advantageous to the parties interested; but no proceedings shall be taken under this Act until six months next after the decease of the testator or party dying intestate in whom the lands or estate in lands to be so partitioned or sold may be vested."

It was contended that the effect of the last proviso in this section was to confine partition to the case of those persons only who had become entitled to the lands sought to be partitioned by the death of a person, testator or intestate, seised of or entitled to an estate in fee simple therein, and that the lands in question not having devolved upon the parties to this suit by the death of such a person, no partitition could be had of them under the Act; but this proviso has not the effect of so confining the Act, but the only effect of it is to provide that in the case of lands so devolving no proceedings shall be taken under this Act until six months next after the decease of such person from whom they so devolved.

This section, it will be observed, only requires that the person filing the petition shall be interested in the lands of which partition or sale is sought, unless he be an infant, in which case he must be entitled to the immediate possession of an estate therein, a form of expression similar to that used in 20 Vic. ch. 65, sec. 2, and which I have sufficiently discussed.

It cannot therefore be successfully contended that the female plaintiff was not such a person as was entitled to file a petition for the partition or sale of the lands in question. Sec. 9 provides "that all proceedings under this Act shall be entitled in the Court in which the same happen to be instituted, and shall be further described as follows:

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In the matter of partition between A. B. (naming the petitioner, or if more than one naming all the petitioners in full) plaintiff (or plaintiffs) and C. D. (naming every then known party having any legal estate in the lands other than the petitioners) defendants.

Sec. 10 provides that any party having at the time of filing the said petition any interest as aforesaid, shall be made a party to such partition proceedings, and the petition shall set forth the interest of the petitioner, and the estates, rights and titles of all parties interested therein in anywise whatsoever.

I think it impossible to successfully contend that the defendant Flora Bolton was not properly and necessarily made a party to these proceedings under the provisions of the two last named sections.

Section 35 provides that the Court or a Judge shall by rule or order determine and declare the rights, title, and interests of all the parties concerned, and thereby order the real representative to proceed as thereinafter directed according to such rights, but not so as to affect any parties whose rights have not been ascertained; and sub-sec. 2 provides that the Court or Judge may, if it seems expedient to the said Court or Judge, in the first instance order a sale of the said lands without a reference to the real representative.

Section 36 provides that the said Court or Judge shall by the rule or order in the last section mentioned, direct the real representative to make the partition so adjudged according to the respective rights and interests of the parties as the same may have been ascertained and determined as aforesaid, and the real representative shall forthwith proceed to make such partition according to the judgment of the Court or Judge, unless it appears to him that the partition cannot be made without prejudice to the owners of the estate, in which case he shall make a return of such fact to the Court in writing under his hand.

Sections 37 and 39 provide that if he makes partition he shall make a report thereof to the Court or Judge,

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who may confirm the same; but such judgment shall not affect any person or persons having claims as tenants, tenants in dower, or by the curtesy, or for life, to the premises which form the subject of such partition.

Section 40 provides that the Court or a Judge in Chambers shall order a sale of the estate, if deemed prudent so to do, upon the report of the real representative that it appears to him that partition cannot be made without prejudice to the owners of, or parties interested in, the estate.

Sections 44, 45, and 46, provide for ascertaining before making any order for sale, whether any creditors have specific liens on the whole estate, or any undivided interest or estate therein of any of the parties, and for calling upon them to come in and prove their claims, and for the payment thereof.

Section 49 provides that wherever the estate of any tenant in dower, or of any tenant by the curtesy, or for life, to the whole or to any part of the estate has been admitted by the parties or ascertained by the Court or Judge to be existing at the time of the order for such sale and the person entitled to such estate has been made a party to the proceedings, the Court or Judge shall first determine whether such estate ought to be exempted from the sale, or whether the same shall be sold, and in making such determination regard shall be had to the interests of all the parties; and if a sale is ordered, including such estate, all the estate and interest of every such tenant shall pass thereby, and no conveyance or release to the purchaser shall be required from such tenant, and the said purchaser, his heirs and assigns, shall hold such premises freed and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same be to any undivided share, or to the whole or any part of the premises sold; and the Court or Judge shall direct the payment of such sum in gross out of the purchase money to the person entitled to such dower or estate by the curtesy, or for life, as may be deemed, upon the

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principles applicable to life annuities, a reasonable satisfaction for such estate.

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Section 50 provides for the sale and for the approval and confirmation thereof by the Court or a Judge, and for the making of an order directing the real representative to execute deeds pursuant to such sale, and that such deeds shall be a bar both in law and equity against all known persons interested in the premises, and against all unknown parties where notice was published as required, and against all persons claiming under or through them, and against all incumbrancers where the notice hereinbefore mentioned has been given to them in manner and form aforesaid.

Section 51 provides that where the notice of the partition has been published as required by this Act, the deed to be executed by the real representative shall set forth the order for sale, and the said deed shall vest in the purchaser an absolute and indefeasible title to the estates and interests in the lands partitioned, to which all or any of the parties interested therein as co-tenants with the petitioner, or any one claiming under them, or any or either of them, or under the petitioner, are entitled; and shall be conclusive evidence that every application, notice, publication, proceeding, and act whatsoever, which ought to have been given and done previously to the execution of the same, has been given and done by the proper parties.

It is clear to my mind that the provisions of this Act, to which I have called attention, conferred undoubted power upon the learned Judge of the County Court to order the sale of the life estate of the defendant Flora Bolton, and I think it impossible to hold otherwise without disregarding and nullifying these provisions, and I am at a loss to imagine by what other form of words than that used by them the Legislature could more positively and distinctly have conferred such power.

The object of the Legislature was clearly this, that whenever any lands became subject to partition, and partition of them was prayed, the Court should have the

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power, having regard to the interests of all the parties, and a sale being more advantageous to the parties interested, to order that such lands and every estate and interest therein, of whatever nature or kind, should be sold.

It must be assumed on this motion that the learned Judge properly exercised the power to sell this life estate, and the only question before us is, whether he had that power.

I have not referred to the provisions of 42 Vic., ch. 22, secs. 5 & 6, because they seem to me to be merely a re-enactment of what is contained in section 49 of R. S. O. ch. 101.

In my opinion the motion must be dismissed with costs. I refer to *Freeman* on Partition, sec. 441; *Cook* v. *Webb*, 19 Minn. 170; *Washburn's* Real Property, Vol. 1, ch. 13, sec. 7.

HAGARTY, C. J.—The point for our consideration seems briefly this:

The Crown granted a lot of land to Flora Bolton for life, remainder to her four children in fee, as tenants in common.

Those in remainder ask for partition. The grantee for life resists, and the learned Judge of the County Court directs a sale of the whole estate with the approbation of the real representative, under the clause in the statute. considering a sale to be best for the interest of all concerned

We are asked to prohibit this exercise of jurisdiction on behalf of the life estate.

It is stated that the Crown made this and a grant of another lot as the most equitable family settlement amongst the widow and children of the deceased owner of the lands unpatented at his decease.

We must deal with it, I consider, as an ordinary grant, or as a conveyance by one party to another for life, remainder to others in fee.

My brother Armour has, with great ingenuity, endeavoured to shew that by the particular wording of our statutes such a tenancy for life may be so dealt with.

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I would proceed to examine the statutes rather from an opposite point of view, viz., to see if words of such irresistible force and plainness have been used to produce a result so startling to our ordinary ideas as to the rights of parties.

I am at present unable to see how the ordinary grantee of a life estate can be forced to give up possession of it and accept a money compensation, because those in remainder so desire, or for their convenience.

I should require the plainest and most unequivocal directions in an Act of Parliament before believing that the Legislature intended so to enact.

The subject of partition and the course of legislation in England are fully treated in *Foster* on Joint Ownership and Partition, (1878) ch. 8.

It seems clear that what is here sought to be done could not be done in England, and that only persons entitled to an estate in possession could maintain a suit therefor. See the authorities in *Foster*, 130.

Lord Hatherley discusses the effect of Imperial Legislation in *Pemberton* v. *Barnes*, L. R. 6 Chy. 685, (*Foster* 113.)

To grant relief and decree partition of estates held in joint tenancy, or tenancy in common or coparcenery, was long claimed and recognized by Parliament as the jurisdiction of the Court of Chancery, whatever the origin of the practice, or the concurrent rights of Common Law Courts may have been.

Many Acts have been passed in Canada for purposes of partition. The earliest seems to have been 2 Wm. IV. ch. 35, 1832, passed, as it is declared, in consequence of the inconvenience from the want of a Court competent to order partition of lands held in joint tenancy, tenancy in common and coparcenery, and for these classes it enables the King's Bench to award partition; no relief to persons other than those who, had there been a Court of Chancery in existence, could have had partition.

The Statute 14 & 15 Vic. ch. 6, abolishing primo-

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geniture in case of intestacy, creates several life estate interests in father and mother, according to circumstances, where no lineal descendants, reversion to brothers and sisters, &c.

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Section 24 provides for partition among parties authorized to make partition.

The 20 Vic. ch. 65 (1857), recites that in the case of persons dying intestate leaving real estate, by reason of absence from the Province or minority of some of the parties, title could not be readily made, &c.

Section 1 declared the County Judge to be the real representative for all property, &c., in respect of which persons seised in fee should die intestate.

By section 2, after six months from the death of intestate, any person or persons entitled to a share or interest and immediate possession thereof, of full age, could apply for partition.

By section 3 the interest of all persons is to be set out, including tenant for years, for life, by curtesy or in dower.

Section 18 excludes from the judgment of the Court after the report, &c., any person having claims as tenant in dower, by curtesy or for life, to the whole of the premises, and any person not named in the petition.

Section 19 allows a sale at the discretion of the Court, and by the same section and section 24 the tenant for life or by curtesy shall be compensated on the principles applicable to life annuities.

Section 32 declares that where the interests in such estate are equitable fees simple the Court of Chancery alone shall act therein.

Consol. Stat. U. C. ch. 86, re-enacts the appointment of the County Judge as real representative of persons dying intestate seised in fee simple.

Section 4 says that all joint tenants, tenants in common and coparceners may be compelled to make partition.

Section 6 is as to filing petition after six months from the death of the intestate on behalf of any entitled to a share and immediate possession.

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Section 8 repeats the provision of section 3 of 20 Vic., already cited.

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32 Vic. ch. 33, sec. 4, O., declares that joint tenants, tenants in common, coparceners, dowresses and parties entitled to dower, tenants by the curtesy, mortgagees and other creditors having liens thereon, and all parties whosoever interested in, to or out of any lands in Ontario, shall and may be compelled to make or suffer partition or sale, &c.

This is the first expansion of the precise description of persons who must suffer partition, and is the same as in our Revised Ontario Statutes, ch. 101.

In setting out what must be in the petition, section 8 omits the words in the Consolidated Statutes as to "the interest of any tenant for years, for life, by the curtesy or in dower:" so also in our Revised Ontario Act; retaining the general words, "the estate, rights and titles of all parties interested therein."

The provisions are generally as in the Rev. Ont. Stat.

Our Rev. Ont. Stat. ch. 101, proceeds on the same lines.

Partition by and against the persons mentioned in the last cited Act.

The real representative is for all property in respect of which any person being seised of or entitled to any estate in fee simple shall die intestate.

Section 8 allows the petition for partition: "But no proceedings shall be taken under this Act until six months next after the decease of the testator or party dying intestate, in whom the lands or estate in lands to be so partitioned or sold may be vested."

The words "the testator" are not in the Consol. Stat. U. C., but appear first in 32 Vic. ch. 33.

In both these Acts the real representative is only declared to represent in case of intestacy.

Section 35 declares that the Court may in the first instance order a sale without reference to the real representative.

Then section 49 provides that wherever the estate of

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any tenant in dower or of any tenant by the curtesy or for life to the whole or any part of the estate has been admitted by the parties, &c., the Court or Judge shall first determine if there shall be a sale, or such estate be exempted. If sold, all the estate of every such tenant shall pass, &c., and whether the same be to any undivided share or to the whole or any part, compensating such tenant, &c.

42 Vict. ch. 22, (1879) O., as to dower, says at sec. 5, that in a suit for partition, &c., in which a partition or sale of land is ordered, and in which the estate of any tenant in dower or tenant by the curtesy or for life is established, &c., the Court shall determine whether such should be exempted or sold.

Sub-section 2 provides that if a sale be ordered all the estate shall pass, and the purchaser shall hold freed therefrom, whether the same be to an undivided share or to the whole or any part of the premises sold.

Section 3 enacts that the Court may direct payment of a sum in gross out of the purchase money to the person entitled to dower or estate by curtesy or for life, as may be deemed reasonable, &c.

I feel very great difficulty in understanding how the case before us comes under any law in force here respecting partition. Apart from the statutes there is no right whatever for partition against the tenant for life, or to turn her estate into money, and deprive her of the possession thereof.

The petitioners would have no standing, not being entitled to any estate or possession.

Under our statute law, of what is there here to make partition? There is no common interest or possession between her and those in remainder.

Reading the revised statutes consolidating the law, and trying to construe it for the first time without reference to any existing or past practice, it might well be asked whether any lands of which somebody had not died seised or entitled to in fee simple, were intended to be affected.

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Certain persons are allowed to petition, but no proceedings shall be taken under the Act till the lapse of six months after the decease of the testator or intestate in whom the lands to be partitioned may be vested.

The "real representative," who made his first appearance in 1857, in 20 Vic. ch. 65, was then declared to be such for all real property of which intestate was seised or entitled.

By subsequent and existing legislation he is so also "for all other purposes hereinafter mentioned."

Then our Revised Act, sec. 4, defines the persons who can be compelled to make partition, not specially mentioning such estates as this woman has.

The Act might be regarded perhaps as providing specially for partition of lands of a testator or intestate, and in addition allowing its machinery to be applied to the cases in which, without its aid, the Court of Chancery would have granted partition.

But here we have to deal with an estate directly granted to this woman for life by the Crown, just as directly and unconditionally as an ordinary grant in fee.

We know nothing in this case of any seisin or estate in any testator or intestate.

If those in remainder can succeed in taking or selling her estate, I do not see how any settlement or conveyance directly or to trustees for life or lives, with remainder over to a class, may not be equally subject to partition.

The whole case of petitioners seems to rest on the presence of the words, "tenant for life to the whole or any part," in the statute.

Even if the presence of these words be not susceptible of any explanation, they would not, in my opinion, warrant our assuming that the Legislature could have intended to allow such an estate as this to be destroyed.

But I think their presence may be explained as previ ously suggested.

New courses of descent of real property were appointed by the Primogeniture Act, 1851.

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In certain cases the father and the mother, in intestacy cases, took life estates, with reversion to tenants in common, as brothers and sisters.

And the next Act as to partition (20 Vic.) speaks for the first time of "the tenant for life."

Such interests were given by operation and direction of the previous Act in the estate of an intestate.

This Act speaks of the petitioners for partition being persons "entitled to the immediate possession," (sec. 2.)

These words are altered in 32 Vic. and the Revised Statutes of Ontario, to the words in section 8: "Any person interested in any land, &c., or the duly authorized agent, &c., or the guardian, &c., of any infant entitled to the immediate possession of any estate therein, may file a petition."

One might still suppose that the draftsman of this clause was regarding the petitioners, adult and infant, as equally being entitled to immediate possession. It is not easy to see why there should be any difference.

After the death of a person seised, whose property passed to his children in common, it might well happen that, by devise or dealings between those interested in common, life interests might be created before any application for partition, which it might be right to deal with as arising after the origin or creation of the estate in joint tenancy or in common.

I think I have stated sufficient to account for the presence in the statutes of these words as to tenants for life.

We have no right to look beyond the Crown grant as to any prior family right as between this woman and her children.

We are brought directly to meet the proposition that the Legislature have in a manner (to say the least of it) most indirect and inferential only, declared that an estate for life specially granted to an individual may be lawfully sold on the application of parties with whom she has no common interest or estate whatever, her possession and personal enjoyment of it destroyed, and money presented to her in lieu thereof.

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I think if that, to me, most startling power was designed to be created, the words used should be of the most clear and unmistakeable import.

A clear legal right should never be invaded by words of doubtful import and direct insignificance.

I am of opinion that there exists no right to sell or deal with this person's life interest, and that the rule for prohibition should be absolute.

CAMERON, J., concurred.

Prohibition granted.

[QUEEN'S BENCH DIVISION]

REGINA V. YOUNG.

Liquor License Act—Conviction—Two offences—One penalty—Locality of offence.

The defendant was convicted under section 41 of the Liquor License Act, R. S. O. ch. 181, for selling liquor without a license, and under section 46, for allowing liquor sold by him to be consumed on the premises; and one penalty was inflicted "for his said offence."

***Held*, bad, in not showing for which offence the penalty was imposed.**

***Held*, also, that it was bad in not showing the place where the offence was committed.**

THIS was a motion to quash a conviction under the Liquor License Act, R. S. O. cap 181.

The grounds were:

1. That the defendant had been convicted of two offences one under sec. 51, for selling "without the license by law required therefor;" and one under sec. 46, for allowing liquors sold by him, and for the sale of which a wholesale license was required, to be consumed on the premises, one penalty being inflicted "for his said offence."

2. That the place where the offence was committed was not shewn, and hence no jurisdiction appeared.

The conviction was as follows:

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"CONVICTION FOR A PENALTY.

"To be levied by distress, and in default of sufficient distress by imprisonment.

"*Canada, Province of Ontario, County of Brant, to Wit:*

"Be it remembered that on the eleventh day of March in the year of our Lord one thousand eight hundred and eighty four at the City of Brantford in the County of Brant, Samuel A. Young is convicted before me, James Weyms, Police Magistrate in and for the City of Brantford in the said County of Brant, for that he the said Samuel A. Young, being the agent of one L. H. Clarke, the said L. H. Clarke having a license to sell by wholesale, on the first day of March in the year of our Lord one thousand eight hundred and eighty four unlawfully did sell liquor in less quantity than five gallons, and unlawfully did allow liquor sold by him and for the sale of which such license is required, to be consumed within the warehouse of the said L. H. Clarke, S. Cole, Inspector of Licenses for the said City of Brantford being the informant. And I adjudge the said Samuel A. Young for his said offence to forfeit and pay the sum of twenty dollars to be paid and applied according to law, and also to pay to the said S. Cole the sum of three dollars and seventy cents for his costs in this behalf; and if the said several sums be not paid forthwith I order that the same be levied by distress and sale of the goods and chattels of the said Samuel A. Young, and in default of sufficient distress I adjudge the said Samuel A. Young to be imprisoned in the common gaol of the said County of Brant, at Brantford, in the said County of Brant, and there kept for the space of twenty days, unless the said several sums and the costs and charges of the said distress (and of the commitment and conveying of the said Samuel A. Young to the said gaol) shall be sooner paid.

"Given under my hand and seal the day and year first above mentioned at the City of Brantford in the said County."

JAMES WEYMS,
Police Magistrate for the City of Brantford.

April 19th, 1884. *V. McKenzie*, Q. C., for the motion.
Delamere, for the conviction.
The arguments appear in the judgment.

April 21st, 1884. ROSE, J.—I think the conviction bad on both grounds. See *Rex* v. *Salomons*, 1 T. R. 251, and *Rex* v. *Chandler*, 14 East 267. Mr. Delamere urged that as only one penalty had been inflicted, and as the evidence warranted conviction for both offences, the conviction might be sustained. The case is very like *Rex* v. *Chandler*, where there were several offences, and conviction, and it was

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adjudged that "*for his said offence* mentioned in the said information, he has forfeited £200;" but by reference to the information it was clear what offence was referred to, and therefore it was not uncertain to which offence the penalty was referable, as was the case in *Rex* v. *Salomons*. In *Rex* v. *Chandler Bayley*, *J.* said "It could not be told in *Salomons' Case*, in respect of which of the two offences charged it was adjudged: here it is certain."

Here defendant "is convicted" of two offences, for each of which he is subject to a penalty, and he is adjudged "for his said offence to forfeit and pay the sum of $20." How can we ascertain in respect of which offence he is adjudged to pay the fine? It is uncertain. See also *Regina* v. *Clennan*, 8 P. R. 418.

The sixth objection in the *Chandler Case* more than covers the ground taken here as the second objection. There it was proven that the *house* was within the jurisdiction of the magistrates, but the offence was committed "in the *garden* of the said house," and it was held that the coviction must be quashed, as, per Lord Ellenborough, C. J., "it does not follow that the garden is in the County of Middlesex, because the house is stated to be there; the house may be in one county and the garden in another. It does not therefore appear that the offence was committed within the jurisdiction of the convicting magistrates." Here the conviction does not show where the offences were committed, and if I amend according to the evidence, the conviction would only show they were "in the beer cellar under Duncan's Saloon," and no more. Mr. Delamere urged that the magistrate knew where that was. So it might, with much force, have been urged in the *Chandler Case;* but no such ground seems to have been taken, and if taken was not allowed to prevail. Mr. Delamere urged upon me the provisions of sec. 77, cap. 181, as to convictions not being void for certain defects. Even if I saw my way to extend its provisions to protect the conviction against the first objection, which I do not, it clearly does not reach the second, for by express terms it only

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applies "provided it can be understood from such conviction * * or proceeding that the same was made for an offence against some provision of this Act *within the jurisdiction* of the justice." For the reasons above given I do not think it can be so understood.

Other objections were taken in the order nisi, but not argued.

The conviction must be quashed, but without costs.

Conviction quashed, without costs.

[QUEEN'S BENCH DIVISION.]

REGINA v. RODWELL.

Liquor License Act—R. S. O. ch. 181—Convictions for second and third offences—Locality of offence—Punishment.

Convictions imposing the increased penalties for second and third offences, under the Liquor License Act, sec. 52, are bad unless proceedings have been taken for the first offence.

In proceedings for selling liquor on Sundays, it was not shewn that the defendant had a license, or that the place in which the liquor was sold was one where intoxicating liquors were or might be sold by wholesale or retail, pursuant to section 43 of the Act.

Held, that the conviction was bad.

Held, also, that the punishment for offences against section 43 must be either imprisonment with hard labour or a fine; and that such imprisonment in the event of non-payment of the fine could not be awarded, but only imprisonment without hard labour.

THIS was a motion to quash three convictions, made on the 21st of March, under the Liquor License Act, R. S. O. ch. 181, the offences being committed on the 17th and 24th days of February, and the 7th of March, respectively.

The charges were laid under sec. 43, and the convictions were under sec. 52 of the same Act. The days on which the liquor was sold were Sundays.

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The first conviction was as follows:

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"CONVICTION FOR A PENALTY,

"To be levied by distress, and in default of sufficient distress by imprisonment.

"*Canada, Province of Ontario, County of Brant, to Wit:*

"Be it remembered that on the twenty-first day of March, in the year of our Lord one thousand eight hundred and eighty-four, at the Township of Brantford, in the County of Brant, Alfred Rodwell is convicted before the undersigned, two of Her Majesty's Justices of the Peace for the County of Brant, for that he the said Alfred Rodwell on the seventeenth day of February, A. D. 1884, at the Township of Brantford, in the County of Brant, in his premises, being a place where liquor may be sold, unlawfully did sell liquor during the time prohibited by "The Liquor License Act" for the sale of the same without any requisition for medicinal purposes, as required by the said Act, being produced by the vendee or his agent; George Inksaker, Inspector of Licenses for the North Riding of Brant, being the informant; and we adjudge the said Alfred Rodwell for his said offence to forfeit and pay the sum of twenty dollars, to be paid and applied according to law, and also to pay the said George Inksaker the sum of ten dollars for his costs in this behalf; and if the said several sums not be paid forthwith, we order that the same be levied by distress and sale of the goods and chattels of the said Alfred Rodwell: and in default of sufficient distress we adjudge the said Alfred Rodwell to be imprisoned in the common goal of the said County of Brant, and there to be kept for the space of fifteen days, with hard labor, unless the said several sums and all costs and charges of the said distress (and of the commitment and conveying of the said Alfred Rodwell to the said *Gaol*) shall be sooner paid.

"Given under our hands and seals the day and year first above written at the Township of Brantford, in the said County."

S. CHARLTON, J.P. { L. S. }

WM. LIKINS, J.P.

April 19th, 1884.—*V. Mackenzie*, Q. C., for the motion. *Delamere*, contra.

The objections and arguments of counsel are referred to in the judgment.

April 21, 1884. ROSE, J.—It was first objected that the second and third convictions being for what are called "second" and "third" offences, with the increased penalties under sec. 52, could not stand, as the increased penalties could not be imposed under that section until pro-

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ceedings were taken for the first offence. This seems to me to be so. Sub-sec. 4 of sec. 73 provides that "convictions for several offences may be made under this Act, although such offences may have been committed on the same day; but the increased penalty or punishment hereinbefore imposed shall only be recoverable in the case of offences committed on *several* days, *and after information laid for a first offence.*"

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Mr. Delamere did not press his contention in support of the convictions after I had expressed an opinion that they were invalid, and with his usual candour admitted that a fair reading of the statute led to that conclusion. See *Regina* v. *French*, 34 U. C. R. 419, and *Regina* v. *White*, 21 C. P. 354.

It was then objected that the first conviction was also invalid, in that, 1st. It did not appear that the magistrates had jurisdiction, as there was nothing to shew that the place where the liquor was sold was one in which "intoxicating liquors are or may be sold by wholesale or retail:" that is, that it was not shewn in evidence that the defendant had a license, nor was it alleged in the conviction that it was a place where it might be sold by wholesale or retail.

2nd. That there was no authority to award imprisonment with hard labour as an alternative punishment in the event of non-payment of the fine, but that the punishment should have been *either* fine *or* imprisonment with hard labour; and that in the event of a fine being inflicted, its recovery was under sec. 59, where, after it was proven that no sufficient distress could be found to satisfy the distress, imprisonment might then be awarded without hard labour.

As to the first ground, *Paley* on Convictions, pp. 126 *et seq.* was referred to, also *Regina* v. *Walsh*, 2 O. R. 206; and as to the second, *Regina* v. *Black*, 43 U. C. R. 188-9, and *Regina* v. *Lawrence*, Ib. 164.

I am of the opinion that both objections are entitled to prevail. I have put them fully, so as to save repetition of statement. It therefore follows that all three convictions

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must be quashed. No ground is shown on which costs could be awarded. It seems a pity that more accuracy could not be secured in these matters. This is the third case within a week in which I have been compelled to quash convictions under the liquor Act for want of form, the merits apparently being against the defendants.

Conviction quashed

[COMMON PLEAS DIVISION.]

THE COSGRAVE BREWING AND MALTING COMPANY OF TORONTO V. STARRS.

Guarantee to firm—Death of partner—Effect of—Notice determining guarantee.

By an agreement under seal made between C. & Co., a firm of brewers, consisting of C. and his two sons, of the first part, Q. of the second part, and defendant of the third part, the defendant agreed to become responsible in a continuing guarantee of $5,000 to C. & Co., or the members for the time being constituting the firm of C. & Co., for beer to be supplied to Q., so long as C. & Co., should desire to sell and Q. to purchase the same. On the 6th September, 1881, C. died, Q.'s liability then being $5,248. By C.'s will he appointed his said two sons his executors. They continued to carry on the business, and shortly afterwards entered into partnership under the same name, C. & Co. On the 2nd of October, 1882, the assets of the then firm were conveyed to one D, in trust for a joint stock company to be formed, and on its incorporation on the 18th of December following, the assets were conveyed to the company, the present plaintiffs. Q. continued to be supplied with beer, and on the 6th June, 1883, when this action was commenced, the indebtedness was over $5,000, but since C.'s death, more than the then liability, $5,248 had been paid by Q. In an action against defendant to recover the amount of his guarantee of $5,000.

Held, that by the death of C., a change of the firm was made whereby the defendant was released from any further liability under the agreement than for the amount then due, which the evidence shewed had since been paid.

On the 5th April, 1882, in consequence of Q. falling into irregular habits, defendant notified the then firm not to supply Q. with any more beer. The evidence shewed that the firm were aware that Q.'s business was not in a satisfactory state.

Semble, that this would put an end to defendant's liability, if not before terminated, notwithstanding the guarantee was under seal, and that the amount due was not paid or tendered at the time of notice.

THIS was an action tried before Rose, J., without a jury, at Toronto, at the Winter Assizes of 1884.

The pleadings and evidence, so far as materal, are stated in the judgment.

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J. K. Kerr, Q. C., and *Aylesworth*, for the defendants, referred to *Barker* v. *Parker*, 1 T. R. 287, referring to *Barclay* v. *Lucas*, p. 291 note; *DeCollyar* on Guarantees, pp. 280, *et seq.*; *Backhouse* v. *Hall*, 6 B. & S. 507; *Weston* v. *Barton*, 4 Taunt. 673; *Berkitt* v. *McGuire*, 31 C. P. 430; *Pemberton* v. *Oakes*, 4 Russell 154; *Burgess* v. *Eve*, L. R. 13 Eq. 450; *Beckett* v. *Addyman*, 9 Q. B. D. 783, 791.

Osler, Q. C., and *Eddis*, for the plaintiffs, referred to *Pease* v. *Hirst*, 10 B. & C. 122; *Lindley* on Partnership, 3rd ed., p. 223; *Morse* v. *Gleason*, 9 N. Y. S. Ct. (Hun) 31; *Mason* v. *Bickle*, 2 A. R. 291; *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; *Harris* v. *Fawcett*, L. R. 8 Ch. 866; *Wheatley* v. *Bastow*, 7 DeG. M. & G. 261, 279, 280.

Aylesworth, in reply, cited *Hathaway* v. *Doig*, 6 A. R. 264; *Hately* v. *American Express Co.*, 2 O. R. 385; *DeCollyar* on Guarantees, p 226.

February 19th, 1884. ROSE, J.—This is an action on an agreement made between Cosgrave & Sons, composed of Patrick, John, and Lawrence Joseph Cosgrave, all of Toronto, brewers, carrying on business under that name, of the first part; Michael Quinn, of Ottawa, hotel keeper, of the second part; and the defendant, of Ottawa, grocer, of the third part; reciting that at the request of the defendant it was agreed that the "parties of the first part should from time to time, so long as they, the said parties of the first part, desire, sell to the said party of the second part, and that the said party of the second part should purchase from the parties of the first part beer, &c. * * * And that the said party of the third part should be a continuing security to the said parties of the first part, or to the member or members for the time being constituting the said firm of Cosgrave & Sons, to the amount of $5,000, to cover and protect any sales or advances now or hereafter indefinitely to be made by the said parties of the first part, or any member or

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members of the said firm of Cosgrave & Sons, to the said party of the second part, so long as they may mutually deal together."

The agreement further provided that until payment in cash the agreement should continue to be good and valid security at law and in equity "to the said firm of Cosgrave & Sons," to the amount of $5,000, notwithstanding that they receive securities, or extend time of payment, or do any other act that would release the party of the third part.

The agreement further contained a covenant on the part of the party of the third part, the defendant, with the "said parties of the first part, and with each of them," that the party of the second part will pay for sales, &c., also any * * * mortgages * * * that may be given for the same or any part thereof, and that to the extent of $5,000 he, the said party of the third part, will "be liable to and pay the said parties of the first part, or to the member or members for the time being constituting the said firm of Cosgrave & Sons, for all ale * * * that may from time to time be sold *by the parties of the first part, or the said firm of Cosgrave & Sons, or by any member thereof to the said party of the second part.*"

It was further provided that nothing in the agreement contained "shall compel the parties or any of them to any dealing to any given amount, or for any given period," and that the agreement should continue a valid and continuing agreement till payment in full.

Patrick Cosgrave died on the 6th of September, 1881, at which date $5,248.39 were due to Cosgrave & Sons by Quinn. He left a will, under which his sons, the remaining members of the firm, were appointed executors. These executors entered into a partnership between themselves shortly after their father's death, under the same firm name of "Cosgrave & Sons."

On the 2nd of October, 1882, the said second firm of Cosgrave & Sons conveyed by two several deeds bearing that date certain assets to one William James Douglas, for

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the purpose of his conveying them to a joint stock company then being formed; and letters patent of incorporation having, on the 29th of November, 1882, been issued, on the 13th of December, 1882, the said Douglas conveyed the same assets to "The Cosgrave Brewing and Malting Company of Toronto," the present plaintiffs.

These conveyances purport to vest in the plaintiffs the interest of John and Lawrence Cosgrave in the business theretofore for some years past carried on by them under the firm name of Cosgrave & Sons. Also the "book and other debts * * * due and owing to them, or any or either of them, on account or in respect of the said trade or business, and all securities for the same, and also all assets, contracts, and engagements, benefits and advantages which have been entered into with them or either of them, or to which they, or either of them, are or can be in any way entitled on account or in respect of the said trade or business."

Amongst other contentions the defendant said this language did not cover the bond in question made to the firm of Cosgrave & Sons, composed of the three members.

On the 2nd of October, 1882, the amount due by Quinn was $6,618.05. The liability on the 13th December, 1882, was $7,931.

It appeared that more than $5,248 were received from Quinn after the 5th December, 1881, and that the account had been practically covered by drafts during the various changes—the drafts being in the favour of the various parties carrying on business at the time, *i. e.*, the three Cosgraves until the death of Patrick; the two, from his death until the formation of the company; and from that time in the name of the company, the plaintiffs, who held drafts covering the whole indebtedness at the time of action: that these drafts were drawn generally on account and not for any ascertained balances; and that those now held represent the indebtedness due on the 13th December 1882, with the exception of a debit of $163.31 for goods

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sold since that date, and a credit of about $1,450 paid by Quinn since that date.

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The account in the ledger seemed never to have been changed, and the goods supplied by the various businesses, and the moneys paid from time to time appeared in the one account, so that the goods supplied by the three Cosgraves seemed to be paid for, and possibly those also by the two Cosgraves. In any event the present plaintiffs, since the 13th of December, 1882, only supplied goods to the value of $163.31. The goods, the price of which is sued for, were therefore supplied either by the two Cosgraves, or by the trustee for the proposed company, or partly by the one, and partly by the other.

The action was commenced on the 1st of June, 1883. It was proved that all the notes or drafts in existence in April, 1882, had been paid, except as to $2,759 which were represented by renewals.

Quinn falling behind in his payments on the 26th January, 1883, the plaintiffs took from him a chattel mortgage for $2,000 as collateral security, and subsequently sold the goods covered by it, the proceeds going to the credit of the account. The sale was about April, 1883. The plaintiffs also took from Quinn at the same time, an assignment of the book debts. It did not appear whether they had been collected.

Evidence was given as to Quinn's falling into irregular habits and the defendant notifying John Cosgrave not to furnish Quinn with more liquor. This was said to be on the 5th April, 1882, in Ottawa. Cosgrave admitted notice but said the defendant immediately after agreed that the supply should be continued, and withdrew the notice.

At the close of the case counsel agreed that this was the only question of fact for the jury, and upon its being left to the jury, they found that the defendant did not withdraw the notice. In effect their finding was that defendant on the 5th April, 1882, notified John Cosgrave not to supply Quinn with any more goods on the credit of his agreement, and never withdrew the notice.

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The defendant thereupon moved for judgment on the following grounds:

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1. That the agreement of the 19th of April, 1879, being made with Cosgrave & Sons, composed of the three members, the death of Patrick put an end to defendant's liability, except for goods supplied up to that date, *i. e.*, September 6th, 1881, and if so, there is nothing remaining unpaid of the amount then owing.

2. That even if the two surviving partners could have carried on the business as such, the liability ceased as to further supplies after the formation of a new partnership between themselves shortly after the father's death; and that if this is so, the financial result is the same as in the event of liability ceasing upon the father's death.

3. That if the liability continued during the continuance of the business by John and Lawrence, it ceased when they sold to the company, and that the proper date for this transaction was the 2nd of October, 1882, or in any event the 13th of December, 1882. That if the liability is continued to either of these dates, a reference is asked to ascertain the liability then existing.

4. That apart from the change in the business the liability ceased on the 3rd of April, 1882, when the defendant notified John Cosgrave not to supply any further goods. The state of the account with reference to the paper held at that date was said to be shewn by exhibit 9, but if the liability is continued to that date, a reference is asked for to ascertain the amount.

5. That the conveyances do not convey the agreement in question, but only agreements between the two sons and their debtors.

6. That the assignment to the plaintiffs only transferred "debts," and that there was no debt assignable, as the whole was represented by notes or drafts discounted, and held by the bank at the date of transfer.

7. That the extension of time by John and Lawrence, and by the plaintiffs, discharged the defendant, as the only extension provided for by the agreement of 19th April 1879, was by the old firm.

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8. That the plaintiffs could not claim as assignees, but only by novation, as the indebtedness is all represented by drafts; and that since the drafts were first made in favour of the plaintiffs there have been renewals and extensions of time by chattel mortgage, and new paper, *i. e.* drafts or notes.

Plaintiffs' counsel, contra, relied on the terms of the agreement as answering most of the objections and urged that the debt was created at the request of the defendant; that the time was to be so long as Cosgrave & Sons desired to sell: that the security was given as a continuing one in favour of the business, and not the particular individuals composing the firm: that the account was a continuous one, a running account: that if the plaintiffs were not entitled to recover in their present name, leave should be given to amend joining the executors as plaintiffs, and to put in a supplemental assignment: that the notice not to supply could not avail the defendant until payment of the indebtedness by him: that a guarantee under seal cannot be put an end to as is attempted in this case by notice: that the right of the guarantor is coextensive with the right of the employer to discharge: that defendant had no substantial reason for withdrawing, as the only reason given by him was the largeness of credit which is provided for by the agreement, and that the defendant by not going to the jury on the question of Quinn being a person of substantial credit admitted his solvency.

As to the question of release of surety by change in the firm, one of the earliest cases is *Wright* v. *Russel*, 14 Geo. 3, reported in 2 Sir W. Blackstone 934. In this case it was decided that where a bond was given to secure faithful service to J. S., a sole trader, it did not extend to a subsequent partnership. Gould, J., remarks that perhaps the surety might rely on the care and circumspection of the one to whom the bond was given, which he could not do with regard to unknown future partners.

This case was followed by *Barclay* v. *Lucas*, 24 Geo. 3,

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found set out in a note to the report of *Barker* v. *Parker*, 26 Geo. 3, reported in 1 T. R. 287.

The bond in *Barclay* v. *Lucas* was to the plaintiffs, who carried on the business of bankers, to secure the fidelity of a clerk. During the continuing of the service a new partner was introduced. The defendant was held liable, notwithstanding the change. The decision was rested on the ground that the security was to the *house*, and not to the plaintiffs; and that the house was one of a class of banking houses which continue for generations, and that the parties must have contemplated change by death and introduction of new partners. The language found in the recital that the service was to be *performed in the counting house* was seized upon to support the decision. The Judges distinguish this case from *Wright* v. *Russel*.

Barker v. *Parker* decided that a bond *to the obliyee and his executors* does not make the obligor liable to the executors carrying on the business for default after the death of the obligee.

Lord Mansfield, C. J., says: "A trade is not transmissible: it is put an end to by the death of the trader. * * If executors carry on a trade, they must do it as individuals for their own advantage." *Barclay* v. *Lucas* is referred to, and distingushed.

This case was followed by *Strange* v. *Lee*, 43 Geo. III. reported in 3 East 484. There the bond by A. recited that B. intended to open a banking account with C. D. & E. as his bankers. The condition was for payment to them of all sums from time to time advanced to B. at *the banking house* of C. D. & E. It was held that on C.'s death the obligation ceased, and did not cover future advances made after another partner was taken in. Also that B., who was indebted to the house at C.'s death, having afterwards paid off the balance which was applied at the time to the old debt incurred in C.'s lifetime, A. was wholly discharged from his obligation.

The judgment of Lord Ellenborough, C. J., at p. 490 is applicable to the facts of this case. He points out that it

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may make a very material difference in the view of the obligor as to the persons constituting the house at the time of entering into the obligation. "For a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently." *Barclay* v. *Lucas* is referred to, and doubt thrown upon its construction of the words in the bond in that case. He adds at p. 491: "But we are now desired to construe an obligation to be answerable for money due to *them* (certain partners having been before named), to mean money due *to any part of them*, a construction which would be contrary to the words of the instrument: what is contended for is, to make this a bond to the persons then constituting the banking house and their successors, which cannot be admitted."

Dance v. *Girdler*, 1 B & P. N. R. 34 (44 Geo. 3), decides that a bond given to a society prior to incorporation does not enure to the benefit of the corporation. Lord Mansfield C. J., refers to *Strange* v. *Lee*, as an authority (per Lord Ellenborough, C. J.), that the death of one of the partners put an end to the liability. He also takes the law to be there well settled that the contract of a surety is not to be extended by implication.

This was followed by *Metcalf* v. *Bruin*, 50 Geo. 3, reported in 12 East 400, where the bond was given to trustees to secure the faithful services of a clerk in an unincorporated company, and it was held that the trustees might maintain an action on the bond notwithstanding changes in the company. Lord Ellenborough, C. J., laid stress on the words, "for the time being," which occurred in the bond, as indicating an intention that the benefit was to enure to those who for the time being composed the company, notwithstanding changes by death, &c.

Pease v. *Hirst*, (cited by the plaintiff), was decided, 10 Geo. IV., reported in 10 B. & C. 122. This was an action on a promissory note whereby the defendants jointly and severally promised to pay, on demand, Messrs. Pease Harrison & Co., *or order*, £300, &c. This was held to be

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a continuing security enuring to the benefit of the banking house, notwithstanding changes in the firm.

Bayley, J., says: "Here by the form of the instrument none of the parties have placed themselves in the position of sureties. They appear on the face of the instrument to be principals, and not to have confined their liability to the then existing partners in the banking house, *for the note is made payble to them or order.*"

Chapman v. *Beckinton*, 3 Q. B. 703 (6 Vic.,) may be referred to especially as citing and following *Pemberton* v. *Oakes*, 4 Russ. 154. Lord Denman, C. J., gave the judgment. He says, at p. 720: "We ought to be slow in extending by implication the meaning of words beyond that which they ordinarily bear in legal construction, in order to extend the liability of a surety." Referring to *Pemberton* v. *Oakes*, he continues: "There a banking partnership was formed for fifteen years between Harding, Oakes, and Willington. It was stipulated that, if Oakes or Willington should die during the term, the concern should be continued *by the survivors or survivor*, * * but, if Harding should die, he might dispose of his share to his wife and children: and there was a provision for his appointing persons who should carry it on, *as if he were living*, during the minority of his children; and the business was in that event to be carried on by the surviving partners and the appointee, in the manner and on the terms and conditions directed by the partnership articles, as if *he had not* died. Harding made a will in favour of his children as to this share, and appointed persons to carry on the concern with his partners; and he dying, this was carried into effect. The question was, whether a surety for *a customer* of the original firm, who had executed a deed to the members of that firm to secure them for sums already due, *or which should become due to them for advances to be made thenceforward to the end of the fifteen years*, was liable for any advance made *after the death of Harding*." And, he adds: "The present Lord Chancellor held clearly that he was not liable for advances by a new firm, although he had

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stipulated to secure advances made during the whole fifteen years; and that the death of Harding, with the substitution of the appointees, though contemplated by the original articles, made a new firm." He continues: "In this case it is true no new partner has been admitted; *but that is immaterial if the death of one of the old ones works a dissolution.* And it is true, also, that in this case the defendant (the surety) is averred to have had full notice of the covenants in the partnership deed, a circumstance which did not exist in the case cited: but this is immaterial, the question turning on the written language of the instruments."

Unless the case in question can be distinguished from *Pemberton* v. *Oakes*, it is decisive against the contention of the plaintiffs. It will be observed that the security in *Pemberton* v. *Oakes*, unlike the other cases cited, was for a customer's account, and is similar in that respect to the agreement in question.

Backhouse v. *Hall*, 6 B. & S. 507, (28 Vic.,) brings the the law down to a date subsequent to the Mercantile Law Amendment Act, 1856, 19 & 20 Vic. cap. 97, section 4, which enacted: "No promise to answer for the debt, &c., "of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt," &c., "of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the persons trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

Blackburn, J., expressed the opinion that that enactment did not alter the law of England; at all events, that it followed the decisions. He adds: "It says first, a change of the

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firm shall put an end to the guarantee. That was so decided by the cases cited by Mr. Lush," (*i.e. Weston* v. *Barton*, 4 Taunt. 673; *Simson* v. *Cooke*, 8 Moore 588; *Dance* v. *Girdler*, 1 B. & P. N. R. 34: *Metcalf* v. *Bruin*, 12 East 400; *Barclay* v. *Lucas*, 1 T. R. 291; *Chapman* v. *Beckinton*, 3 Q. B. 703.) "Then comes the proviso, unless the intention of the parties that the guarantee should continue to be binding appear by express stipulation, an obviously just and proper provision, or unless it appear 'by necessary implication from the nature of the firm or otherwise.' This last provision means no more than that in such a case as *Metcalf* v. *Bruin*, 12 East 400, the law shall be the same as it was before. If the intention of the parties necessarily appears as it did in *Metcalf* v. *Bruin*, the intention shall guide.

The guarantee in this case was given to a banking firm and was in these words: "In consideration that you have at our instance and request consented to open an account with the firm of G. W. & W. J. Hall, shipbuilders, Monkwearmouth, shore, we and each of us do hereby guarantee the payment to you of the moneys that *at any time may become due*, not exceeding five thousand pounds, £5000, such payment by us not to be made at shorter date than twelve months from the date." One of the guarantors, G. S. Moore was a member of the firm of G. W. & W. J. Hall. In pursuance of this guarantee the plaintiffs from time to time gave accommodation to the firm of G. W. & J. W. Hall, and that firm thereby became indebted to the plaintiffs on a balance of account in a sum which on the 17th September, 1858, exceeded £5,000. On the 5th of July, 1858, Elizabeth Hall (one of the firm) died. *This was known to the defendant at the time, but was not known to the plaintiffs until the year* 1862. The business was carried on after her death.

It was contended the liability continued after her death; that from the nature of the firm and of the account there must be continued changes going on in both, and that con-

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sequently the case came within the words: "By necessary implication from the nature of the firm or otherwise."

In giving judgment for the defendant, Blackburn, J., said, at p. 518: "The death was not known to the plaintiffs for some years, though it was known to the defendant at the time, but nothing is stated to shew either that the defendant was under any obligation to inform the banking house of that fact, or that he took any steps to conceal it." This language is specially applicable to the case before me in reply to the argument urged that the plaintiffs stood in some better position by reason of the defendant residing in the same place as the debtor Quinn; an argument which is, however, hardly applicable, and probably was not specially directed, to the point under consideration."

Mr. Justice Blackburn again says, at p. 521: "It appears that some years afterwards the defendant wrote a letter shewing that he was under the impression that the guarantee continued, but we cannot alter the construction of a written instrument on that account."

This language is of force in applying it to the case before me in clearing away any acts or conduct of the defendant subsequent to the death of Patrick Cosgrave, if by the terms of the deed his liability was not to continue after a change in the firm.

Blackburn, J., uses some language with respect to alteration by death, the exact meaning of which I do not quite apprehend. It is this: "So long as the parties were only *liable* to be altered by death there would be no change in the firm; but if they took in new partners there would." Of course while the parties were "only liable to be altered by death" there would be no change in the firm, the change would occur when the death happened. As the language is inaccurate, and is not in accordance with the prior decisions, and not consistent with the judgment of the learned Judge in the case he was considering, I venture to think it has been inaccurately reported. I am the more of this opinion as in that case he held that the death of Elizabeth Hall released the sureties, so that they were not lia-

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ble for any advances to the firm composed of the surviving partners. Doubt is again thrown upon *Barclay* v. *Lucas*, the learned Judge referring to it in these words: "We need not pronounce if that decision was right or not."

The result of the decisions is stated in the last (8th) edition of *Addison* on Contracts, p. 655, wherethe cases are collected.

Referring to the agreement in question, we find in the recital that the credit is given at the request of the defendant. My attention was directed to this by counsel for the plaintiffs, but I find this the usual provision in the cases referred to, and nothing seemed to turn upon that fact or form of words.

Next, there is recited an agreement that the parties of the first part may sell, and party of the second part purchase. So far the agreement is without doubt confined to the parties to the deed.

The next provision is, that the said party of the third part should be a continuing security to the said parties of the first part, or to the member or members for the time being constituting the said firm of Cosgrave & Sons, to the amount of $5,000, to cover and protect any sales or advances now or hereafter indefinitely to be made by the parties of the first part, or any member or members of the said firm or Cosgrave & Sons, to the said party of the second part, so long as they mutually deal together.

This language may be satisfied by holding that the sales or advances are to be made during the continuance of the firm composed of the parties of the first part, otherwise one would feel a difficulty in stopping short of holding that it must extend to any sales made by any one of the said parties of the first part, even though the firm had been dissolved. Reading this together with the first clause, I give it the limited construction, and hold that the sales are to be made during the continuing of the firm, *i. e.*, with the parties of the first part *as members*, and that as to any liability for sales during such period the security shall continue to the parties of the first part, or

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the member or members for the time being constituting the firm.

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It seems to me that the words "*said* firm" are restrictive, and cannot apply to a new firm under said name, and that the words "member or members for the time being constituting said firm," are similar in import and meaning to "survivor or survivors."

I think this construction is supported by reference to the clause providing that until payment in cash the agreement shall continue to be good and valid security at law and in equity to the *said* firm of Cosgrave & Sons; no words of succession being used.

Looking at the covenant of the defendant we find it is made with the parties of the first part and each of them. This gives a right of action to each member of the firm on the security, which is already stated as continuing to the said parties of the first part, or to the member or members of the firm for the time being. The covenant is to pay to the *said* parties of the first part, or to the member or members for the time being constituting the *said* firm of Cosgrave & Sons, for all ale that may from time to time be sold by the parties of the first part, *i. e.*, all three, or the *said* firm of Cosgrave & Sons, *i. e.*, all three, or by any member thereof, *i. e.*, of the *said* firm.

I do not think this case can be fairly distinguished from *Pemberton v. Oakes.*

I think it is clear from the cases that the death of Patrick did constitute a change in the firm of Cosgrave & Sons; and that such change released the defendant; as it does not seem to me, to borrow the words of the Mercantile Law Amendment Act, as stating the law as settled by the decisions, that the intention of the parties that such promise shall continue to be binding notwithstanding such change does appear either by express stipulation or by necessary implication from the nature of the firm or otherwise. It follows therefore that if my view is correct judgment must be entered for the defendant, as the plaintiff admits the amount due by Quinn at the time of Patrick's death to have been subsequently paid off.

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If I am in error in my conclusion the defendant will be able to urge the other grounds of objection to the plaintiffs succeeding.

The case of *Barker* v. *Parker*, will be in point if it is contended that the sons carried on business as executors.

The case of *Dance* v. *Girdler*, will apply from the time the business was conveyed to trustees for the proposed corporation (plaintiffs).

If upon further consideration of this case it shall be held that the liability of the defendant continued, notwithstanding any and all changes in the business, by the death of Patrick, forming a new partnership between the sons, conveyance to trustee, and subsequent conveyance to the plaintiffs, it will be necessary to consider the effect of the notice given by the defendant on the 5th of April, 1882.

The plaintiffs contend that this notice did not avail because, (1) The guarantee was by deed. (2) That the defendant did not pay or offer to pay at the time of notice the amount due by Quinn.

To support this contention *Burgess* v. *Eve*, L. R. 13 Eq. 450-457, and *Phillips* v. *Foxall*, L. R. 7 Q. B. 666, were cited.

In *Burgess* v. *Eve*, the guarantee was by deed, and a continuing guarantee unlimited in time. I assume that the agreement or deed in question was also a continuing guarantee unlimited as to time. In *Burgess* v. *Eve*, such a guarantee is decided not to be irrevocable. Therefore this guarantee is not irrevocable.

Vice-Chancellor Malins, in *Burgess* v. *Eve*, at p. 459, uses language peculiarly applicable to the case before me. He says: "Then a further argument has been pressed very strongly. If a man gives a guarantee that he will be answerable for money to be advanced to A. B., limited to a very large amount—take it to be, for the sake of argument, £20,000—and after the bank has advanced him £1,000 only, the guarantor discovers that the person he has become security for is unworthy of credit, and of a different character from what was supposed when the guarantee was given, and

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that the money which the bank advanced to A. B. on the faith of the guarantee, is utterly thrown away, and wasted, and under these circumstances gives notice to the bank not to make any further advance; it is said because the instrument is under seal, the notice is inoperative. When a man says, 'I will no longer be liable for a person whom I now find dishonest,' upon what principle should he be ruined because the bank have got a guarantee to the extent of £20,000? I am clearly of the opinion that the principle of *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514, would apply to such a case as the present."

The decision in that case was that a first mortgagee having a continuing security mortgage, was not entitled after notice of a second mortgage to make further advances on the security of his first mortgage.

V.C. Malins, again says, at p. 460: "In this case no attempt was ever made to revoke the guarantee. But if such an attempt had been made, I am clearly of opinion that the father would have been entitled to stop the guarantee for the future (of course upon the condition of paying what might have been due under it at that time) though it was under seal, just in the same way as it is admitted he would have been if it had not been under seal."

Mr. Osler strongly pressed upon me that the words in brackets meant that the notice would have no effect until payment of the amount due.

I cannot accede to this argument. I think the learned Vice-Chancellor could not have intended to lay down such a doctrine. If he did it is, in my opinion, inconsistent with what precedes, and with the principles of law found in *Phillips* v. *Foxall*. In the latter case the Court rest their finding on the principle "that the right to have an unlimited or continuing guarantee determined arises rather out of the nature and equity of the contract between the parties than upon any assumed right of revocation."

If therefore such a state of facts existed at the time of the notice in question as would have entitled the defendant to require the Cosgraves to stop the acconnt unless with the

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assent of the defendant, the notice can only be material as evidencing the intention of the defendant not to allow the supplies to be continued.

Blackburn, J., in that case rests his decision on the ground that the surety was discharged in Equity because the master continued the servant in his employ after discovering his dishonesty, the right to terminate the employment being a remedy which the surety had a right to require to be exercised for the surety's benefit.

It seems to me that John Cosgrave's evidence disclosed such a state of facts as if not communicated to defendant would have as much entitled him to require the supplies to be discontinued without notice, as in *Phillips* v. *Foxall*, the facts entitled the surety to require the discharge of the servant.

I am aware that the defendant in the hands of skilfu counsel, and in the course of a somewhat humorous cross-examination, did not rest his right to give notice upon the dissipated condition of Quinn, but I did not understand it to be disputed at all that Quinn's account was not in as satisfactory condition as before, and his habits and circumstances so changed as to render the further continuance of the account unsafe, as indeed the event proved. It may be that the defendant ought to have had this question submitted to the jury, and that if the case should be found to turn upon it, the Court will think it necessary to order a new trial.

The other questions raised I do not further consider.

I find therefore for the defendant, and direct judgment to be entered for him, with costs. If the plaintiffs desire, proceedings to be stayed to enable them to move.

Judgment for defendant.

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[COMMON PLEAS DIVISION.]

COUGHLIN V. HOLLINGSWORTH.

Claim—Counter-claim—Balance in favour of defendant—Costs.

An action on an unsettled account, to which there was a counterclaim also on an unsettled account, was referred. The referee found that there was a sum of $148 81 due the plaintiff on his claim, and $164.50 due the defendant on his counterclaim, leaving a balance due defendant of $15.69, and he certified to entitle the defendant to full costs. The Statute of Limitations was pleaded respectively to the claim and counterclaim, and the items barred by the statute were in consequence disallowed; but apart from the statute the balance would have been in the plaintiff's favor.

Held, that the plaintiff and defendant were entitled to recover the costs of, and relating to the claim and counter-claim, and proof thereof respectively including the reference and subsequent proceedings; the defendant being also entitled to recover the sum of $15 69. The taxing officer to divide items in common; and judgment entered for the party in whose favour the balance should be found.

THIS was a motion to enter judgment for the defendant on the report or finding of the County Court Judge of Leeds and Grenville, reporting a balance in favour of the defendant of $15.69 on his counter-claim.

On February 19, 1884, *J. J. French*, (of Prescott,) supported the motion.

G. H. Watson, contra.

February 22, 1884. ROSE, J.—The learned Judge certified to entitle the defendant to full costs. The plaintiff does not oppose the motion, except in so far as costs are in question, contending that the learned Judge had no power over costs. The defendant admits this, but asks me to give effect to the certificate as an expression of opinion.

The plaintiff's claim was for $299.49, on a long account, commencing in the year 1873, covering over ten pages of foolscap sized paper. The learned Judge disallowed $129.18, as barred by the Statute of Limitations, and of this amount he found $44.50 not proven, leaving a balance of $84.68 disallowed as proven and barred. He also disallowed from the items within the six years, $21.50= $150.68, leaving a balance to credit of $148.81.

The defendant's counter-claim was also on a long acccount, commencing in 1873, amounting to $277.50,

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of which there were disallowed as barred, $68, and not proven, $45, balance, $164.50.

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The item of $68 was not investigated, and it may be a portion would have been disallowed as not proven, had the statute not been pleaded.

The learned Judge says $4 would clearly have been taken off two of the items had it been necessary to have investigated the proofs.

The result is, that had neither party pleaded the statute, the account would have stood thus: Plaintiff's claim, $299.49 ; not proven, $66.50 ; making $232.99. Counter-claim, $277.50 ; not proven, $49; making $228.50. Balance in favour of plaintiff, $4.49. And this balance would possibly have been increased had there been an investigation of the items disallowed as barred.

The learned Judge has not expressed any opinion adversely to the conduct of either the plaintiff or the defendant, and I presume has certified as to costs, merely on the ground that the balance is in favour of the defendant.

In England various orders have been made where plaintiff has proved his claim substantially, and defendant has succeeded on his counter-claim. See *Baines* v. *Bromley* 50 L. J. N. S. Q. B. 465; *Lowe* v. *Holme*, 10 Q. B. D. 286, and other cases cited in *Lefroy and Cassel's* Notes of Practice Cases under Rule 428, p. 14, *et seq.*

I think I will be doing substantial justice if I adopt the rule in *Cole* v. *Firth*, 4 Ex. D. 301, and which, I think, is in accordance with *Baines* v. *Bromley*, and not in conflict with *Lowe* v. *Holme*. In the judgment of Brett, L. J., in *Baines* v. *Bromley*, at p. 466, we find the sentence: "Where the so-called counter-claim is a set off there is but one action." His lordship may have reference to the former plea of set-off, which did not, in terms, put the plaintiff's claim in issue.

I direct, therefore, that the plaintiff recover the costs of and relating to his claim and proof thereof, including the reference and subsequent proceedings; and the defendant, $15.69, with costs of and relating to his counter-claim and

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the proof thereof, including the reference and subsequent proceedings. Where items are in common, the Master will divide them. Let judgment be entered for the party in whose favour the balance shall he found.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

BROOKE V. MCLEAN.

Wall—Erection on plaintiff's land—Damages—Trustee—Parties.

The plaintiff was the surviving trustee under the will of one J. B., of certain land, on which was erected a two storey brick house, the westerly wall of which formed the boundary of one L's land, immediately adjoining the plaintiff's on the west. L leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two stories higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant.

Held, that the plaintiff under the O. J. Act, Rule 95, was entitled to maintain an action as representing the estate, without making the *cestui qui trustent* parties; and that he was entitled to a decree that the defendant should desist from further using the wall built on the plaintiff's wall, or the ends of the joists which he had placed therein, but not to a direction that the defendant should pull down such wall, which the defendant had not erected.

Held, also that the plaintiff was entitled to recover as damages, the expense of removing such wall, so erected on his wall, and the damages occasioned by his wall being weakened: but not damages for the loss of a sale of the property by reason of the erection.

THE statement of claim sets out sundry conveyances beginning on the 7th of December, 1841, to one John Brooke, of the land and premises in question, in the City of Toronto, and alleges that the said John Brooke was seised in fee simple and in possession, under a direct line of conveyances from the grantee of the Crown, of the said land and premises: that John Brooke made his last will and testament dated the 27th of February,

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1869, by which he devised all his real and personal estate, including the land and premises above mentioned, in fee simple to the plaintiff and one Thomas Brooke, and the survivor of them, and their heirs, upon the trusts therein mentioned; and that the said John Brooke died some time in the year 1869, and Thomas Brooke died before the commencement of this action. The said John Brooke, in his lifetime, and more than ten years before the committing of the trespasses herein complained of, entered into and took, held, and enjoyed as of right, quiet and undisturbed possession of the said land and premises, and by himself and his tenants continued in possession thereof until the time of his death, and the plaintiff and Thomas Brooke thereafter, until the death of Thomas Brooke, continued in possession of the said land and premises, and the plaintiff since the death of Thomas Brooke has since continued in possession thereof by himself and his tenants, and has received the rents and profits thereof up to the time of the committing of the trespasses complained of. And the plaintiff claims to be seised in fee simple of the land and premises by virtue of the said recited deeds and length of possession, and he insists on the Statute of Limitations in that behalf. That upon the said land stands an old two-storey brick building erected about forty years ago, the westerly wall of which is built up to and marks the westerly boundary of the said land for the whole depth thereof. The defendant is lessee for a long term of years of the land lying immediately west of and adjoining the plaintiff's land, under a building lease, and is the owner of a certain building erected on the said adjoining land. The defendant, or those under whom he claims, in or about the fall of the year 1876, erected the said buildings on the said land lying west of the plaintiff's land, and in erecting the same made holes in the westerly wall of the plaintiff's building, and placed and fastened the ends of the joists of the defendant's building therein, and used and continues to use the plaintiff's said wall as and for a wall for the defendant's said building. The defen-

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dant, or those under whom he claims, also built the same building two stories higher than the plaintiff's building and built and erected a brick wall upon the top of the plaintiff's said westerly wall to the height of four stories from the ground. The westerly wall of the plaintiff's building is old and frail and not sufficiently strong to bear with safety the weight of the said wall so built on the top thereof, and by reason of the weight of the said wall, the plaintiff's wall has become cracked, damaged, and unsafe. The plaintiff's land is in a good business locality, is very valuable for building purposes, and any person owning or purchasing the same would probably within a few years desire to pull down the said building and build another, and in that event he would be compelled to pull down the said wall and build a stronger and better wall instead thereof, as the same is not sufficiently strong or good to be used as an outside wall. The plaintiff's land has only a very narrow frontage on King street (43½ feet) and the loss of land covered by the said wall would greatly depreciate in value the remaining part of the plaintiff's land. The estate of the said John Brooke, deceased, is being administered under a decree of the Court of Chancery for Ontario, and the plaintiff's said land is sought to be sold under the direction of the Master, but the plaintiff cannot safely enter into a contract to sell the same until the defendant's wall and the ends of his joists have been removed. The plaintiff has requested the defendant to pull down the wall as built by him, and to remove the ends of the said joists, but the defendant has refused and neglected, and still refuses and neglects to do so. The plaintiff's land is described as beginning on the north side of King street, and at the distance of sixty feet from the junction of the northerly side of King street with the westerly side of Yonge street, and being a parallelegram with a frontage on King street of forty-three and a half feet by ninety feet in depth; and the trespass and encroachment complained of by the plaintiff is also particularly described.

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And the plaintiff claims—1. Possession of the land covered by the defendant's said wall. 2. Damages for the wrong complained of. 3. A mandatory injunction to compel the defendant to pull down the wall built on top of the plaintiff's wall, and to remove the ends of the joists of the defendant's building out of and from the plaintiff's wall. 4. An order restraining the defendant from any repetition of any of the acts complained of. 5. And such further and other relief as the nature of the case may require.

The defendant by his statement of defence—

1. Denies the plaintiff's title to the land and premises, and he further avers the plaintiff has no title which enables him to prosecute this action in his name alone.

2. Prior to the making of the lease hereinafter mentioned, Mary Emily Josephine Lawlor, Mary Louise Augustine Lawlor, Arthur Ruse Patrick Lawlor, and John Lawrence Lawlor were the owners in fee of the property immediately adjoining the land and premises in the statement of claim mentioned, on the west; and by indenture of the 18th of April, 1876, they demised and leased the said property to one George Faulkner for twenty-one years from the 15th of April, 1876, and it was provided in the lease that at the end of the said term the lessors would take the buildings and improvements upon the premises at a valuation, to be ascertained as therein provided.

3. By indenture of 30th of April, 1878, Faulkner assigned by way of mortgage the said demised land and premises, and all his interest therein, to the Building and Loan Association, to secure the payment of the sum of $14,624.40.

4. Faulkner having made default under the mortgage, all his interest in the said demised land and premises was sold by public auction by the said Association on the 25th of February, 1882, and the defendant became the purchaser thereof for the sum of $7,188.50.

5. For thirty years or more prior to the making of the lease a frame building had been erected, and was standing

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upon the said property, built up to and against the wall in the statement of claim mentioned, and the owners had obtained by prescription and user at all events the right of support of the said wall.

6. After the execution of the said lease George Faulkner, in order to improve the said property, determined to remove the said frame building, and for that purpose he consulted with the plaintiff's agent, and discussed with him in what manner the said wall could best be utilised for the mutual benefit of both parties.

7. The said land and premises are advantageously situated for business purposes, and inasmuch as the said wall was fourteen inches in thickness and of ample strength to serve as a party wall between the adjoining owners, and inasmuch as Faulkner and those through whom he claimed had acquired certain rights of user of the said wall apart from the legal ownership thereof, the said Faulkner proposed to renew the foundations thereof at his own expense, and in other respects to give additional strength and durability thereto for the purposes aforesaid.

8. The plaintiff's agent did not object to this, and Faulkner expended large sums of money in removing the foundations of the said wall, and in underpinning and strengthening the same, and he erected an expensive and substantial building upon his said property, using the said wall in all respects as a party wall, under the belief that the plaintiff's agent was acquiescing in the same, and that he, Faulkner, by his improvements was rendering a fair and reasonable equivalent for any use he was making of it; and the defendant submits it would be inequitable and unjust to permit an objection to be raised now, and he further submits that under any circumstances he is entitled to be allowed the value of all such improvements.

9. Faulkner, acting under the belief that the plaintiff's agent was acquiescing in the improvements and building, caused the necessary joists to be placed in the said wall, and extended the said wall a few feet higher by good and substantial masonry, and raised the chimneys then and

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still in use by the plaintiff; but Faulkner never claimed nor does the defendant claim he is entitled to the additional portion of said wall, otherwise than in common with the plaintiff and the adjoining owner as and for a party wall.

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10. At the time the defendant became the purchaser of the property he was not aware the plaintiff or any other person claimed to be entitled to the wall otherwise than as a party wall, and he purchased the said property in good faith under the belief that it was a party wall; and he submits the plaintiff is barred by his own laches and by acquiescence in the improvements made by Faulkner to treat the said wall as a party wall, and the defendant claims the benefit of being an innocent purchaser for value of the said land and premises, including the right of using the said wall as a party wall, without notice of the plaintiff's claim.

11. The wall is a good and substantial wall, fully capable of supporting any reasonable weight or strain from the adjoining buildings, and the defendant submits the plaintiff's case discloses no title to relief.

12. The defendant submits that inasmuch as the plaintiff and his agents, and all others interested in the said wall, stood by and permitted the erection of the defendant's building in its present position and the continuation of the wall upward without offering any objection, and inasmuch as no objection has been raised for many years, and the defendant was allowed to become the purchaser of the said building and premises at public auction for a very large sum of money, without any notice or knowledge of the plaintiff's contention, the plaintiff should not be heard now to object to the same.

13. The defendant duly registered the deed to him from the said Association, and he claims the benefit of the registry law.

14. In order to avoid the expense and annoyance of a lawsuit, the defendant before action offered the plaintiff a reasonable sum by way of compromise and settlement,

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without prejudice to the defendant's true position, but the plaintiff refused, and still refuses to accept the same.

15. The defendant prays the said wall may be declared a party wall, and that he may be hence dismissed, with his costs.

Replication:

1. The plaintiff joins issue on the statement of defence.

2. The plaintiff says he had no agent authorized to act in respect of the matter set forth in the statement of defence, and the plaintiff claims the benefit of the Statute of Frauds, 29 Car. II. ch. 3.

The cause was tried before Osler, J., without a jury, at Toronto, at the Summer Assizes of 1883.

The evidence was very fully given.

The learned Judge disposed of the case as follows:

1. I think that the plaintiff has made out a very full and satisfactory title by possession for the last fifty years of the buildings bounded as they stand now, and he has made out a paper title from the Crown.

2. I do not think the defendant is liable for any injury done to the plaintiff's wall by Mr. Faulkner's acts in the cutting of the wall and the insertion of the joists in it—if that injured the wall—and perhaps it did weaken it, and I should have supposed it did.

3. The defendant is a trespasser on the plaintiff's property, and he has been a trespasser since he bought from the Building Association, by making use of the wall to support his joists by the holes which have been cut in it.

4. The plaintiff is entitled to have these joists removed and the injunction which he asks for.

5. As to damages, I should be disposed to think they may fairly be estimated by the difference between the interest on the amount offered by Mr. Manning and the present value of the property, but I do not think I have sufficient evidence before me to enable me to say what that value is. There must be a reference as to that. Should it turn out that the present reasonable value of the property is more than Mr. Manning's offer, then there has been no

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substantial damage suffered, and I would award the merely nominal damage of five dollars.

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6. The only other question is as to the parties, and that I must look into.

On a later day the learned Judge said: "I have considered the objection as to parties, and apart from any difficulty that the defendant might be in from having omitted to take it at an earlier stage of the cause, I do not think it is one that can be raised in this action. The action is for trespass to the wall of the plaintiff, and for a mandatory injunction to restrain further trespass. I think the plaintiff is entitled to that without bringing in the persons who are the present owners. So far, I think the plaintiff is entitled to succeed on all grounds. There must be judgment in the terms I indicated yesterday, with costs of suit, but all proceedings to be stayed until the matter is mentioned to me again in order to give an opportunity for a settlement. If the matter is not settled, or if the plaintiff desires a reference as to damages, I must direct a reference on the principle which I mentioned yesterday, namely, that if the value of the land is not increased, then the plaintiff will be entitled to the interest which would have accrued on the difference between Mr. Manning's offer and the value of the property at the present time. Of course if he can get a better offer it simply shews he has sustained no damage."

The verdict endorsed upon the pleadings, was as follows:

I find the statement of claim is proved, and I decree as follows:

1. Plaintiff entitled to recover possession of the land mentioned in the 13th paragraph of the statement of claim.

2. The defendant to pull down and remove the wall of his house built upon the top of the plaintiff's wall, and to remove the ends of the joists of the defendant's building out of and from the said wall.

3. The defendant to desist from committing any of the acts complained of in the statement of claim.

4. Damages for the acts complained of, other than dam-

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ages, if any, caused by loss of interest on the purchase money payable upon the sale of the property, assessed at ten dollars.

5. Reference to the Registrar to enquire and report as to such last mentioned damages.

6. Costs, other than the costs of such reference and subsequent proceedings thereon which are to abide the result of such reference, to the plaintiff.

I direct judgment to be entered in accordance with the above.

The defendant gave notice of motion to set aside the verdict rendered for the plaintiff, or for a new trial, on the grounds:

1. That the verdict is contrary to law and evidence and the weight of evidence. 2. The defendant has only a leasehold in trust, and the owners of the fee ought to have been made parties to the action. 3. The wall in question was and is in fact a party wall, and has been so used by the adjoining owner. 4. The said wall was built partially upon the ground now owned by the defendant, and his predecessors in title had a right to utilise the said wall as a party wall. 5. There was no evidence to warrant a reference as to damages. 6. The plaintiff's evidence of title was insufficient to support the action.

At the Michaelmas Sittings, December, 10 1883, *Cassels*, Q.C., and *Galt*, supported the motion. Faulkner, the former lessee of the property of the defendant, committed the acts which are complained of as a trespass, and the defendant acquired his title to the property after all these acts had been committed, and only on the 26th of February, 1882. The defendant is not answerable for the erection upon the wall which the plaintiff claims to be his wall, and he should not have been ordered to remove it, he should only have been ordered to desist from using the wall; nor is the defendant liable for the joists put into the wall, because they are in fact in great part, at least where they rest on the wall, upon the defendant's own property. The

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damages which the defendant has been directed to pay, namely the interest on the offer of $24,000 made by Mr. Manning up to the present time, if the value of the land has not risen since such offer was made, or if it has risen, then the difference between that interest and the increased value—this is not a proper means of ascertaining the damage, because Mr. Manning had no right to break his contract because of the dispute there was between the plaintiff and the defendant respecting the wall. The plaintiff has the title of a mortgagee only; he has not the fee simple absolute, nor is he a reversioner. The defendant is lessee only, deriving title from the Building Association, and the association, who were mortgagees of Faulkner the former tenant for years of the land, as well as the reversioner in fee, should be parties to this action. The evidence shewed also that the acts done to the wall by Faulkner were done, according to the evidence, with the assent of the plaintiff's agent. The work was begun in 1876. The plaintiff himself was here in 1878, and saw the building as it is now, and no objection was made until lately.

J. B. Clarke, contra. The plaintiff's estate is being administered in Chancery The plaintiff's property was offered for sale. Manning made an offer of $24,000 for it, but upon discovering that the wall in question was built upon by the adjoining proprietor, and that the defendant claimed it to be a party wall, he refused to abide by his offer, and the Court directed this action to be brought. The plaintiff's title is good in law as a fee simple absolute. He claims under a mortgagee who derived his title as mortgagee in 1841, and he and those from whom he claims have been in the actual possession of the land by themselves and their tenants for a period of at least thirty-two years without disturbance and without accounting for the rents or profits, or ever having been called upon to account for them, and without the mortgagor, or any one claiming from him, ever paying interest or making any claim to the land. As to the joists being in fact where they rest on the wall in part on the defendant's own property, that is a new

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title set up now for the first time, but it does not help the defendant because if an inch and a half or two inches of the wall be built outside of the plaintiff's westerly limit according to strict measurement, the plaintiff and those for whom he claims have had their house to such extreme limit just where it is now for upwards of forty years, and that inch and a half or two inches of land have passed to the plaintiff by length of possession. The defendant may be ordered to remove the part of the wall built upon the plaintiff's wall: *Hervey* v. *Smith*, 1 K. & J. 389; *Martyr* v. *Lawrence*, 2 DeG. J. & S. 261. It cannot be inferred that the plantiff ever assented to the use of the wall by Faulkner which he made of it, because in 1874 Bloomfield filed a bill in Chancery against the plaintiff and his co-executor, a receiver was then appointed for the estate, and the executors were restained from interfering with the estate. The decree to that effect was made in May, 1875. The final decree was made in the cause in June, 1879, discharging the receiver, and the plaintiff again got into the receipt of the rents and profits, so that from 1875 till 1879, the plaintiff could not act in or for the estate, and could not grant any license to Faulkner to use the wall as he did; nor had Mr. Alcorn, the plaintiff's agent to collect the rents, any power between these years to give any such license either, and the work was done by Faulkner after May, 1875, and long before June, 1879. Alcorn denies ever having given any such license in fact, and he swears positively he never knew the wall had been so used until Mr. Manning refused to carry out his contract because of the dispute respecting the defendant's claim to use this wall as a party wall. Mr. Brooke also swears he was not aware of the wall having been so used until in 1883, when he was informed of it by his solicitor. The defendant is liable for the whole of the damages claimable against him because there is no contribution among tort-feasors: *Joyce* on Injunctions, 64, 65; *Allen* v. *Martin*, L. R. 20 Eq. 462; *Goodson* v. *Richardson*, L. R. 9 Ch. 221; *Walker* v. *McMillan*, 6 Sup. Ct. R. 241.

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Cassels, Q. C., in reply. There is no case in which a person who has not committed the act of trespass such as is alleged in this action—a person such as the defendant is, who has merely come into possession of the property said to have been trespassed upon—has been ordered to remove the matter alleged to be the trespass, such as the heightening of the wall, and the placing of the joists in the wall. All that can be ordered against him is, to restrain him from using the subject of the trespass, that is, in this case, the wall in question.

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February 9, 1884. WILSON. C. J.—As to the plaintiff's title. He is a trustee under the will of the late John Brooke, of Montreal, who was mortgagee of the land and premises claimed by the plaintiff, and as such trustee he and the late John Brooke in his lifetime have been in possession of the land covered by the building upon it just as it is at present for upwards of thirty years. He has therefore a perfect title in fee to the land by mere length of possession, independently of his substantial right and interest under the different conveyances made to the late John Brooke, now deceased. The original mortgagor, or any one claiming from or under him, but the plaintiff, has no kind of claim or title to the land. And the plaintiff, as trustee, by Rule 95 of the Judicature Act, is entitled to bring this action as representing the property or estate of which he is trustee, without joining any of the parties interested in the trust or the estate.

1. The plaintiff is entitled also to the whole of the land covered by his building, whether from a point sixty feet west from the west side of Yonge Street, continuing westerly from such point forty-three feet six inches or forty-three feet eight inches, because he and those for whom he claims have had possession of the whole of that area for more than fifty years without dispute, such possession being taken at a time when an inch and a half or two inches on King Street was of no measurable value or concern. I agree with the finding of the learned Judge as to the plaintiff's title.

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2. I agree also as to his second finding, that the defendant is not liable for Faulkner's acts.

3. I agree also that the defendant is and has been a trespasser by his user of the wall since he acquired his title to it in February, 1882, by reason of his user of the wall with the wrongful heightening of it, and with the ends of the joists which had been let into it, for the continuance of a trespass is a new trespass: *Holmes* v. *Wilson*, 10 A. & E. 553; *Hudson* v. *Nicholson*, 5 M. & W. 437; *Thompson* v. *Gibson*, 7 M. & W. 456; *Bowyer* v. *Cook*, 4 C. B. 236; *Nicklin* v. *Williams*, 10 Ex. 259, 266; *Clegg* v. *Dearden*, 12 Q. B. 576; *Battishill* v. *Reed*, 18 C. B. 696.

4. The learned Judge held the plaintiff was entitled to have the joists removed, and to have the injunction he asked for to pull down the wall also which had been built on the top of the plaintiff's wall. It cannot be disputed that may be done if the acts had been done by the defendant, and if the removal was to be made of what had been done upon the defendant's own land, according to the case referred to of *Hervey* v. *Smith*, 1 K. & J. 389, and many other cases needless to mention.

But it is said it cannot be ordered to be done by the defendant when the trespass has been done on the plaintiff's land, nor when the acts complained of were not done by the defendant. No doubt at the common law a trespasser was not bound to remove the cause of the trespass done upon the plaintiff's land, because he had not the power to enter to do so, as he would be a trespasser if he were to enter for that purpose. He is merely compellable to discontinue the trespass. The defendant in that case is liable for such damages which will enable the plaintiff himself to remove the act, work, or other thing from his land which has caused the trespass: *Battishill* v. *Reed*, 18 C. B. 696, and the different cases referred to in it, p. 707 to p. 714; *Holmes* v. *Wilson*, 10 A. & E. 503; *Clegg* v. *Dearden*, 12 Q. B. 576.

The case of *Powell* v. *Aiken*, 4 K. & J. 343, at p. 355, shews the Court will not oblige the defendant to remove

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the work or other thing which causes the trespass when done on the plaintiff's land, if the defendant did not himself do the act, but claims title only from the original trespasser.

But that case also shews the Court would have compelled the original trespasser to undo his own wrongful act, which had been done on the plaintiff's land, if he had been the defendant. The defendant would not be a trespasser by entering on the plaintiff's land or house to remove the unauthorized erection upon the wall, or to remove the ends of the joists and make good the wall again, when the plaintiff prayed that the defendant should be ordered to do so; but it seems that if he be not the original trespasser he will not be directed to undo or remove the subjects of trespass.

The direction of the learned Judge in that respect, we think, cannot be maintained in the words in which it is expressed. I shall refer to that part of the case at the end.

5. As to the damages for the acts complained of being assessed at ten dollars, and the other damages which were claimed for the loss of sale of the property by the continuance of the acts of trespass being referred to the registrar to determine, the plaintiff has not complained. The defendant contends there was no evidence to warrant the reference of any such claim to the registrar.

The learned Judge stated the basis of such enquiry should be as follows: To take Mr. Manning's offer for the property at $24,000, and to compute the interest upon that sum up to the holding of the enquiry, and having ascertained that sum, then to ascertain whether the property has since the time of such offer increased in value, and if so, what that increase is at the time of the enquiry. If the property has increased in value as much as the interest on the $24,000 before mentioned, the plaintiff is not to recover any other sum than the above ten dollars for damages, because the loss of interest will be compensated for to the plaintiff by the increase in the value of his land. If it has increased in value beyond the $24,000, but not so much

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as to balance the amount of interest aforesaid, the plaintiff is to recover the difference the interest may exceed the increase in value. And if it has not increased in value beyond the $24,000, the plaintiff is to recover the amount of such interest for his damages.

I think the basis taken by the learned Judge for the ascertainment and award of damages is not the proper one. The defendant's wrongful acts have occasioned to the plaintiff a particular amount of damage. Compensation must be made to the plaintiff for the damage done to him. That damage arises from the heightening of the plaintiff's wall, and the building of the joists into the wall, and the damage the plaintiff's wall has sustained in consequence of these acts having been continued by the defendant from the time of his purchase in February, 1882, till the present time, and such damages need not necessarily be assessed upon a strict computation of the work, labour, and timber required to replace the property as it was.

I do not think that more or less than the amount so to be ascertained can be given or recovered. If the loss of a sale could be recovered against a trespasser which his act of trespass may have in fact occasioned, it would introduce into every action for the recovery of land, or injury to land, or for the detention of or injury to personal property, a different method of compensation for acts of this kind than has heretofore been allowed.

In *Battishill* v. *Reed*, 18 C. B. 696, the defendant built to the extremity of the land adjoining to the plaintiff's property an erection higher than the plaintiff's, and he removed the tiles which formed the plaintiff's projecting eaves, and he placed his own eaves so as to overhang the plaintiff's premises, with a zinc gutter to intercept the drip. It was proved the tiles so removed might have been replaced at a cost of about thirty shillings. The only question was whether the forty shillings paid into Court was enough to cover the actual damage. The Judge refused to allow the plaintiff to give evidence to shew a deterioration in the saleable value of the premises. The jury found

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the forty shillings paid into Court was sufficient. The Court held the Judge had acted rightly in rejecting such evidence.

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The basis laid down has this further disadvantage, that it in effect pays off the defendant's wrongful act by the increase in value of the plaintiff's property, giving to the wrongdoer that rise in value instead of giving it to the proprietor of the land. And it does not subject the defendant to the depreciation there might be in the value of the property.

I think the direction in that respect cannot be sustained.

Then, with respect to the defendant's notice:

1. The verdict is not contrary to the law and evidence, but is, as the learned Judge has found, fully supported by it.

2. The defendant, although only a lessee for years, is the wrongful party, and the only one, in continuing the trespass; the owners of the fee have nothing to do with it.

3. The wall in question is not, nor ever was, a party wall, and there is not the least pretence for saying it was or is.

4. The wall may be built an inch and a half or two inches upon the land of which the defendant is now lessee, but if so, the plaintiff and those from whom he claims have had possession of it by the wall now in question, and otherwise, for upwards of forty years, and whatever right the predecessors of the defendant may have had to that small strip they have lost by long continuous adverse possession many years before these acts of trespass were committed.

5. I have already said the reference as to the damages was made upon a basis, not I think warranted, and they must be differently ascertained.

6. The plaintiff's title was and is quite sufficient to support the action.

One of the matters remaining to be disposed of is the damages. All the evidence with respect to them has been given which can be given, and we are in as good position now to determine what they should be as we can be, or as the learned Judge was at the trial, or as any other Judge

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can be, if the cause were to be again sent down to trial to settle what that amount should be.

The allowance to the plaintiff will be:

1. The expense of removing the brick addition made to the wall, which addition is wholly upon the plaintiff's property.

2. Compensation to the plaintiff for the damage done to the wall by its being weakened or affected by the weight of that addition, and by reason of the joists being let into the wall; such damage to be computed from the time of the defendant's purchase in February, 1882.

As to the first claim, removing the added bricks. Rankin, a builder, said the bricks could be taken down for $3, or $4 a thousand, or say $3.50, and Langley, an architect, said he supposed the quantity would be about 30,000; that would be $105. Langley, the architect, said that four men at $2 a day each, could take down and stack the bricks in a week, the thirty thousand; that would be $4 \times 2 \times 6 = \$48$. Rankin said the worth of the brick when taken down and cleaned would be about as much as the cost of the brick in taking it down. Langley said the brick could be taken down and cleaned for $3, or $3.50 a thousand, and they would for building be as good as new brick. New brick would cost $3, or $4 more a thousand, I understand by this above method of getting at the cost of taking down the thirty thousand brick, and cleaning them, the cost would be say $3.50 a thousand, or $105.

But as the plaintiff should not be cut down to the lowest possible allowance for removing the wrongful erection, I think it would not be too much to allow the plaintiff for taking down and stacking the bricks the sum of $105, if he have to do so.

Then as to the damage done to the wall by the defendant's retaining the weight of the additional brick work upon the wall, and the weight of the building by the bearing of the joists upon the wall since the time of the purchase in February, 1882. It is difficult to separate such damage [if any] has been done, and I assume such

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damage has been done, taking the whole of the evidence, although Mr. Langley, the architect, says no damage has been done to the wall, for the damage done to it was before the defendant's purchase; and I am not disposed to allow much on that account, for I am of opinion the chief injury must have been done before the time of the defendant's purchase, and as it is not the intention of the plaintiff to maintain the building, but to sell it, and there is no doubt the purchaser will pull the whole building down and rebuild, I may take the learned Judge's estimate of ten dollars as a sufficient allowance, making the total $115.

The only remaining point to be disposed of is, what order to make in place of that part of the decree of the learned Judge which directs "the defendant to pull down and remove the wall of his house built on the top of the plaintiff's wall, and to remove the ends of the joists of the defendant's building out of and from the said wall."

That part of the decree should be as follows: "The defendant to desist from further using in any way whatever the wall of his house built on the top of the plaintiff's wall, and to desist also from further using in any way whatever the ends of the joists of the defendant's building which have been let into the plaintiff's wall."

The decree will be drawn according to the judgment we have pronounced, with the costs of the action and of this motion.

GALT, J., concurred *(a)*.

Judgment accordingly.

(a) This case was argued before WILSON, C. J., and GALT, J., OSLER, J., having ceased to be a member of the Court on his appointment as Judge of the Court of Appeal, and the vacancy not having been then filled.

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[COMMON PLEAS DIVISION.]

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BRADLEY V. MCINTOSH.

Libel and slander—Privileged documents relating to public service—New trial.

In an action for libel and slander the plaintiff's counsel insisted on the production of a certain anonymous letter written by the defendant to the Ontario Government, relating to the licensing of the plaintiff's hotel. The head of the department attended and declined to produce the letter on the ground that its production would be injurious to the public service, and it was therefore privileged. The learned Judge at the trial, on plaintiff's counsel insisting on its production, ordered it to be produced, but stated that if the Court should hold that the production was not compellable, any verdict recovered would go for nothing. The letter was then produced and read. The learned Judge told the jury that the letter was not evidence of libel as it was privileged, but that it could be looked at as evidence of malice on the slander count. The jury found for the plaintiff.

Held, that the question whether the production of such a document was injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper, and the production of the document ought not to have been compelled.

Under the circumstances the Court granted a new trial without costs.

ACTION for slander and libel.

The cause was tried before Hagarty, C. J., and a jury, at Cobourg, at the Fall Assizes of 1883.

The slander complained of consisted in the defendant having charged the plaintiff, an hotel keeper, in the presence of others, with keeping a house of ill-fame.

The libel was charged to have been contained in certain letters written by the defendant: one of them to the Government of Ontario; and the other to the Chairman of the Board of License Commissioners.

Henry Totten, the clerk in charge of the license branch of the Provincial Secretary's office, appeared to the subpœna *duces tecum*, and was called upon by the plaintiff's counsel to produce an anonymous letter written to the Attorney-General. He claimed that the document was privileged. It was admitted by the counsel for the plaintiff that Mr. Totten should be considered as representing his superiors, the Attorney-General and the Provincial Secretary, and it should be considered the same as if they were present in person, and declined to produce the document for the like reason.

Mr. Totten stated that he had consulted the Attorney-

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General and the Provincial Secretary, and had written instructions not to produce any documents in his possession, as it would be prejudicial to the public interest.

The learned Judge said: "I do not exactly see the ground on which they say 'the public interest is affected.' The working of the license law may be affected, but not the public interest of the Province of Ontario. If I admit this letter, and I am held by the Court to be wrong, and Mr. Kerr gets a verdict, it will all go for nothing."

The counsel for the plaintiff pressed for the production of the letter.

The learned Judge further said: "I do not at present understand how the interests of the public are concerned in the non-production of an anonymous letter, and I would go as far as possible in protecting a person who in good faith addresses letters to the Government; but I think that an anonymous communication cannot by any possible construction come under that. Of course, if I am wrong the verdict will go for nothing." The learned Judge then asked the learned counsel if he still pressed for its production. The plaintiff's counsel said he did. The learned Judge then ordered it to be produced and read.

The following is a note made by the learned Judge on the question of privilege:—"Mr. Totten states that he has the instructions of the Attorney-General and the Provincial Secretary that in their judgment the production of these documents will be prejudicial to the public service. Mr. Kerr waived the objection of the non-attendance of the Provincial Secretary or the Attorney-General. See *Beatson* v. *Skene*, 5 H. & N. 839. After reading this case and conferring with Armour, J., I am of the opinion that the anonymous letter, having nothing to do with any preceding enquiry, cannot come within the privilege accorded or in any way affect the public interest. I cannot understand, in a matter between individuals, how anonymous communications can be withheld as in any way privileged. I can understand that in matters affecting the public safety or security such communications can be properly refused. Mr. J. K. Kerr presses its reception. It is at his risk."

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The letter from the defendant to the Board of License Commissioners was produced by the Secretary of the Board, who was one of the License Commissioners when the letter was written. It was written in answer to a communication to defendant from the Chairman of the Board as to what the defendant knew of the plaintiff. Privilege was claimed for it if the Government had a right to claim privilege for it, but no instructions were received as to it from the Government. Mr. Totten stated that Mr. Preston was an officer of the same department as he was; and had it been known that he was to be called upon to produce the letter, the Attorney-General would in all probability have objected.

At the close of the case the learned Judge, in charging the jury, told them that the plaintiff's case was originally both for slander and libel; but that libel was now out of the question, and any damages they might give were to be confined to the spoken words. The only use made of the letters produced was to shew that there was malice on the plaintiff's part—that in speaking these words he had the malicious intention of injuring the plaintiff.

The jury found for the plaintiff, with $800 damages.

During Michaelmas Sittings *Delamere* obtained an order *nisi* to set aside the verdict for the plaintiff, and for a new trial, on the ground of the admission of improper evidence; and that the verdict was against the evidence, and the weight of evidence, and that the damages were excessive.

During the same sittings, December 11, 1883, *Delamere* supported the order. The learned Chief Justice held that the letter was privileged; there was, therefore, no question of libel to go to the jury; and that the only question was that of slander. He however allowed the letter to go to the jury on the question of malice. If the letter was privileged, then it was not admissible as evidence of libel without evidence of express malice. No malice was proved. The letter not being admissible on the charge of libel cannot be submitted as evidence of malice on the

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charge of slander. The letter however was not proved. It was not signed by the defendant and he denied that he wrote it. The only evidence offered was, that it looked like the defendant's writing. The letter had nothing to do with the slander. It was also written long after the words uttered which constituted the slander complained of. The next point is, that the letter never should have been ordered to be produced. The question of its admissibility was for the head of the department, and not for the Judge at the trial. This is clearly laid down in the cases: *Beatson* v. *Skene*, 5 H. & N. 838; *Odger* on Libel and Slander pp. 205, 519; *McElveney* v. *Connellan*, 17 Ir. C. L. R 55; *Anderson* v. *Hamilton*, 8 Price 244, note; *Kain* v. *Farrer*, 37 L. T. N. S. 469; *Livingstone* v. *Gartshore*, 23 U. C. R. 166; *Smith* v. *East India Co.*, 1 Phil. 50; *H. M. S. Bellerophon*, 2 *Aspinwall's* Maritime Cases, 449; *Wadeer* v. *East India Co.*, 8 DeG. McN. & G. 182; *Robshaw* v. *Smith*, 38 L. T. N. S. 423. The damages were certainly enhanced by the admission of the letter. The learned Chief Justice told the plaintiff's counsel that if the letter was held to be improperly admitted, any verdict recovered by the plaintiff would go for nothing, Under these circumstances there must be a new trial.

Lash, Q. C., contra. There was evidence to go to the jury that the defendant wrote the letter, and the jury so found. It was also written with reference to the same subject matter, namely, the licensing of the plaintiff's house. The letter was properly left to the jury on the question of malice. The letter was privileged, and the question of malice was urged at the very threshold of the case, so as to take away the privilege. The letter, when once admitted, was properly left to the jury as evidence of malice. The next point is, as to the power of the learned Judge to order its production. The letter was properly admitted. It was not a state paper, or of the class of documents for which the government could claim privilege. It was not written on public business, but merely as to the licensing of a public house. It was not written with reference to any department of the government, but to the

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Attorney-General. It clearly does not come within the class of cases cited on the other side. The learned Chief Justice only admitted the letter after consultation with another Judge. The fact of the letter being written after the slander complained of is of no consequence, for it is clearly laid down that all words written or spoken before or after the fact complained of are evidence of malice to go to the jury: *Odger* on Libel and Slander, 271 *et seq.* Apart from the letter, there was sufficient evidence of malice to go to the jury; and the jury were justified in giving the amount of damages they did without the letter. The learned Chief Justice told the jury they were not to take the letter into consideration in assessing the damages. The justification pleaded by defendant was in itself evidence of malice. Moreover, it was not essential to prove damages, for the slander complained of charging an indictable offence against a person in business, the law will imply general damages. Under Ontario Judicature Act, Rule 211 a new trial will not be granted unless it is shewn that some substantial wrong has been done.

February 9, 1884. WILSON, C. J.—The question was as to the admissibility of an anonymous communication addressed to the Attorney-General. It referred to the plaintiff's house as one which should not, from its character or reputation, have been licensed; and it referred also to the Inspector of Licenses in that section who had recommended it for license, although he knew of the character of the house, because he was paid money to keep quiet, and it suggested an enquiry should be made into the facts.

The bearer of the communication was from the office of the Provincial Secretary, who had directions from his superiors, the Attorney-General and the Provincial Secretary, not to produce it as it would, in their opinion, be prejudicial to the public service to do so.

It was admitted by the counsel for the plaintiff that the clerk who had possession of the document should be con-

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sidered as if his superiors the Attorney-General and the Provincial Secretary were present there in person, and declined to produce the document for the like reason.

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The learned Chief Justice was of opinion the communication was not one which affected the state.

The letter was directed to be produced, upon the counsel for the plaintiff pressing for its production; the learned Chief Justice saying more than once, as a warning, that if he should not have ordered its production the verdict for the plaintiff, if he succeeded, would be set aside, and upon that understanding the letter was produced and read and went to the jury.

The subject of the letter, although containing expressions beyond a fair representation of facts, was concerning a subject of great public interest, the due licensing of hotels, and the proper conduct of the officers engaged in the administration of that branch of the public service. And the defendant, who had been living at the plaintiff's hotel for some time, knew or professed to know, of his own observation what the character of the house was.

It appears to me it was a subject upon which he could properly communicate with the Government, although he was in nc wise personally interested in it; and although no enquiry was then pending concerning it, or against those who were spoken of, for it was a duty common to every one to make a proper communication to the government upon, and that was a sufficient justification to the writer.

The cases referred to in *Beatson* v. *Skene*, 5 H. & N. 838. at pp. 846, 847, shew that either interest or duty is a sufficient cause for making a proper communication upon the subject.

Whether the communication is a proper one in spirit, purpose, or language, cannot be known without the production of the document, and if the officer at the head of one the High Government departments declines to produce it because it will not, in his opinion, be conducive to the public interest to do so, his judgment is conclusive. He surely can determine better than, or at least quite as well as, the Judge at the trial what is or what is not for the

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public interest. It is not to be presumed he will abuse his high office. It must therefore be presumed he is speaking conscientiously in the interest of the public, and not unadvisedly to protect an offender nor capriciously to defeat justice.

I do not understand the communication should be of the high nature entitling it to the designation of a state paper, or that it should relate to what may be called a matter of state, as the communication of Ambassadors with the Home Government, or the reports on the state of the army or navy, or respecting particular regiments, or upon combinations dangerous to the public peace or safety, and the like; but that communications are privileged which relate to the infringement of the revenue laws—to the perpretation of crimes: *Attorney-General* v. *Briant*, 15 M. & W. 169, and the cases therein mentioned; and to complaints against Justices of the Peace: *Harrison* v. *Bush*, 5 E. & B. 344.

In this last case the Government did not refuse to produce the complaint, although I do not see why they might not have refused, if they thought there was sufficient reason not to disclose the name of the complainant in the public interest. It is very probable, however, that a copy of the communication was sent to the party complained of in order that he might answer it; and most likely that was the case also in *Fairman* v. *Ives*, 5 B. & Al. 642, after which the Government could not refuse to produce the original complaint, which was required for the purposes of the civil action. In that case a creditor had complained to the Secretary at War of the plaintiff, who was a half-pay officer, of the non-payment by the officer of the debt which he owed to the creditor under circumstances which were to the discredit of the officer.

The object of not producing communications of the kind is to protect the communicant from "vengeance or ignominy" to which he might be exposed if it were known who he was, and if the channels from or through which the information has been obtained were disclosed: By the

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counsel *arquendo* for the plaintiff in the *Attorney-General* v. *Briant*, 15 M. & W. 169, at p. 172.

It is well known that informers are never looked upon with much favour, and that many matters which should be known would not be known if their names were always given up. It is not in the interest of the public, therefore, that every private communication and the source of it should be divulged.

As this communication related to a matter in which the public are interested—the due licensing of proper houses, and the due exercise of the licensing powers by the officers appointed by the Government for that purpose—and as the Government acted upon the information they received, and as the proper officers of Government declined to produce the communication because they judged it to be for the public interest not to do so, the refusal to produce it was a proper exercise of departmental power, and the production which was ordered was not, I think, authorizedly done.

If the case had rested there we probably could not have interfered, because the document was produced, and it is the privilege of the Government which was affected, and not the privilege of the defendant, who has properly no right to complain that the document was produced.

But the question is, the document having been received upon the express understanding that the verdict, if it were for the plaintiff, should "go for nothing," can the verdict for the plaintiff be allowed to stand when we are of opinion the letter should not have been required to be produced?

We think it should not, and more especially as the further question of privilege of the communication itself, apart from its production, was not apparently considered, and the case went to the jury without objection on either side, as if the letter were not a privileged communication. It may be the jury might have found the language of the letter was much stronger than was warranted, and that it shewed evidence of malice, but that was not submitted to them.

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The letter then went to the jury for the purpose of influencing the damages against the defendant, and it no doubt had its full effect in that respect.

The other letter which the defendant wrote to the Inspector of Licenses was also given to the jury for the like purpose, without objection, and no motion has been made against the course which was then taken. No relief can be given for that cause, but it is very manifest this last letter was not admissible for that purpose, as the learned Chief Justice had expressly ruled it was a privileged communication, that is, one which rebutted malice, unless that rebuttal was itself repelled, which was not done, nor attempted to be done. That letter could not therefore properly be given to the jury for the purpose of enhancing the damages upon the ground of malice. Upon the whole we think there ought to be a new trial, without costs.

GALT, J.—I agree with the learned Chief Justice that this rule must be made absolute.

The plaintiff's counsel at the trial insisted on the production of a certain letter which the officer at the head of the department declined producing, on the ground that it was privileged. The learned Chief Justice of the Queen's Bench Division, before whom the case was being tried, warned the counsel that if this Court should be of opinion that he ought not to compel its production, any verdict recovered would go for nothing. The learned counsel still urging its production, the officer produced the letter, which was an anonymous communication, and it was read.

Great stress was laid on the circumstance that the letter was anonymous, but in my opinion that makes no difference. When Mr. Totten, the gentleman in charge of the paper, and who was, for the purpose of the trial, admitted as representing the head of the department, was asked as to what papers he had. He said: "Before doing so I must appeal to the Court for privilege." He then, in consequence of the Chief Justice saying he could make no rule unless

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he knew what the papers were, said: "The first is an anonymous communication marked private, 'To the Hon. O. Mowat.' There is no signature to it." Q. "Then the next." A. "Well, my Lord, am I not divulging the documents when I am telling you what they are? I have written instructions with regard to these papers from the Attorney-General." It was after this his Lordship said, "If I admit this letter, and if I am held by the Court to be wrong, and Mr. Kerr gets a verdict, it will all go for nothing." The letter was then produced and subsequently went to the jury.

I need hardly say it is with extreme diffidence I state that in my opinion the production of the letter ought not to have been ordered in the face of the objection raised.

It appears to me the production or non-production rests in the discretion of the head of the department.

In *Beatson* v. *Skene*, 5 H. & N., 838, the Court says, at p. 853: "We are of opinion that if the production of a State paper" (the learned Chief Baron had previously stated the meaning the Court attached to that expression) "would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice; and the question then arises, how is this to be determined?"

It is manifest it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was and why the publication of it would be injurious to the public service, an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against.

It appears to us, therefore, that the question whether the production of the document would be injurious to the public service must be determined not by the Judge, but by the head of the department having the custody of the paper, and if he is in attendance and states that in

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his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it."

In 2 *Aspinwall's Maritime Cases*, 449, *H. M. S. Bellerophon*, Sir Robert Phillimore, after citing the judgment of the Court in *Beatson* v. *Skene*, 5 H. & N. 838, says, at p. 451: "It appears to me that nothing has been urged before me which is sufficient to take the present case out of the operation of the principle here laid down. It is true that in this case Mr. Vernon Lushington has made a statement in an affidavit instead of orally. I cannot see that that makes any difference as to the principle to be applied to the case; and in this case the heads of the department, for so I read the affidavit of Mr. Lushington—that is to say, the Lords of the Admiralty—have distinctly stated that it will be prejudicial to the public service to allow such reports to become liable to inspection by litigants in any proceedings at law touching the matter therein reported." Order refused.

In the case of actions for malicious prosecution, where the production of an exemplification of the record of acquittal is absolutely necessary, it rests with the Attorney-General in his discretion to grant or withhold his *fiat*, without which the exemplification will not be furnished (*a*).

Rule absolute for new trial, without costs.

(*a*) This case was argued before WILSON, C. J., and GALT, J., OSLER, J., having ceased to be a member of the Court, on his appointment as Judge of the Court of Appeal, and the vacancy not having been then filled.

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[COMMON PLEAS DIVISION.]

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PAGE ET AL. v. PROCTOR.

Contract—Sale of goods—"Ordinary sections"—Right of selection—Parol evidence admissibility—Usage of trade.

The plaintiffs in the beginning of January, 1880, had purchased through C. & G. of Montreal, a quantity of rails, and requiring 2000 tons more, negotiations were entered into between H., the plaintiff's agent, C. & G., and the defendant, which resulted in a note being signed on the 14th January, by C. & G. addressed to the defendant, advising him that they had sold to the plaintiffs on the defendant's account 2000 tons of rails (56 lbs.) at £8 18s. 9d *stg.*, per ton payment to be made in London against documents, and credit to be there opened with approved bankers in favour of defendant's agent. The defendant who was then in Montreal, signed a sale note in similar terms to the above. The sale was immediately communicated to the plaintiffs, who signed a confirmatory note, adding the words that the make should be either Ebbwvale or Moss Bay, and wrote across the face that the rails were to to be 56 lbs. "ordinary section and specification." This confirmatory note was not communicated to the defendant until after action brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in, and not manufacturers of rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbwvale, for the manufacture of rails of a section known as "Hamilton and North Western," and which came within the terms, "ordinary section," by which a number of different kinds of sections were embraced; and these were the rails which the defendant intended delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary section," and when they discovered the defendant's rails were Hamilton and North Western, they endeavoured to get defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and paid for under the credit, and it was not till afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had the right to name the section.

Held, that even if the confirmatory note were embraced in the contract, it did not give the plaintiffs the right of selection; that parol evidence was not admissible to add such a term to the contract: and that the evidence failed to establish any usage giving such right, especially as the parties were dealers and not manufacturers, and in view of the plaintiff's conduct in the matter; and that the contract was therefore performed by the section delivered.

THE plaintiffs, in the first count of the declaration, stated their cause of action in substance to be, that on the 14th day of January, 1880, they agreed with the defendant for the purchase from him of 2,000 tons of English steel rails, at £8 18s. 9d. sterling per ton, to be delivered by the defendant to the plaintiffs, at the port of New York, by the 31st day of May, 1880, upon the terms of payment in the contract declared. And they averred that by the said contract it was agreed between the plaintiffs and defendant that the said rails were to be of such ordinary section and

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specification, length, and weight as the plaintiffs should thereafter determine and notify the defendant thereof; and that the plaintiffs did thereafter, and in compliance with the terms of the said agreement, notify the defendant that the said rails should be of the section known as "Sandberg," which is an ordinary section and specification, and of the length of thirty feet each, with the usual proportion of short lengths, weighing 56 pounds to the yard: that the price stipulated and agreed upon was duly paid by the plaintiffs and accepted by the defendant. And all times elapsed, and all conditions were fulfilled, and all things happened and were done to entitle the plaintiffs to a delivery of the rails, but the defendant wholly neglected and refused to deliver the rails, &c., whereby the plaintiffs lost the price, £18,000 sterling, and the interest thereon, and the sale of the rails and the profits arising therefrom.

In a second count the plaintiffs' cause of action, though varying in form, was in substance stated in the same way.

A third count was also to the same effect, merely varying the form of stating the cause of action.

The common counts were added for money lent to and money paid by the plaintiffs for the use of the defendant.

The defendant pleaded to the first, second, and third counts, that he did not promise as alleged, and special pleas, as follows:—

To the first count:—2. "That the plaintiffs did not, within a reasonable time, determine upon the section, specification, length, and weight of the rails, and notify the defendant thereof; and defendant thereupon delivered to the plaintiffs 2,000 tons of the section and specification known as the Hamilton and North-Western Railway, which is an ordinary section and specification, and of the length and weight in the first count mentioned; and plaintiffs accepted and received the same as and for the rails so agreed to be purchased from him.

3. That the plaintiffs did not determine upon the section, specification, length, and weight that the rails should be, and notify the defendant, and he delivered rails known as Ham-

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ilton and North-Western Railway section and specification, which is an ordinary section and specification, and the plaintiffs accepted and received the same from the defendant as and for the rails so agreed to be purchased from him.

4. That the plaintiffs, after making the said agreement, and before any breach thereof, agreed with the defendant that the said rails should be of section and specification known as the Hamilton and North-Western Railway, and so notified the defendant, who thereupon delivered rails of the last mentioned section and specification, length, and weight, and plaintiffs accepted and paid for the same.

The other pleas to the second and third counts were in substance the same as the third and fourth pleas to the first count.

To the last or common counts the defendant pleaded never indebted.

The plaintiffs joined issue.

This action was commenced on the 14th day of June, 1880, and issue was joined on the 21st September, 1880. It was first entered for trial at the Spring Assizes, Toronto, in March, 1881, and was from time to time made a remanet of or postponed until the 18th day of October, 1881, when, after taking some evidence, it was adjourned, on account of the absence of a witness, on the 21st day of October, 1881, till the then next sittings of the High Court for the trial of civil cases, upon the terms endorsed upon the record. It was at that Court, and a subsequent one, further postponed until the 3rd day of November, 1882, when the same came on to be tried before Cameron, J., at Osgoode Hall, without a jury, was further heard on the 4th and 5th November, and was then further adjourned and continued on the 18th day of November.

From the evidence, it appeared that a contract was negotiated and arranged between the parties, through the agency of Mr. A. Hugel, and Messrs. Cox & Green, brokers, of Montreal; and that this arrangement was reduced to

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writing by Mr. Cox, of the firm of Cox & Green, in an advice note addressed to the defendant, as follows:

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"MONTREAL, 14th January, 1880.

"JOHN PROCTOR, Esq.,

"Hamilton.

"DEAR SIR,—

"We have this day sold on your account, to Messrs. Page, Newell & Co., Boston, Mass., (2,000,) two thousand tons steel rails (56lbs. p. yd.,) for spring shipment, delivery either at Montreal or New York, at the price of (£8 18s. 9.,) eight pounds eighteen shillings and nine pence sterling, per ton; payment to be made in London, in cash, against documents; credit to be opened with approved bankers in London, to be named on or before the 20th inst., and these parties, Messrs. Page, Newell & Co., are to declare whether the delivery is to be at Montreal or New York by that date.

"Yours respectfully,

COX & GREEN."

This was confirmed by the defendant on the same date he being then in Montreal, by the following letter addressed to Messrs. Cox & Green:

"MONTREAL, January 14th, 1880.

"MESSRS. COX & GREEN.

"Montreal.

"DEAR SIRS—

"I now beg to confirm the sale to Messrs. Page, Newell & Co., of Boston, of (2,000) two thousand tons of steel rails, for spring shipment, delivery either at Montreal or New York, at the price of (£8 18s. 9d. stg.) eight pounds eighteen shillings and nine pence per ton, payment to be made in London, in cash, against documents; credit to be opened with approved bankers in favour of my agents in London, to be named on or before the 20th inst., and these parties, Messrs. Page, Newell & Co., are to declare whether the delivery is to be at Montreal or New York by that date.

"Yours truly,

JOHN PROCTOR."

The plaintiffs, through Mr. Page at New York, somewhere between the 14th and 18th January, confirmed the brokers' act by the following letter addressed to Messrs. Cox & Green. Mr. Cox, with Mr. Hugel, being then in New York:

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"MONTREAL, January 14th, 1880.

"MESSRS. COX & GREEN,

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"Montreal.

"DEAR SIRS,—

"We now beg to confirm the purchase from John Proctor, Esq., Hamilton, of (2,000) two thousand tons of English steel rails, for spring shipment, delivery either at Montreal or New York, at the price of (£8 18s. 9d.) eight pounds eighteen shillings and nine pence per ton; payment to be made in London, in cash, against documents; credit to be opened with approved bankers, in favour of seller's agent in London, (to be named,) on or before the 20th instant. We are to declare whether the delivery is to be at Montreal or New York by that date. The makers of the above rails to be either Ebbwvale or Moss Bay.

"Yours truly,

PAGE, NEWELL & CO."

Across the face of this letter was written:

"The rails to be 56lbs. ordinary section and specification."

On the 20th January, the defendant telegraphed to the plaintiffs, the makers of the rails were the Ebbwvale Co., and requested the credit to be opened in his own favour subject to drafts of agent in London to be appointed by him and endorsed.

On the same day the plaintiffs telegraphed they would take delivery of the rails at New York.

On the 2nd February, the plaintiffs sent to defendant a duplicate letter of credit in the following words:

"£18,000. BOSTON, February 2nd, 1880.

"MESSRS. BROWN, SHEPLEY & CO..

"London.

"We hereby open a credit with you on account of Messrs, Page, Newell & Co., Boston, to be used by such parties as they may authorize in drafts on you at sight, payable in London, to the extent of £18,000, say eighteen thousand pounds sterling, for cost of 2,000 tons steel rails, value not exceeding £8 18s. 9d., c. f. i., in goods, to be placed with you for shipment to New York, to order; or in case the goods are to be sent from any port other than London, then the bills of lading to New York to order must be placed with you at time of shipment, and in either case the bills of lading must be sent through us. For your reimbursement you are required to draw, or to authorize us to draw, at sight on Messrs. Page, Newell & Co., Boston, simultaneously with the transmission of the bills of lading at the

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time of shipment; and to enable you to comply with this condition, it is distinctly understood that prior to your parting with the bills of lading you are to be advised of the value of the goods, and of the exact amount to be drawn against them; and further, that the drafts are to be drawn and dated at the time of shipment: and unless all these conditions be complied with you will not consider yourself bound to accept. The marine insurance to be effected satisfactorily to you. This credit becomes void if not used on or before the 30th June, 1880. This credit is subject to revocation by you to the extent it shall not have been acted upon when notice of revocation is recived by the user.

"Yours respectfully,

"p. p. BROWN BROTHERS & CO.
"GEO. E. BULLARD."

Brown, Shepley & Co., and Brown Brothers & Co., were the same firms, the former names being used in London, and the latter in Boston.

Accompanying the above letter of credit was the following letter addressed by the plaintiffs to Messrs. Brown, Shepley & Co.:

"BOSTON, February 2nd, 1880.

"GENTLEMEN,—

"Please accept drafts of Mr. John Proctor, or his agent, against a purchase 2,000 tons Ebbwvale steel rails, at the price of £8 18s. 9d. stg. per ton, cost, insurance, freight to New York, cash against invoices B. of L. and policies of insurance, shipments during spring of this year. Bills to be drawn at sight.

"Your obed't servants,

"PAGE, NEWELL & CO.

At the foot of this letter was the following from the defendant:

"MESSRS. BROWN, SHEPLEY & Co.,

"London.

"GENTLEMEN,—

"I hereby appoint Messrs. Stephens & Reynolds, of No. 3 Clement's Lane, Lombard Street, London, my agents to make drafts upon you under the within letter of credit.

"Your obed't servant,

"JOHN PROCTOR."

In the month of December, 1879, the defendant had

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purchased from Messrs. Stephens & Reynolds 2,000 tons steel rails, the purchase whereof was confirmed by them by letter of the 1st January, 1880.

The rails so purchased, according to the evidence of Mr. Reynolds taken under commission, and of the defendant, were of what is known as the Reynolds or Hamilton and North-Western section—section being, as appeared from the evidence and statement of counsel on both sides, the shape and size of the rail as indicated by the end view. And according to the defendant's contention these were the rails he agreed to sell to the plaintiffs. This section and a section known as the "Sandberg" appeared on the evidence to be properly described as ordinary sections. The difference between the Sandberg and Hamilton and North-Western is, that the latter is three inches and seven-eighths of an inch in width at the base, while the former is four inches. They are both four inches in height, and each weighs 56lbs. to the yard, but the drillings for the fish plates are different. There would appear from Mr. Reynolds's evidence to be several different sections of Sandberg, but only two where the weight is 56lbs. to the yard, one for an iron rail 4x4¼ inches.

The difficulty between the parties arose out of the existence of different sections, and the claim by each that if the contract was not to be taken as having been made in respect of the 2,000 tons bought by the defendant from Stephens & Reynolds, the option was in him to name the section.

The first indication of a misunderstanding existing occurred by the plaintiffs on the 16th February, 1880, writing to the defendant as follows :

"We wish you to have the two thousand tons steel rails which we have purchased of you made fifty-six pounds to the yard, "Sandberg section,' with the drillings and notchings as is customary. We understand tha all rails made to the Sandberg section are so drilled and notched that a regular standard fish plate and bolts will be right for them. If we are not correct in this matter, please enlighten us. The length of the rails we understand to be 30 feet each, with the usual percentage of short ones. Whenever you can inform us if the destination can be changed to Montreal, please do so."

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To this the defendant on the 18th February replied:

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"The rails you purchased from me were to be made to the Hamilton and North Western Railway section, which is a first-class one, nearly resembling the Sandberg, and is well known both in Canada and the States. They will be 56lbs. to the yard. I am afraid it will be too late to secure the alterations you wish as to section, but I will write to-day on the subject, and if the rolling has not already commenced will endeavour to meet your views, although I consider the Hamilton and North-Western section and specification the best. The drilling and notching are of course uniform in the Sandberg as well as in other sections, and the fishes have to be specified accordingly so as to suit the particular section used. Should you wish to have fish plates for the rails, I can ascertain at what price they can be furnished and shipped at the same time."

The plaintiffs made no reply to this till the 25th February, when they telegraphed:

"Our buyers insist upon Sandberg section. Please cable this at our expense."

The defendant, on the same day, answered:

"I have received your telegram saying that yo ir buyers insist upon the Sandberg section, &c. In reply I beg to say that Messrs. Cox & Green were fully aware that the rails were to be made to the Hamilton and North-Western section and specification, and that I therefore cannot assume any responsibility in the matter. As soon, however, as I knew your wishes in regard to it, I wrote to England requesting that if it were possible the change might be made to the Sandberg section, and my letter will, no doubt, be to hand in a few days, so that it seems scarcely worth while to cable on the subject. still if you particularly desire it I will do so, on hearing from you again to that effect."

On the 26th February, plaintiffs wrote:

"We find that the road which is to have the rails purchased of you has fixed upon Sandberg's section, 56lbs., and are using that section, and consequently require that these 2,000 tons shall conform. We therefore wired yesterday to you, asking you to cable to that effect to England, at our expense, which we trust you have done, and hoping it will result favourably."

When this was written, defendant's letter of the 25th apparently had not been received, and on the 27th February, the plaintiffs telegraphed to defendant:

"Please send us Hamilton and North-Western section."

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On the 1st March, defendant replied by letter:

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"I have received your letter of 26th ult. and your telegram of 27th. In compliance with the request contained in the latter, I enclose you herewith tracings of the Hamilton and North-Western section. When you have made a copy of such portions as you require, be good enough to return it, as it is the only one I have. You will perceive that it very closely resembles the Sandberg section. In Canada we think it superior to that. My letter to England respecting the change of section is due about this date, so that I hope it will be in time to secure the attention you wish."

On the 8th March, plaintiffs wrote:

"Yours of the 1st came duly to hand, and contents noted. We are obliged by the section of Hamilton and North-Western. Same is now enclosed herewith. We hope soon to hear in relation to the change in section which we requested."

On the 23rd March, they wrote enquiring whether defendant had "ascertained in regard to the change of section."

To which defendant replied, 25th March, that his agents had acknowledged receipt of his letter, and were doing their best to comply with the plaintiffs' request, and he would let them know the result in the course of a few days.

On the 9th April, the plaintiffs telegraphed to defendant:

"When will rails be shipped, and to which port, and are they Sandberg section?"

On the 10th April, defendant telegraphed, in reply:

"Port New York:—Have cabled for particulars; will write."

On the 12th April, he wrote:

"Referring to my letter of 25th ult., I regret to have to inform you that my agents in England have at length advised me that they have not been able to secure an alteration in the section of the rails. * * * Since replying to your telegram of Saturday I have been advised that your rails were loading, so I presume they are now afloat."

On the 15th April, plaintiffs telegraphed:

"We understand the rails are insured by you; are we correct?"

To which, on same day, the defendant replied:

"You are quite correct. Price includes cost of freight and insurance."

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On 26th April, plaintiffs telegraphed:

"Can same fastenings be used with your section as with Sandberg; are they punched alike? Answer.

Defendants' clerk telegraphed:

"Mr. Proctor, in New York, will answer to-morrow."

And on 28th April, defendant replied:

"Not sure about punching; will write tomorrow."

On the 29th April, plaintiffs telegraphed:

"Must have rails Sandberg section, according to contract of January fourteenth last. If you have used our credit, and shipped anything different we shall hold you responsible in damages."

To this defendant replied, 1st May:

"When I telegraphed to you on 28th ult., I expected that the engineer of our road would be here, so that I could get from him the information you wished, and write to you on the following day. I was not able however to obtain the facts till yesterday. I then learned that the fastenings and punchings on the different roads varied very much, being determined by the respective engineers, so that it would be impossible to say how far those adopted by the Hamilton and North-Western would suit the particular road you have in view, and the difficulty would be increased by the fact of there being two Sandberg sections. But I sent you, on 1st March, at your request, tracings of our section, and on reference to your copy of which you will find all the information you desire. Your telegram of the 29th ult. greatly surprised me. I enclose copy of letter of contract af 14th of January, from which you will perceive that so far from Sandberg being stipulated for, as you intimate, there is in fact no mention of section at all. All the rails, however, a considerable quantity, sold by me this season to different parties through the same agents, Messrs. Cox & Green, were of the Hamilton and North-Western section. Accordingly, when on 16th February you expressed a wish, *for the first time*, being nearly five weeks after all arrangements had been completed, that your lot should be changed to the Sandberg section, I replied on 18th idem, that I was afraid it would be too late to make the alteration, but that 'I would write on the subject; and endeavour to meet your views.' Again, on the 25th February, in answer to your telegram of that date, I informed you that I could not assume any responsibility in the matter, but that I had written to England requesting that if it were possible the change might be made. In order to comply with your wishes in this respect, as far as could be, I have put myself to considerable trouble, and incurred a good deal of expense. I can only regret that after all, as advised in my letter of the 12th inst., my efforts have not only not been successful, but that they do not seem to have been appreciated."

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No reply was made to this letter.

The letter of the 25th February, sent by defendants to Stephens and Reynolds, was as follows:

"Referring to my letter of 18th inst., I should be very glad if the alteration there mentioned could be made in the case of the 2,000 lot as well as the others. The parties are all good, and it will be to our advantage to accommodate them, as it will no doubt lead to further transactions."

The defendant succeeded in getting a change made in a quantity he had sold to another party, by payment of a shilling a ton extra. He did not advise the plaintiffs of this, and give them the option of paying the additional shilling per ton, but advised as above, the change could not be made.

From the plaintiffs' particulars of claim the rails appeared to have been shipped by four different vessels, on the following dates: ex Stambo, 22nd April, 1880; ex Vale, 26th April; ex Electra, 29th April; ex North Britain, 7th May, 1880.

On the 4th June, 1880, Messrs. Cameron & Applebe wrote the defendant:

"We are instructed by Messrs. Page Newell & Co., of Boston, to notify you that the steel rails which have arrived in New York for delivery to them under their letter to you and yours to them, dated 14th January, 1880, are not of the section and pattern called for by these letters and the subsequent correspondence, and that they therefore decline to accept the rails, and look to you for re-payment of the amount drawn by you from Brown, Shepley & Co., against the bills of lading of these rails under our clients' credit from that house. We now offer to assign to you, or procure Brown, Shepley & Co. to assign, the bills of lading of these rails, on re-payment of the amount drawn against them, and in default of your forthwith doing so the rails will be held and disposed of at your risk and expense for re-payment of the amount drawn against them, looking to you for the deficiency and all loss and damage our clients may sustain."

And on the 10th June, they wrote again as follows:

"We beg to notify you that the steel rails arrived in New York by ships *Electra*, *Stambo*, and *Vale*, for which you used credit number G. forty-four hundred and four, of Brown, Shepley & Co., furnished by us, are being stored under general order issued by collector at request of masters. We decline to receive these rails in fulfilment of contract of

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January 14th, 1880, not being in accordance with terms, nor with your drawing and specification furnished. We demand immediate re-payment of the full amount of drafts under said credit, failing in which within three days we shall, to protect our lien, sell the rails on your account and hold you for whatever difference there may be between amount received and amount of credit misapplied by you, with interest and expenses.

"Yours truly,

"PAGE, NEWELL & CO.,

"By CAMERON & APPLEBE, their Attorneys."

The defendant paid no attention to these notices, and on the 30th June, 1880, the rails were sold to the Vulcan Steel Co. of St. Louis, Missouri, at $60.50 per ton, realizing $120,986.37. The sale was made by private contract through the agency of Messrs. Childs & Oliver, brokers, New York. The duties paid on the rails amounted to $55,993.31, and the brokerage at one per cent. came to $1,209.86, netting $63,783.22.

The plaintiffs claimed as damages the difference between this sum and the agreed price of the rails at £8. 18s. 9d. sterling per ton, together with bank commission in connection with the letter of credit and payment of drafts &c., expenses of warehousing the rails, custom charges, expenses to Toronto and Montreal with the view of obtaining a settlement, and expenses to England to purchase other rails to fill a contract made by the plaintiffs with other parties.

Previous to entering into the contract, the plaintiffs had purchased through Messrs. Cox & Green 4,000 tons of rails under a written offer containing the following provision:

"Subject to the privilege of our naming inspector and to furnish the requisite section."

The proposal to buy also contained this further offer:

"We will accept another two thousand tons of these rails at the same price and conditions, for shipment next September.' "

This offer was made on the 7th January, 1880, signed by the plaintiffs, and was addressed to Messrs. Cox & Green.

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At the bottom of the letter was written by Mr. Hugel, the following:

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"Referring to the above, acting for and authorized by Messrs. Page, Newell & Co., Boston, I hereby advance above offer to eight pounds seventeen shillings and sixpence. Montreal, 7th January, 1880.—A. HUGEL. Moreover, since I understand Col. D. Tisdale, the vendor, has since accepted the other offer, and I ratify the purchase of Page, Newell & Co.—A. HUGEL."

The admissibility of this offer in evidence was objected to, as the defendant was not in any way connected therewith. The plaintiffs contended that Cox & Green had notice of it, and were negotiating the sale on the strength of the offer to take the additional 2,000 tons on the same terms as the 4,000. Without deciding the question, the learned Judge admitted the evidence subject to the objection.

There was other correspondence between the parties in reference to a change of the port of delivery from New York to Montreal, but it did not appear to have any important bearing one way or the other, and therefore no more special reference is made to it.

The learned Judge reserved his decision and subsequently delivered the following judgment:

CAMERON, J.—The main questions presented by the case would seem to be two; first, divided into subordinate questions: what is the legal effect of the contract *per se?* was it performed by the defendant by the delivery of the quantity of rails agreed upon of the Hamilton and North-Western Section; or, had the plaintiffs a right to declare the section they required, such declared section being an ordinary and not an unusual section, and was the defendant bound to furnish rails of that section? Or, secondly, if the contract *per se* did not give the plaintiffs the right of declaring or naming the section, and require the defendant in performance of it to supply rails of the section named, was there custom or usage established by the evidence in the trade that gives such effect to the contract?

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Upon the first question, I am of opinion the contract *per se* does not give to the plaintiffs a right to name the section, and that it was well performed by the defendants delivery of the agreed quantity of rails of the Hamilton and North-Western or Reynolds section—by which latter name it was first known in England.

The evidence clearly establishes that there are many sections of rails known as ordinary section. That where the weight of rail is the same, one rail may be used on any railway as well as another. The only inconvenience resulting from the use of a rail of a section different from that in use at the time on any railway is that arising from the punchings and drillings for the fish-plates being made to suit fish-plates made for the particular rail, fish-plates corresponding to the new rail must be obtained.

The case of *Smith* v. *Jeffryes*, 15 M. & W. 561, seems to be a conclusive authority upon this point, The head note of that case is: "The defendant, by a written contract, agreed to sell the plaintiff sixty tons of "Ware potatoes," at £5 a ton. It appeared in evidence that in the neighbourhood three qualities of potatoes were known, "Wares, Middlings, and Chats," Wares being the largest and best. Held, that evidence was not admissible to shew that the plaintiff had in fact contracted for the sale to him of a particular *kind* of Ware potatoes, viz., "Regent's Wares," while those offered to him by the defendant were of an inferior kind, viz., Kidney Wares."

To the same effect is *Harnor* v. *Groves*, 15 C. B. 667. The head note of this case is: "In an action for a breach of warranty on a sale of goods upon a written contract, parol evidence is not admissible to shew that the seller's agent at the time of the sale represented the goods to be of a particular quality." The evidence shewed that one Howard, an agent of the defendant, represented certain flour, which he offered to sell to the plaintiff, was as good as some he had recently sold to one Mackness, when it was in fact a different and much inferior flour; but it answered the descrip-

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tion in the contract, which was made the same evening in writing, and signed by the defendant. This contract was as follows: "Sold Mr. W. Harnor, per Mr. Howard, twenty-five sacks Whites X. S. at 68s. per sack. J. T. Groves." During the argument of the case, Maule, J., remarked, p. 671: "This was not a contract for the sale of a specific article. If the flour delivered answered the description in the contract-note, the plaintiff cannot complain."

In giving judgment, Jervis, C. J., at p. 673, said: "The contract here is the note in writing; for, if the plaintiff had intended to say that the note did not truly represent the real bargain, inasmuch as it omitted the warranty that the flour should be equal in quality to that sold to Mackness, he should immediately have returned the note. Instead of doing so, he takes it without that warranty, and so adopts the contract as a contract made without the qualification. The defendant, therefore, has contracted simply to deliver twenty-five sacks X. S. whites, and he has delivered flour of that description.

I do not think later decisions respecting the admissibility of parol evidence to affect written agreements go so far as to hold it competent for a party to such written agreement to add a term to it such as contended for in this case; that is to say, so to modify it, by adding after the words, "steel rails," the words, "of such section or ordinary section as I shall name." Steel rails, by that name, are a marketable commodity; potatoes and flour are marketable commodities; and the only specification of kind of rail provided for by the contract was rails of fifty-six pounds to the yard, Ebbwvale or Moss Bay makes; and unless there is an established custom in the trade that where the contract contains no more than this, the buyer has the right to name the section, a delivery of steel rails of that weight to the yard, made by these makers, would be a performance of the contract beyond reasonable question, upon the authorities cited, and I do not think the more recent authorities are in conflict with them.

They are reviewed in *La Roche* v. *O'Hagan*, 1 O. R. 300,

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308, by the learned Chief Justice of the Queen's Bench, on the point as to the admissibility of parol evidence to vary a written contract.

The case of *Mason* v. *Scott*, in appeal, 22 Gr. 590, is clearly against the addition of such a term to the contract, even upon clear oral evidence to shew that a verbal agreement existed to that effect.

In this case there is no ground for the contention that there was any such verbal agreement. There is no evidence that it was spoken of between the parties. It rests wholly upon the fact that there was such a stipulation in the offer of the plaintiffs to Messrs. Cox & Green, in making the purchase from Col. Tisdale of the 4,000 tons. It does not appear that the defendant was aware of this, and he cannot be affected by Messrs. Cox & Green's knowledge in a matter in which he had no concern. They were, I think, up to the time of signing the bought and sold notes, the agents of the plaintiffs rather than of the defendant. It was on the plaintiffs' behalf they applied to the defendant to know if he had rails to sell. They became the defendant's agents to bind him by the sold note, but not by any previous knowledge of theirs; and whatever the previous contract may have been as a matter of fact, apart from any legal question, the terms of that contract were not made part of the present, which was reduced to writing not only by the agents, Cox & Green, but by the principals themselves.

The most favourable position the plaintiffs have a right to claim is, that their confirmatory note of the contract is to govern. It qualifies the broker's note by the addition of the term "ordinary section." The broker's sold note describes the subject of sale, as 2,000 tons steel rails, 56 lbs. per yard, omitting all reference to the makers, while the defendant's note of confirmation does not mention either weight or maker. The plaintiffs describe the rails as *English* steel rails, 56 lbs. to the yard, ordinary sections and specifications, Ebbwvale or Moss Bay makes. By the payment of the price, the sale having become valid within

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the Statute of Frauds, I think the plaintiffs may claim the benefit of what is stated in their confirmatory note, though this may not be free from doubt.

On the contract, then, unaided by custom, the defendant is entitled to judgment.

This brings up the second question: Does the evidence establish a custom entitling the plaintiffs to name on this contract the particular section of rail to fulfil it?

In my judgmennt, it fails to do so.

There is no doubt that the buyer usually names the section, but it is done as a rule in the contract, and though there is evidence by brokers in Philadelphia and New York of such custom, and by Mr. Reynolds that he would think the right to name the section rested with the buyer, it is clear from the evidence adduced by the defendant's witnesses, that it is not known as a rule of universal application.

To me it seems the custom is to specify this option in the contract, rather than that the custom exists to entitle the buyer to it when the contract is silent on the subject.

I presume there can be no doubt that where a well established custom or usage of trade is well known to exist, all contracts in relation to such trade, which do not in terms exclude such usage or custom, will be taken to be made in reference thereto: *Hutton* v. *Warren*, 1 M. & W. 466; *Syers* v. *Jonas*, 2 Ex. 111.

The contract in the present case was made in Montreal, and it is the custom of this country that must prevail, not that of the city of New York, or the city of London.

The evidence of the custom contended for as exising in Montreal, I think fails. Mr. Fairman would not say that it existed, nor does it appear to be established by any of the witnesses as a matter of certainty.

In *Torcher* v. *Linger*, 21 Ch. D. 20, at p. 34, Jessel M. R., while upholding the custom there in question, used the following language as to what is requisite in establishing a custom: "An agricultural custom need not have subsisted from time immemorial, but it must have subsisted

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for a reasonable length of time, and it must be adequately proved. Again, as regards the proof. Those who have had to deal with evidence upon these subjects know that you very seldom get even two witnesses to give exactly the same account of an agricultural custom, unless it is of the simplest kind. The custom therefore must be collected not from what the witnesses say they think the custom is, but from what was publicly done throughout the district."

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In applying this kind of test to the evidence of custom presented in this case, I fail to find from the way in which the business in the railway rail trade has been transacted that there is any custom which gives to the buyer, in a case like the present, a right to name the kind of section necessary to fill a contract which is silent as to that, but otherwise defines the character of the rail.

I shall therefore find against the plaintiffs on the whole case.

It is to be observed that by the declaration it is alleged the defendant agreed to deliver rails of such length and weight as the plaintiff should thereafter declare. The evidence does not shew that there is an established custom that rails are to be of thirty feet in length; for at the time this contract was made the rails of the Hamilton and North-Western Railway were made twenty-four feet long, and have since been increased. Technically, then, if plaintiffs had maintained the alleged custom as to the right of naming the section, not having shewn one as to the length of rail, they would, under the practice before the Ontario Judicature Act, on account of the variance, have failed to support their declaration, and must have been nonsuited.

If the plaintiffs were entitled to succeed an important question would arise as to the legal measure of damages applicable to this case. I think by the endorsement or delivery of the bills of lading to Messrs. Brown, Shepley & Co. in London, and the subsequent dealing with the rails in New York by their sale to the Vulcan Steel Co., the plaintiffs are not in a position to claim back the purchase-money paid, but must be left, at best, to their right to

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recover the difference in the value between the rails delivered and rails of the Sandberg section. The evidence does not shew that there was any difference in the value between those rails. Depreciation in value was not on account of the kind of rail, but by reason of a fall in the market of all kinds of rail. The plaintiffs purchased 1,500 tons of the Sandberg section to fulfil the contract they had entered into with Mr. McMillan, at £6 5s. a ton, and thus if they had not paid the agreed price, and defendant had failed to supply any rails, they would have been gainers by the defendant's breach of contract.

The case of *Harnor* v. *Groves*, 15 C. B. 657, already referred to on another point, is a clear authority that after the sale of the rails by them or their agents, the plaintiffs cannot recover the price paid under the common counts, but must rely on a breach of the special contract, which, in my opinion, they have failed to establish.

See also, as confirmatory of this view, *Grimoldby* v. *Wills*, L. R. 10 C. P. 391.

The case also of *Johnson* v. *Lancashire and Yorkshire R. W. Co.*, 3 C. P. D. 499, may be referred to as shewing the right of the plaintiffs in this case, had the rails been converted by a stranger.

I have only to add, that I do not think, under the circumstances the principles of law which govern when the contracting parties minds are not *ad idem*, have any application to the present case.

At the Michaelmas Sittings, *Bethune*, Q. C., moved, on notice, to set aside the judgment entered for the defendant, and for a new trial, on the ground that the said judgment was contrary to law and evidence.

During the same sittings, November 23, 1884, *Bethune*, Q. C., and *McPhillips*, supported the motion.

Robinson, Q. C., and *MCarthy*, Q. C., contra.

The arguments and cases cited sufficiently appear from the judgment of the learned Judge at the trial, and of this Court.

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February 9, 1884. GALT, J.—The evidence in this case is very voluminous.

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The plaintiffs and defendant are not manufacturers. They are dealers in railway supplies. This must be borne in mind. The facts are very simple, so far as the original agreement is concerned. The plaintiffs had purchased a quantity of rails, through certain brokers in Montreal, Messrs Cox & Green, in the beginning of January, 1880. Their agent, Mr. Hugel, being desirous of obtaining a further quantity of 2,000 tons, a negotiation was entered into between Cox & Green and the defendant and Hugel, which ended in a sale of 2,000 tons, as appears from the following note, addressed by Cox & Green to defendant:

"MONTREAL, 14th Jan'y, 1880.

"We have this day sold, on your account, to Messrs. Page Newell & Co., Boston, Mass., (2,000) two thousand tons steel rails, (56 lbs. p. yd.,) for spring shipment, delivery either at Montreal or New York, at the price of (£8 18. 9d.) eight pounds eighteen shillings and nine pence sterling per ton. Payment to be made in London, in cash, against documents. Credit to be opened with approved bankers in favour of your agent in London, to be named on or before the 20th instant, and these parties, Messrs. Page, Newell & Co., are to declare whether the delivery is to be at Montreal or New York by that date."

This sale was confirmed by defendant, who was then in Montreal, on the same day. As the letter of confirmation is a repetition of the sale note, it is unnecessary to set it out.

Hugel and Cox went that same evening to New York, and in that city the following note was written by plaintiff to Cox & Green. It is dated Montreal, January 14th, although written in New York: "We now beg to confirm the purchase from John Proctor, Esq., Hamilton, of two thousand tons of English steel rails for spring shipment, delivery either at Montreal or New York, at the price of (£8 18s. 9d.,) eight pounds eighteen shillings and nine pence per ton; payment to be made in London, in cash, against documents; credit to be opened with approved

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bankers, in favour of seller's agent in London, (to be named) on or before the 20th instant. We are to declare whether the delivery is to be at Montreal or New York by that date. The makes of the above rails to be either Ebbwvale or Moss Bay."

Across the face of this letter is written: "The rails to be 56lbs., ordinary section and specification."

The foregoing letters contain the agreement between the parties.

The letter of confirmation by the plaintiffs was not communicated to the defendant until after this suit was commenced; but as the rails tendered by defendant were of an ordinary section and specification, weighing 56 lbs. to the yard, and were made at Ebbwvale, it appears to me nothing turns on the added terms.

It was proved that the defendant had, in the month of December, 1879, purchased from Messrs. Stephens & Reynolds, merchants and brokers, *not* manufacturers, London, England, a quantity of 2,000 tons of steel rails, to be made by the Ebbwvale company, of a section known as "The Hamilton and North-Western," which was proved to be an "ordinary section," and it was these rails which he intended to sell to the defendant.

After the above agreement had been made on the 14th January, a good deal of correspondence took place between the parties respecting the form of the letter of credit, and as to destination of the rails, whether they could be shipped to Montreal in place of New York; but as it has no bearing on the question I am now considering, it need not be detailed.

On the 16th February, the plaintiffs wrote to the defendant as follows: "We wish you to have the two thousand tons steel rails, which we have purchased from you, made fifty-six pounds to the yard, Sandberg section," &c., &c. The length of the rail we understand are to be 30 feet each, with the usual per centage of short ones," &c.

This was the first intimation received by defendant as to the section required by plaintiffs.

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He replied on 18th February: "The rails you have purchased from me were to be made to the Hamilton and North-Western section, which is a first-class one, nearly resembling the Sandberg, and is well known both in Canada and the States. They will be 56 lbs. to the yard," &c.

On the 25th February, plaintiffs telegraphed: "Our buyers insist upon Sandberg section. Please cable this at our expense." This defendant did not do, having previously written to that effect.

On 27th, plaintiffs requested defendant to send them Hamilton and North-Western section, which he did on 1st March.

On 8th March, plaintiff wrote: "We hope soon to hear in relation to the change in section which we requested." This was repeated in a letter of 23rd March.

On 25th March, defendant wrote that his agent was doing his best to get the change made.

On 9th April, plaintiffs telegraphed to defendant, "When will rails be shipped, and to which port, and are they Sandberg section?"

The defendants replied, on 10th April: "Port New York. Have cabled for particulars: will write:"

On 12th April, the defendant wrote: "I regret to have to inform you that my agents in England have at length advised me that they have not been able to secure an alteration in the section of the rails," &c. "Since replying to your telegram on Saturday, I have been advised that your rails were loading, so I presume they are now afloat."

On the 15th April, plaintiff telegraphed: "We understand the rails are insured by you; are we correct?"

The same day defendant replied: "You are quite correct. Price included cost, freight, and insurance."

On the 29th April, plaintiff telegraphed: "Must have rails Sandberg section, according to contract of January fourteenth last. If you have used our credit and shipped anything different, we shall hold you responsible in damages."

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To which the defendant replied, on 1st May, setting out a reference to the correspondence, and contending that the contract had no reference to the Sandberg section.

There was no further correspondence.

The rails arrived shortly after at New York: the plaintiffs refused to accept them, and they were subsequently sold; the purchase-money was paid to Brown Bros., who had given the letter of credit; the plaintiffs paid them the balance due. The rails having been sold for considerably less than the cost, this action is brought to recover the balance so paid, and damages.

Before considering the law governing this case, it may be well briefly summarize the position of the parties. The plaintiffs and the defendant are both dealers in railway supplies. Neither of them is a manufacturer. The defendant had purchased 2,000 tons of rails of the Hamilton and North-Western section from a firm in England who were not manufacturers, but had made an arrangement with the Ebbwvale company to manufacture them. The plaintiffs and defendant entered into a contract, on 14th January, to purchase and sell 2,000 tons of rails of an ordinary section and specification, to be made at Ebbwvale or Moss Bay, (I am stating the contract now in the terms of confirmation signed by plaintiffs,) nothing being said as to any particular section. Some weeks after this contract had been made the plaintiffs in the meantime, (but some two weeks after the bargain with the defendant,) having agreed to sell 2,000 tons of rails of the Sandberg section, demand from the defendant that the rails shall be of that section, and as they were not so refused to accept them, the rails having been made and shipped to the port of New York.

The contention of the plaintiffs is, that that they have a right to name the section, according to the usage of trade, and thus to vary the written argreement; and in support thereof a considerable amount of evidence was given. To allow this would be in direct opposition to the case of *Smith* v. *Jeffryes*, 15 M. & W. 561; but I am further of opinion that the evidence, supposing it to be admissible, does not

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support the plaintiffs' case. This was not a purchase of a quantity of rails from a manufacturer, but from a dealer who had purchased them from another party, who had bargained for rails of a known section with the manufacturers. They were, to all intents and purposes, so far as the defendant is concerned, in the same condition as if they had been already made, unless he could induce the party from whom he had bought to change the section. This he endeavoured to do, but was unsuccessful; and all the witnesses agree, (as in fact it could not be otherwise,) that where the rails are already made they must be taken just as they are. It appears to me that the conduct of the plaintiffs, after they knew the section which the defendant contended he had sold, precludes them from asserting a right to reject the rails after they had reached their destination. They had paid for them, and were the owners. The bargain was, "payment was to be made in London, in cash, against documents." The documents had been delivered to the bankers in London, who paid the cash, and the property had passed to the plaintiffs. See *Tregelles* v *Sewell*, 7 H. & N. 574. They never instructed the defendant not to use the letter of credit, nor did they notify him not to ship the rails; on the contrary, after they knew the section which the defendant stated he had sold to them, viz., on the 9th April, they telegraphed: "When will rails be shipped, and to which port, and are they Sandberg section?" To which he replied on the 12th: "I have been advised that your rails were loading, so I presume they are now afloat." On the 15th they enquire whether the rails are insured.

The principle of law on which *Harnor* v. *Groves*, 15 C. B. 667, was decided, has a strong bearing on both branches of this case. There an attempt was made to vary a written contract by parol testimony, which was overruled by the Court; and it was moreover held that as the plaintiff had actually used some of the flour, he could not afterwards rescind the contract.

It is true that in the present case the plaintiffs have not

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actually received any portion of the iron, but they allowed their agents to pay for it and the defendant to ship it after they had been informed by him that the section was the Hamilton and North-Western, and not the Sandberg

Mr. Bethune contended that if the plaintiffs were not to be at liberty to name any "ordinary section," then the writing did not express the real contract, and consequently there was no agreement.

I cannot accede to this proposition.

The plaintiffs themselves, by their own memorandum, stipulated for an ordinary section and specification, without naming any particular section, and the section tendered by the defendant was an ordinary section.

WILSON, C. J., concurred. *(a)*

Motion dismissed, with costs.

(a) This case was argued before Wilson, C. J., and Galt, J., Osler, J., having ceased to be a member of the Court on his appointment as Judge of the Court of Appeal, and the vacancy not having then been then filled.

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[COMMON PLEAS DIVISION]

NELLES V. MALTBY ET AL.

Assignment in trust for creditors—Partnership and separate creditors—Execution of assignment—Omission of goods therefrom—Preference—Voluntary judgment.

Under an assignment by a firm in trust for creditors, the assignee was directed to distribute the proceeds of the property assigned "ratably and proportionably among all the creditors of the assignors in payment and satisfaction as far as possible of their just debts, having due regard to the rights of partnership and private creditors, and distributing the same as between them according to law."

Held, that the assignment was valid, that it provided for the payment, both of the partnership and separate creditors, out of their respective estates appointed for that purpose according to law, the meaning of which is well known.

The assignment was executed by one of the partners for a co-partner under verbal instructions from the co-partner before leaving for England to sign for him, if an assignment became necessary; and also under a cablegram received from him while in England, to the same intent.

Held, that though authority to execute a deed must be by deed, this would not affect goods of which the assignee took actual possession of, namely, the stock-in-trade in the assignee's store; nor to goods warehoused for and held by a bank, where the bank were notified and agreed to hold the surplus, after paying the bank's claim, for the assignee, which was equivalent to taking possession, and which were the only goods in question here.

Held, also, that the omission of some part of the assignors' estate from the assignment or the postponing the making of the assignment until certain favoured creditors had obtained judgment and execution, did not invalidate it.

INTERPLEADER to determine whether goods taken in execution by the sheriff of the county of Middlesex, at the instance of the now defendants, the execution creditors, against Hearn, Macaulay & McNab, the execution debtors, were, on July 16th, 1883, the property of the plaintiff as against the now defendants.

The cause was tried before Patterson, J. A., without a jury, at the London Fall Assizes of 1883.

The plaintiff claimed the property in question under an assignment made on July 11th, 1883, for the benefit of creditors.

The facts, so far as material, were as follows: The Molsons Bank had a warehouse receipt, under which they held the goods of Hearn, Macaulay & McNab, the assignors to the plaintiff and the execution debtors, which were

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in the warehouse of Saunders. The bank's claim upon these goods was about $3,000.

Before the assignment to the plaintiff was made the following creditors of the firm were allowed, as the learned Judge found, to recover judgment for the amount of their respective claims: Mrs. Rothwell, a sister of the partner Hearn, who held a note of the firm for $1,000; Mrs. Hearn, the wife of the partner Hearn; Mrs. Macaulay, the wife of the partner Macaulay; Mrs. Burdick, a connection or relation of Mrs. Macaulay.

In addition to these executions, an adverse judgment at the suit of Wentwood, Joyce & Co. was obtained against the debtors before they made the assignment.

Before the assignment was made the sheriff's bailiff was in possession of the goods of the debtors which they had in their store, and on the day the assignment was made the plaintiff, as assignee of the debtors, put a man in possession of the same goods for him under his assignment.

By arrangement then made between the sheriff and the plaintiff as assignee, the sheriff appointed the plaintiff's man, who had been put in possession, his (the sheriff's) bailiff, so that the one man represented by possession both the sheriff and the assignee.

By a further arrangement made between the plaintiff as assignee and The Molsons Bank, the goods of the debtors held by the bank under the warehouse receipt were advertised along with the sheriff's advertisement of the goods seized by him in the debtors' store, to be sold at the same time as the sheriff sold the goods he had taken under the execution; and both allotments of goods were so sold.

Those sold which were held by warehouse receipt produced, beyond the bank's claim, a sum of	$380 71
And the goods sold under the executions in the debtors' store left a surplus, after payment of the exe-	

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cutions, of	67 17

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Or a surplus altogether of.....	$447 88

Which is the sum now in dispute.

The total sales amounted to.....	$11,450 62
The claims paid out of the same and expenses amounted to	11,002 74
Leaving as a balance.....	$447 88

No part of the goods of the individual partners was sold, and each of them had private personal estate:

Hearn to about the amount of.....	$279 00
Macaulay " "	390 00
And McNab " "	460 00

The case was argued by counsel at the trial, and the learned Judge reserved the case for consideration, and subsequently delivered the following judgment.

October 20, 1883. PATTERSON, J. A.—The plaintiff is assignee for the benefit of creditors of Henry Hearn, Alexander Macaulay, and Charles McNab, who traded under the style of Hearn, Macaulay & McNab, under a deed dated July 11th, 1883.

The defendants are execution creditors of the firm, whose writ of *fi. fa.* was issued and delivered to the sheriff to be executed on July 16th, 1883.

At the date of the assignment the sheriff had already in his hands several executions against the same firm, under which he had seized the stock-in-trade and partnership effects in the store or warehouse of the firm, but not any separate property of the partners.

There were other partnership goods in a warehouse of one Saunders, which were held by the Molsons Bank as security under a warehouse receipt, which I assume (though it was not specifically stated at the trial) to have been given by the warehouseman to the firm and by the firm transferred to the bank.

By an arrangement between the sheriff and the plaintiff

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the same man acted as bailiff for the sheriff and as agent for the plaintiff, in keeping possession of the goods in the firm's warehouse until the sale; and by another arrangement the goods in Saunders's warehouse were sold by the sheriff at the same time as those actually seized by him. His advertisement of sale stated that the goods in Saunders's warehouse were not sold under the executions. Those goods realized $380.71 over and above the debt due to the bank. The total proceeds of the sale were $11,450.62, and the whole of that sum, except $447.88, was absorbed by the executions which were in the sheriff's hands before the assignment. The balance of $447.88 is the subject of the present contest.

The assignment is impeached on several grounds.

One ground is the same which was raised in *Mills* v. *Kerr*, 7 A. R. 769, and in *Badenach* v. *Slater*, which I believe is not yet reported. *(a)* It is shewn that each of the three partners had separate property and separate creditors, and I understand from the evidence of McNab that at least one of the partners, viz., Macaulay, had real estate.

The assignment would come directly within the authority of *Mills* v. *Kerr*, and would therefore have to be held invalid under R. S. O. ch. 118, sec. 2, were it not that some words have been added to the form in which the trust was declared in that case. The trust in this case, as in that, is to distribute the proceeds of the property assigned rateably and proportionably, and without preference or priority, among all the creditors of the assignors, in payment and satisfaction, as far as possible, of their just debts; and then this is added, "having due regard to the rights of partnership creditors and private creditors, and distributing the same as between them according to law."

This additional direction is relied on as being equivalent to the specific direction in *Badenach* v. *Slater*; to which the defendants answer that the trusts should be set out on the face of the instrument, because there is no general rule of law which can be resorted to as fixing with certainty the duty of the trustee under this deed.

(a) Now reported, 8 A. R. 402; since argued in the Supreme Court.

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I feel a great deal of doubt of the propriety of treating this declaration as having the effect contended for by the plaintiff. If it should happen that the partnership effects satisfied the partnership debts, I do not clearly see that this deed would not unite all the separate estates into one fund for distribution *pari passu* among all the separate creditors. I think we should have to add to the deed if we read it as declaring that the separate creditors of A. should not share in the separate estate of B. until all B.'s separate creditors were paid in full.

Another objection to the assignment is, that the relation of trustee and *cestui que trust* was not created between the plaintiff and any creditor before the issue of the defendants execution.

The fact is, that Mr. Gibbons, a solicitor who had instructions from clients in England to collect an amount from the firm, assented to the deed on behalf of his clients, which was the only assent given. There is evidence, given by one of the firm, that Mr. Gibbons's clients were creditors.

I am inclined to think the assent sufficient. The principal ground on which that is disputed is the alleged want of authority in the solicitor, whose retainer was merely to collect the debt: and it is argued that the clients are not bound by his assent, but may repudiate it.

There would be great force in this objection if the solicitor had assumed to release any part of the debt. He has not done so. He has merely intimated to the trustee and to the assignors that on behalf of his clients he will resort to the estate in the hands of the trustee on the same terms as the other *cestuis que trustent* under the deed.

I do not doubt that a ratification by the clients would, as we held in *Howell* v. *McFarland*, 2 A. R. 31, relate back to the time of the assent given by the solicitor. There has been no ratification proved; but I do not see on what ground the assignors or the trustee could, after what was done, regard the deed as revocable, which I believe is the test. The cases of *Burrows* v. *Yates*, 8 C. P. 121, and *Goodeve* v. *Manners*, 5 Gr. 114, to which I was referred, I think support the plaintiff on this point.

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A third objection—the assignment not having been filed under the Chattel Mortgage Act—is that there was no change of possession of those goods which were in Saunders's warehouse. The goods in the warehouse of the firm were taken actual possession of by the assignee in conjunction with the sheriff.

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I do not think there is anything in this objection. The goods in Saunders's warehouse were pledged to the bank, and by the transfer of the warehouse receipt the property in them had passed to the bank, and the warehouseman held them for the bank, subject to be redeemed.

The fourth objection touches the validity of the assignment under R. S. O. ch. 118, sec. 2.

It was proved, though perhaps not so fully as it would have been if the same facts had not appeared in a case tried just before this one, and the fact was, that friends of the three partners, Hearn, Macaulay, and MacNab, were designedly allowed by the partners to recover judgments against the firm, before the assignment was made, with the intent to enable them to obtain payment in full. One of these preferred creditors was Mrs. Rothwell, a sister of Hearn. She had made a note for $1,000, at three months, on 28th February, 1883, for the accommodation of the firm, and had taken a note of the firm for $1,000 on demand. The three months' note had been discounted for the benefit of the firm, and had been renewed, and the renewal note was current when the partners decided to make the assignment. Mrs. Rothwell was at that time out of the country, but she had left the demand note with one of the firm, who gave it to a solicitor to sue, and judgment was obtained against the firm by default. Some of these details are from the evidence in the former suit, in which the present defendants attacked Mrs. Rothwell's judgment as fraudulent, but unsuccessfully, because, not being obtained by cognovit or warrant of attorney, it was not within the first section of R. S. O. ch. 118, and the jury found that there was no actual fraud. The essential facts, however, appear in the evidence given in the present case, particularly that of Macaulay.

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The other judgments were recovered by Mrs. Hearn, wife of one partner, Mrs. Macaulay, wife of another and Mrs. Burdick, who, I believe, is Mrs. Macaulay's mother or step-mother.

There is nothing in the evidence to impeach the *bonâ fides* of the debts for which these several judgments were recovered. Each plaintiff was, as far as we are now concerned, and was in reality, as far as the evidence shews, a creditor of the firm, standing on the same footing as other creditors.

I have no doubt of the fact that the proceedings on which the judgments were recovered were taken, in Mrs. Rothwell's case, in view of the impending assignment, and would not at that time have been taken except in anticipation of the assignment, and were taken in privity with the firm, who deferred the making of the assignment for the purpose of allowing the execution to be in the hands of the sheriff before it was made. I have not materials for finding the same facts so specifically with respect to the other judgments; but I believe they stood essentially on the same footing. In fact the delay in making the assignment, which was intended only for the benefit of the creditors I have named, enabled another creditor to get in and to gain an advantage which the debtors had not planned for him.

Mr. Meredith now contends that all these things must be regarded as one transaction, or one dealing with the body of creditors, by which the debtors managed to pay in full the preferred creditors, and to give only an insignificant part of their assets to the others. That that has been the effect of what was done there can be no question. We have to see whether or not it comes within the provisions of the statute.

If the several writs had been executed and the assignment had been merely of what remained after the sheriff had withdrawn, I do not see on what hypothesis the statute could be held to apply. It deals with a transfer of goods, chattels, or effects, and the only goods, chattels, or effects

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which, in the case supposed, would be transferred would be the unsold residue, and those would be designated for the equal benefit of all remaining creditors.

What is here done, however, is to assign all the effects at a time when the property in the whole remained undivested in the assignors and at their disposal, subject only to be followed by the sheriff in order to satisfy the executions, but after the assignors had purposely deferred the making of the assignment to enable those executions, or four out of the five of them, to bind the goods.

I feel very strongly that this conduct has worked the inequality in the distribution of the assets which it was the purpose of the Indigent Debtors' Act to prevent; and that that Act has thus been intentionally evaded; but I do not see my way to hold in this case, any more than in *Maltby* v. *Rothwell*, that the provisions of the Act which forbid active steps on the part of the debtor can be applied to mere acquiescence in the action of the creditor whom it was intended to prefer; and I regret that I cannot give effect to this fourth objection.

There is still another objection. Macaulay did not personally execute the assignment. It was made when he was in England. When he was leaving home he left verbal instructions with his partners to make the assignment in case he should fail, as in fact he did fail, on his way through Montreal, to obtain a stay or suspension of proceedings which were then either commenced or threatened by an English creditor; but it was not to be made until the friendly suits had resulted in judgments. He verbally authorized one of his partners to execute for him, and he repeated his instructions by a telegram sent from England, containing the words "execute assignment," and addressed to "Hermon."

The objection is to the validity of the deed on the part of Macaulay.

I am inclined to think the execution of it may be supported as against Macaulay, and as against this objection, so far as it covers the partnership effects, or, at all events,

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that part of them of which actual delivery was made; but I am not without doubt. The implied agency of one partner to bind the others in matters connected with the carrying on of the partnership business will not support an act the effect of which is to put an end to the business altogether. Authorities for this proposition are quoted in *Cameron* v. *Stevenson*, 12 C. P. 389, which was cited to me. Here it may not not be necessary to rely upon the implication of agency, because Macaulay expressly authorized the assignment. I do not suppose that one partner can bind his co-partner by the execution of an instrument, or by any other act outside of the scope of his agency as partner, unless authorized in some way which would be effectual if they were not partners. His authority must, I apprehend be derived from one source or the other, that is to say, either from the partnership agency, or from express delegation; and in the latter case I am not prepared to say that the existence of the partnership counts for anything. But while the assignment may not, properly speaking, be the deed of Macaulay, there was the actual delivery of the goods in the warehouse of the firm, which was sufficient to pass the property in those goods, and which could well be made by an agent whose authority was given only by word of mouth. My doubt is concerning the other goods which were in Saunders's warehouse, and the equity of redemption in which was a valuable asset. I have some doubts also of the validity of the transfer of Macaulay's interest in the book accounts. They differ from the debt which was in question in *Howell* v. *McFarland*, 2 A. R. 31, in the circumstance that they formed part of the transfer which put an end to the business, and which was therefore outside of the ordinary partnership agency. But part of Macaulay's assets consisted of his separate personal property, of which no delivery was made, and part was real estate.

I do not think any of this separate property passed under the deed of 11th July. The result of this is, that while the intent in making the deed is averred to have been to delay some creditors by removing the property

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beyond the reach of their executions, it cannot be said that, so far at least as Macaulay is concerned, this deed of assignment was made and executed for the purpose of paying all his creditors their just debts, ratably and proportionably.

My opinion of the matter, as touching Macaulay, may be thus repeated: He intended by the assignment to delay some of his creditors; therefore it is *prima facie* bad. It is not saved by the proviso, because part of the property was not assigned for the benefit of the creditors; and because, even if the goods actually delivered passed by the delivery, that would be a transfer not saved by the proviso, which applies only to *deeds of assignment*.

Then, reverting to the first objection which I discussed, the inclination of my opinion being, as I have explained, against the sufficiency of the added clause to take this deed out of the decision in *Mills* v. *Kerr*, I think my proper course is to hold the entire assignment invalid.

I adopt this conclusion with the feeling that the case will bear more discussion, but that the defendants are entitled to the benefit of my opinion, and that the burden of further proceedings ought to fall upon the plaintiff.

If it is proper for me to adjudicate as to the costs of the issue, I give costs to the defendants.

The learned Judge entered his finding as follows: "I find that the goods within mentioned were not, at the time of the delivery of the within mentioned writ to the sheriff, the property of the plaintiff Henry E. Nelles, as against the defendants Maltby and Middleton, as execution creditors; and I adjudge the costs of this issue and trial to the defendants, if it is my duty to adjudicate upon the said costs."

At the Michaelmas sittings, *Gibbons*, for the plaintiff, moved on notice, to set aside the verdict and judgment for the defendant and to enter judgment for the plaintiff, on the grounds that the verdict and judgment are contrary to law and the evidence, and to the weight of evidence.

During the same sittings, December 5, 1883, *Gibbons*,

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supported the motion. The assignment sufficiently provided for the due distribution of the joint and several estates of the partners amongst the respective creditors: and it follows the words of the statute: R. S. O. ch. 118, sec. 2. The assignment says that the distribution is to be according to law; that is, as a Court of Equity would distribute it, namely in due course of administration among the joint and several creditors of the partnership and of the respective partners according to the nature of the estate. The fact of the assignors allowing certain creditors to get judgment before the assignment was executed cannot make the assignment bad. The most that could be urged is, that the judgments so recovered were fraudulent and should be set aside; there is nothing in the statute to prevent a debtor allowing his creditors to get judgment. To hold the assignment bad in such a case would be to defeat the very object of the statute, and to prevent the general body of creditors from getting anything. The assignment was duly executed. The authority given by Macaulay to McNab to execute for him was sufficient; but if it were necessary to do so Macaulay ratified McNab's act on his return. The mere fact of assigning only part of the debtors' property cannot render the assignment invalid. The creditors' rights as to the property not assigned remains subject to the ordinary process of law. The non-registration of the deed of assignment cannot affect the creditors. The neglect to do so was the fault of the assignee, and not of the creditors, and the creditors cannot be held responsible for the neglect of the assignee to do his duty. The second assignment was duly registered, and was so registered before the execution issued. He referred to *McMaster* v. *Garland*, 8 A. R. 1; *Feehan* v. *Bank of Toronto*, 10 C. P. 32; *Maulson* v. *Commercial Bank*, 17 U. C. R. 30; *Foster* v. *Smith*, 13 U. C. R. 243; *Burton* v. *Bellhouse*, 20 U. C. R. 60.

Street, Q.C., contra. As to the form of the assignment, according to *Mills* v. *Kerr*, 32 C. P. 68, 7 A. R. 769, the assignment would be invalid as not providing for the

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separate creditors. In the later case of *Badenach* v. *Slater*, 8 A. R. 402, where the separate creditors were provided for, the assignments were held good. The words relied on here, that the distribution between the partnership and separate creditors was to be "according to law," does not assist the matter. There is no recognized mode provided by law for distribution by an assignee. The only way in which there can be a distribution according to law is, when legal proceedings are taken for the administration of the estate, and this cannot apply to an assignee: *Ex parte Ruffin* 6 Ves. 119; *Burrill* on Assignments, p. 298, 350; *Kirby* v. *Schoonmaker*, 3 Barb. Ch. R. 46. Every deed is *primâ facie* assumed to delay creditors, and the onus is on the person who supports the deed to shew that it comes within the Act. The deed is also bad because it put the whole of the assets into one fund, and provides for the payment of the assignee out of such fund, instead of providing that the expenses of the realization and distribution of the partnership and separate assets shall be chargeable on the particular estate on which they are incurred; and also because it does not provide that the partnership and separate debts shall be payable out of the partnership and separate assets respectively. The fact also of the debtors allowing certain favoured creditors to obtain judgment, whereby the great bulk of the estate was swept away and only a small amount left for the general body of creditors, invalidated the assignment. The deed was never properly executed by the debtors. The mere verbal authority given by Macaulay to his partner to execute for him is not sufficient. The authority to execute a deed must be by a deed, and clearly an assignment to execute a deed would not pass the land. The warehouse goods were never taken possession of by the assignee. He did not take the proper steps to obtain possession. Then all the property was not assigned; the assignment must be of the whole of the estate. The deed should have been registered. The statute requires registration, and it is immaterial whose the neglect is. He referred to *Short*

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v. *Ruttan*, 12 U. C. R. 79; *Burrill* on Assignments, p. 586; *Richardson* v. *Gray*, 29 U. C. R. 360.

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February 9, 1884. WILSON, C. J. — The only two objections taken by the defendant which were supported by the learned Judge at the trial were the first and fifth. The first was, that the words the rights of partnership creditors and private creditors, mentioned in the assignment "having due regard to and distributing the same as between them according to law," did not provide for the due administration of the estate, joint and several, of the respective partners among the joint and several creditors of the partnership, and of the respective partners, as the same should in a due course of administration be applied, but left the separate creditors of the respective partners wholly unprovided for, and therefore the assignment was not a valid conveyance under the R. S. O. ch. 118, sec. 2, because it was not in its terms made "for the purpose of paying and satisfying ratably and proportionably and without preference or priority all the creditors of the debtors their just debts."

The words referred to being part of the deed must be given effect to, if it is possible to do so. The intent of the parties must, if it can, be ascertained, and the instrument be construed accordingly; and such a construction will be put upon the words as will give effect to the intention of the parties, as will support the instrument rather than defeat it.

The three grantors were merchants in partnership. They grant all their joint and separate estate for the payment of "all the creditors of the parties of the first part," having regard, &c.

The grant of the joint and separate estate indicates that the parties intended to provide for creditors upon the joint and separate estate. The words *all their* estate in one part of the grant point to a grant of the joint estate rather to a grant of the separate estates of the grantors being assigned. But these are not the only words to be con-

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sidered, nor do they stand alone: they are part only of an instrument which must be construed as a whole, and they are not of such a nature as to exclude a different interpretation being put upon them by a later part of the instrument, if such later part do shew that what the parties meant by the words "*all their* creditors" was all *their joint and several creditors*. And if such further effect can be given to the instrument without creating any repugnance.

What then is the meaning of these later words, "having due regard," &c.?

They point expressly to there being both partnership and individual creditors who are within the terms of the assignment, and who are to be provided for; and they declare that "having due regard," &c., that is, to the distribution of the joint and several estate the parties have assigned, that estate should be distributed between such joint and several creditors according to law.

That is, in my opinion, a sufficient declaration and provision that the joint and separate estate assigned shall be distributed among the joint and separate creditors of the assignors "according to law."

The words "according to law" must have the natural, proper and plain meaning ascribed to them, which shall support the instrument and not defeat it, and that meaning primarily is, that the partnership creditors shall be paid first in order out of the partnership estate, and that the individual creditors of each of the respective assignors shall be paid first in order out of the estate of the particular debtor of whom he is a creditor: that if the partnership creditors are not paid in full out of the partnership assets, they shall be paid out of the separate estate of all or any of the individual debtors after the separate creditors against the respective individual estates have been satisfied, if there be any residue for that purpose; and in like manner the separate creditors shall be paid any balance due to them, not satisfied by the separate estate of the particular debtor against whom such claim exists, out of

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the partnership assets after the partnership creditors have been paid in full.

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In such a case the separate creditor of any one of the assignors, say for instance Hearn, cannot rank upon the estate of either of the other two assignors, Macaulay or McNab, either in the first place or in case of a deficiency of assets of his own special debtor, or of the partnership estate. And there was no occasion to provide that the separate creditors of one of the partners should not rank upon the separate estate of either of the other two partners. Such a provision was not required, because a claim of that kind would not be "according to law," but absolutely against law.

I am of opinion the assignment does provide for the payment of both partnership and separate creditors of the respective partners out of the respective estates appointed for that purpose according to law; and what that means is well known in insolvency proceedings, in the administration of estates in the public Courts, in the execution of writs by the sheriff, and in every day's proceedings under trust and composition deeds for the payment of creditors; and it was always the rule in the Courts of equity; and these rules now specially apply in all cases by the Judicature Act. I am of opinion that an estate, to be administered "according to law," means where there is a rule of law in such a case, to be administered according to that law.

I am of opinion the first objection found for the defendants should have been found for the plaintiff.

The fifth objection taken against the plaintiff's recovery was, that Macaulay's name was attached to the assignment by his co-partner, McNab, who acted under verbal instructions from Macaulay to sign for him, if an assignment had to be made, while he, Macaulay, was in England, and who acted also under a cablegram sent by Macaulay from England to McNab, in this country, to sign for him.

The learned Judge held that, as to the goods in the store, of which actual possession was taken by the assignee, not only with the assent of Hearn and McNab, who were in this

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country, but with the actual assent also of Macaulay, given by him verbally and by cablegram to McNab, the actual possession, with the assent of all the three partners, passed to the assignee a sufficient title and interest in the goods so taken into possession by him independently of the instrument of assignment. That would entitle the plaintiff to a verdict of $67.17 only, as that was the surplus payable by the sheriff, after the executions he held against these goods had been satisfied. The learned Judge decided, however, that as Macaulay assented to the assignment for the purpose of delaying some of his creditors—giving a preference to some favoured creditors, by delaying his assent to the same for the purpose of enabling them to recover judgments in actions which were not defended, prior to the assignment—the assigment was void.

The objection to the execution of the assignment by McNab for Macaulay being held not to affect the goods actually taken possession of by the assignee, as just stated, the question is, how and to what extent it affected the other property. The learned Judge, after disposing of the goods actually taken possession of by the assignee, in the manner just stated, said: "My doubt is concerning the other goods which were in Saunders' warehouse, and the equity of redemption in which was a valuable asset. I have some doubt also upon the validity of the transfer of McNab's interest in the book accounts, * * * Part of Macaulay's assets consisted of his separate personal property, of which no delivery was made, and part was real estate."

As to the book accounts, Macaulay's separate personal property, and any real estate he had, they either passed by McNab's execution of the assignment for Macaulay, or they did not. If they passed—and I need not consider whether they did or not—the objection in respect of them fails. If they did not pass, I do not understand how or in what way that can affect the title to such property as did pass by it.

A person who makes an assignment is not compelled by

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the statute to transfer all his property. He is not obliged to assign at all.

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If he assign a part of his estate he is doing a wrong to no one, for what he does not assign he leaves subject to the ordinary process of the law. And it makes no difference whether he omits inadvertently, by mistake or forgetfulness, part of his estate, or whether he does so by design; the assignment, so far as it goes, is (if valid in other respects,) valid for what it does assign.

It is of frequent occurrence that some part of the estate, from one cause or another, has not been conveyed, and the omitted property has been taken by an execution creditor but I never heard it argued that because of that omission such a creditor could seize any of the property which had, been conveyed, because the whole assignment was invalid by reason of that omission.

I think these items of property may, therefore, be left out of consideration, and because no claim upon or in respect of them is made in this action. The claim in question in this action arises wholly upon and in respect of the goods which were in the store, and of which actual possession was taken by the assignee, and upon which, after satifying the execution, there was a surplus of $67.17, as before stated The residue of the claim is for $380.71, the surplus, after satisfying the bank lien upon the goods which were held under the warehouse receipt, and which were sold to satisfy that lien.

As to these goods, the assignee did not get the actual possession of them, because they were warehoused for and held by the bank. The debtors had the equity of redemption only in them.

The assignee did, however, on the day of the assignment, or the day after it, notify the bank manager of the assignment having been made, and he agreed with them the property so held by the bank should be advertised for sale, to take place at the same time as the sale of the other property under the executions was made; and that, I should presume, was done for the purpose of satisfying the bank's

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claim and getting the surplus, if any, for the creditors under the assignment.

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I am of opinion the notice so given to the bank of the plaintiff's claim, as assignee, and their co-operation in the sale of the goods so covered by the warehouse receipt, was such a notice to the bank of the assignors' claim, that the bank could have done nothing with that property after such notice to the detriment of the assignee, without being responsible for it. And as it was personal property, and as Macaulay did in fact assent to the firm assigning it, and to its being dealt with just as it was dealt with, the property, in my opinion, transferred to the assignee the title of the firm in and to these goods.

A partner cannot sell the stock of the firm out and out but only in the regular course of business. But he may assent to his co-partner doing so in the name of the firm. If the sale so made is valid, the property will pass. If for any reason, for the want of some formality, or the like, it is not binding upon the one partner, there is no reason why it should not transfer the interest of the other partner.

In this case, if the stock in the store, or which was held by the bank, has not, on account of the necessary formal authority, passed the interest of Macaulay in these goods, the property of the other partners, Hearn and McNab, has certainly passed, because what they have done they intended to do—and, so far as it is material, what they did was done with the assent of Macaulay ; and in any event, their two-thirds interest have been transferred to the plaintiff.

I agree with the learned Judge as to the goods in the store, of which the actual possession was taken by the assignee, that such possession, being with the express assent and parol authority of Macaulay, was sufficient to pass that property to the assignee. And I am of opinion that as all was done by the assignee by notice to the bank of his claim, and by the bank co-operating with him in the sale of the property—which was held by warehouse receipt—which could be done to give the assignee a title equivalent

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to possession, and which co-operation was and could only have been for the purpose of giving to the assignee the surplus, if any, after payment of this bank claim, that a title to that property, with Macaulay's express assent, passed also to the assignee, just as if actual possession of it had been taken by the assignee. It may be admitted that McNab could not bind Macaulay by deed unless his authority so to act was conferred by deed, but that will not affect the goods taken possession of by the assignee, nor the goods, that is, the equity of redemption in the goods in the warehouse, which were claimed by the assignee by the only acts which he could do to acquire possession, and which in respect of these goods were equivalent to possession. So far as confirmation by Macaulay of what had been done under the deed so executed for him, or in respect of the property of the partnership is concerned, there was no express confirmation on his part until after the defendants' rights had supervened, and therefore confirmation cannot be relied upon by the plaintiff to support his title in respect of Macaulay's interest.

The only other matter to be considered is, whether the fact that the assignment was postponed until after the favoured and preferred creditors had recovered their judgments, so as to come in before the creditors not so protected —whether that conduct is chargeable upon all three members of the partnership, or upon Macaulay only—is a reason for holding the assignment invalid as against all or any of the members of the partnership.

If there is a fraud in such a course of dealing, I should say it would be a reason for avoiding the recoveries had by these favoured creditors, rather than a reason for vacating the assignment.

To defeat the assignment for such a cause is to let the wrongful recovery stand, and to annul the assignment which is not fraudulent, and to let these fraudulent judgment creditors seize the goods assigned which their executions may not cover.

If relief were to be given in such a case it would be by

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setting aside the judgments, or staying proceedings upon them, and giving these judgment creditors the option of taking under the assignment.

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The learned Judge did not think the mere act of a designed preference on the part of the firm, by their not defending the actions of the favoured creditors, invalidated the assignment; and it is certain that there is nothing wrong in law in giving a preference to one creditor over another, by payment or otherwise—although it plainly defeats a ratable and proportionable distribution of the debtor's estate among the creditors. But the mode of preference adopted in the cases in question is not forbidden by the statute.

The learned Judge, while of opinion that he could not set aside the assignment on account of such preference under the fourth objection, decided under the fifth objection that the assignment was *primâ facie* void, because Macaulay intended it should delay some of his creditors.

I do not think the assignment can be impeached for that cause.

The case of *Wolverhampton and Staffordshire Banking Co.* v. *Marston*, 7 H. & N. 148, was the converse of this case. There the defendants assigned all their property in trust for the payment of their creditors generally in order to defeat the recovery of a judgment by an adverse creditor; and it was sustained. And in *Arch.* Pr., 12th ed., p. 230, the course of allowing a friendly judgment to be recovered is recommended, in order to secure a more equitable distribution of the assets to be made.

There is no objection at the common law to a debtor preferring one creditor to another.

I am of opinion there is no reason why the plaintiff should not recover at least two-thirds of the sum of $447.48, in respect of Hearn and McNab, who duly executed the assignment; and I think the plaintiff is entitled to recover the full sum of $447.48 in respect of the goods of which that sum is the surplus. And that the motion should be allowed to set aside the verdict and judgment for the

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defendants, and to enter the same for the plaintiff, with the costs of the action and of this motion.

GALT, J.—Concurred. (a)

Motion allowed.

[COMMON PLEAS DIVISION.]

NOTT V. NOTT.

Award—Joint execution of.

Three arbitrators on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them but not signed, and it was understood that nothing further was to be done but have a formal award drawn up and executed. NEXT day the award was drawn up and executed by two of the arbitrators in the presence of each other, but in the absence of the third arbitrator, who a couple of days afterwards executed it in the presence of one of the other arbitrators. In an action on such award:

Held, that the award should have been executed by the three arbitrators together, and that it was invalid.

ACTION on an award.

Pleas, denying award.

The cause was tried before Hagarty, C. J., without a jury, at Lindsay, at the Fall Assizes of 1883, who delivered the following judgment, in which the facts are stated:

HAGARTY, C. J.—The reference was to two named referees, and a third to be chosen by them, or any two of them.

The referees Gordon and Marsh appointed Major.

On the evidence I find that the three referees had several meetings, and at the last meeting they all agreed on their findings, and a minute was made in writing, but not signed, and there was no expressed or apparent differences of opinion amongst the three. Gordon, the referee appointed by defendant, wrote down the terms of their agreement.

They separated late at night. There was to be no further

(a) This case was argued before WILSON, C. J., and GALT, J., OSLER, J., having ceased to be a member of the Court on his appointment as Judge of the Court of Appeal, and the vacancy not having been then filled.

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consultation, and they all understood there was nothing to be done except to have the award formally drawn up and executed.

Next day Marsh called on Gordon and suggested his drawing up the award. He suggested that it should be drawn by Mr. Patterson, and the latter accordingly drew it up, leaving the amount in blank. Marsh took it to Gordon, who filled up the blank, and he and Marsh signed the award in presence of a witness.

About two days after, Major, who had been absent a couple of days from home, signed the award in presence of Gordon.

Gordon, the defendant's referee, swears that he had objected to the amount agreed on by the others, and that he only signed thinking that as the majority could decide, he should, as a matter of course, sign any award they agreed to make.

When they separated, after agreeing to the amount, no further adjournment was made or meeting arranged for signing the award.

I prefer accepting as the true state of facts, that Gordon did not give the others to understand that he did not agree in their finding.

The whole argument of defendant against the award rests on the objection that the referees did not execute it all being together: that it is a judicial act, and their action as judges determining the matter can be and is only evidenced by their execution of the award, and that it must be their united action and judgment.

The question is one of very great importance.

It may at once be conceded that litigants are entitled to the joint consultation and exchange of views of all the referees up to the last moment: that an award executed by one referee, and sent to the other for his consideration or assent, and executed by the latter apart from the first signer, cannot be supported.

The plaintiff's contention here is that the final consultation did take place: that the whole consideration of the question was closed: that all the referees had finally agreed on a named result, and that nothing remained but a merely ministerial act of signing the formal enunciation of that result.

The defendant answers that the only legal result contemplated by the reference was the execution of a written instrument under the hands of the referees or any two of

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them: that that alone, and not the previous verbal agreement, was or could be the judgment of the judges selected by the parties, and that such judgment must be a joint and not a separate act.

The case came before my brother Cameron, and he (as fully warranted by the authorities) refused to enforce the award on motion, and left the plaintiff to proceed by action in which the point could be decided and reviewed in a Court of Error.

The authorities are not in a very satisfactory state.

In 1852 our Court of Queen's Bench, in *Williams* v. *Squair*, 10 U. C. R. 24, upheld an award on motion to set aside, executed on different days and separately by the referees.

The judgment of the Court was delivered by Burns, J. After citing the cases of *Little* v. *Newton*, 2 M. & G. 351; *Stalworth* v. *Inns*, 13 M. & W. 466; *Wright* v. *Graham*, 3 Ex. 131, he says, at p. 31: "In this case we are relieved, we think, from pronouncing an opinion upon a point upon which one Court hesitated, and another Court was rather inclined to take a strong view adverse to the award, when it is shewn to us that in fact the arbitrators did, after they had heard all the evidence and deliberated upon it, make up their minds, and reduced the heads of the award to writing, and all the three arbitrators signed the memorandum. This they did on the 21st May, and the formal award drawn out *in extenso* only embodies the memorandum in legal terms and phraseology. The parties were made aware of the award on the 21st May by copies of the memorandum being delivered to the plaintiff and the defendant respectively. The more formal award was signed, it is true, by the arbitrators at different times and places, but within the time given them by the submission. The difference between this case and those cited is, that in the cited cases it did not appear but that there was or might be an opinion or judgment still to be given upon some of the submitted matters, or that a meeting was to take place for the purpose of signing the award. Here everything was adjudged upon and actually signed by the arbitrators on 21st May, and there was no further exercise of opinion or judgment to take place, nor does it appear that the arbitrators were again to meet * * We think it was competent to have the formal judgment prepared and signed by the different arbitrators, without forcing them to come together again merely for the purpose of signing and sealing the same."

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About a year afterwards *Jones* v. *Reid*, 1 P. R. 247 was before the same learned Judge in Practice Court on motions to enforce and also to set aside the award. The award was signed by two on 31st May, and by the third referee on 1st June.

The learned Judge says, at p. 253: "It appears that what the award should be had been settled and determined upon by all the arbitrators before the award was signed by the two, and the person who witnessed these signatures carried it to the third arbitrator the next morning for his signature." After noticing the general rule as to all signing together, and that if there were the slightest reason to suppose that anything remained to be done beyond the mere signing the award could not be enforced, he proceeds: "The parties are entitled to the judgment of each arbitrator, and that judgment should without doubt be expressed when the arbitrators are altogether; but the reducing of the judgment to writing and the signatures need not be done while they remain together, as the Court had occasion to say in *Williams* v. *Squair*."

I cannot say that a careful perusal of *Williams* v. *Squair* warrants my holding that it supports the reference made to it by Mr. Justice Burns. Regarded in the light of subsequent decisions, *Williams* v. *Squair* seems supportable chiefly on the ground that the arbitrators' memorandum, signed by all of them, was in fact the award, and the formal instrument merely its expression into legal phraseology.

In *Wright* v. *Graham*, 3 Ex. 131, (1849), cited by the Court, the point was not decided, the parties being left to an action.

Stalworth v. *Inns*, 13 M. & W. 466, 469, (1844): *Per curiam*.—We are strongly disposed to think that the signing of an award by joint arbitrators ought, like all other judicial acts, to take place in the presence of each other; but we give no final opinion on the point. * * If an action be brought, the question can be decided on appeal to a Court of Error. Probably, when this strong intimation of opinion of the Court is made known to joint arbitrators they will take care not to make their awards except in the presence of each other."

Parke, B., remarks, at p. 469: "In the case of an award, the instrument is itself the judgment, which surely ought to be completed while the arbitrators are together. *Non constat* that at the last moment one of them may not use arguments which may convince the others."

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Pollock, C. B.: "When a joint judicial act is to be done, it ought to be done by the parties jointly. It is not a joint act, if it be done by one of them at one place and by the other at another. One of the arbitrators, after signing the award, may repent of his act, and wish to alter the award. before the others have signed it."

In *Little* v. *Newton*, 2 M. & G. 351 (1841), also cited, Tindal, C. J., says: "If this objection had rested on no other ground than this, that the two arbitrators who signed the award, after having agreed upon the terms of their award when they last met together, had affixed their respective signatures thereto at different places and different times, we might perhaps have hesitated in holding the award to be void on that objection."

We now turn to the subsequent authorities.

Wade v. *Dowling*, 4 E. & B. 44, was decided in 1854. The two referees called in a third, and conferred together. The third man left without expressing any opinion. Afterwards he executed an award, and sent it by post to one of the first two, with whom he agreed. The other executed it in the country, and returned it to the sender, and it was published. It was of course held to be no award. The authorities are reviewed.

Coleridge, J., says they shew "there is good reason for requiring that the award should be signed *simul et semel*. I agree that hitherto no case has occurred precisely on this point. * * All through the cases it is assumed that the arbitrators are to act together, and that each has jurisdiction to the last. I think less mischief will be done by requiring arbitrators to look accurately to their powers, than by permitting a practice contravening the intention of the parties to the submission."

Erle, J. "If an execution at two different places were held good, we should get to what seems in fact to be made here, an award by one arbitrator conditioned upon the assent of the other. That is not a joint award. I think the possibility of a change of opinion is exemplified by cases which I have known, where a single arbitrator, having made his award, has afterwards taken a different view, and has himself made an affidavit to get his award set aside. That surely may equally well happen when there are two arbitrators, and might be produced by fresh light thrown upon the question atthe last conference."

In the same year *Eads* v. *Williams*, 1 Jur. N. S. 193, 24 L. T. 162, 163, was decided by Lord Cranworth, C., using

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strong language, to the effect that the award should be executed by all together. "It is the duty of two persons to keep the matter open to the last moment, and it is not competent for the one to sign at one time and the other to sign at another." He says that he does not decide the case on this ground, but on other grounds fatal to the award.

In 1856 *Helps* v. *Roblin*, 6 C. P. 52, was decided. The two last cases are cited and relied on, and the award set aside on motion, having been executed at different times, and both signers not together. An attempt was made to fall back on a previous somewhat informal award, signed by two of the referees together. But it was shewn that it had been altered at the instance of the party seeking to uphold the second award.

In *Lord* v. *Lord*, 26 L. J. N. S. Q. B. 34, 35, 5 E. & B. 404, 406, decided in 1855, the submission provided for the referees appointing an umpire by writing under their hands; they signed the appointment, but not together. The Court refused to enforce the award by attachment, on this ground, and left the plaintiff to his action.

The judgment of full Court was delivered by Sir J. Coleridge. He says: "It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who do it; for those who are to be affected by it have a right to the united judgment of all up to the very last moment * * * It appears to to us that what is true of the execution of the award by arbitrators, is equally true of their appointment of an umpire. This is a judicial act of the last importance," &c.

This case is recognized in *Re Beck* v. *Jackson*, 1 C. B. N. S. 695, 700 (1857).

In 1858, *Anning* v. *Hartley*, 27 L. J. N. S. Ex. 145, 3 H. & N. 929. (Am. ed.) On a rule to set aside an award, two arbitrators signed together, the third at another time, apart from them.

Pollock, C. B., says; "No doubt, as an award is a joint judicial act, where there are several arbitrators, that is a fatal objection, and has been held so to be," citing *Lord* v. *Lord*, 26 L. J. N. S. Q. B. 34, 5 E. & B. 404. The Court, however, sent back the award to the arbitrators to correct the error.

I am not aware of any later English case on the point, nor is any one noticed in *Russell* on Awards, 6th ed., 404. (1882)

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Anglin v. *Nickle*, 30 C. P. 72, 86, was a railway arbitration.

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Wilson, C. J., notices the general principle as to the execution being a judicial act up to the last moment, allowing the exercise of opinion, &c. See *Jekyll* v. *Wade*, 8 Gr. 363; *Martin* v. *Kergan*, 2 P. R. 370.

The authority of *Lord* v. *Lord* may be perhaps considered as somewhat weakened by *Re Hopper*, L. R. 2 Q. B. 367 (1867), where it was held by Cockburn, C. J., Blackburn and Lush, J.J., that the arbitrators having previously agreed upon an umpire, the indorsing the appointment on the submission was not a judicial act, and need not be done by the arbitrators at the same time.

The arbitrators each named an umpire, but could not agree on either. They agreed that either of the persons was a fit and proper umpire, and they decided by drawing which of the two should be chosen, and they then agreed on the person thus selected. This was held sufficient. A meeting was fixed for signing the appointment. Only one attended who signed; the other next day.

Cockburn, C. J., says, at p. 376, the case is distinguishable from *Lord* v. *Lord*, as there the arbitrators had never exercised their functions together judicially, in which case he would agree the appointment would be invalid. "Signing the appointment * * is not a judicial act; the judicial act is the agreement as to the appointment of the particular person, * * and the signing is merely the record of that which they have already done in the judicial exercise of their functions."

Blackburn, J., said, at p. 377; "No case has decided that where two arbitrators have exercised their judgment on the selection of an umpire, their not being present together at the mere formal act of afterwards recording the appointment vitiates it, and to uphold this proposition would be to adhere to the letter of the law instead of to the substance."

This case is noticed in *Russell* on Awards, p. 220, and again at p. 240, but without special comment.

From an early date the principle adopted by the English Courts was declared in the United States.

In *Moore* v. *Ewing*, Coxe N. J. 144 (1792), the Court held: "The judges" (arbitrators) "must meet together, they ought to confer, their decision ought to be the result of a joint conference, and should itself be a joint act. If they inquire separately, or decide separately, it is altogether void." The

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referees had agreed on the terms, and adjourned to execute. They never met, but signed separately.

The matter is discussed, and cases cited in *Morse* on Arbitration (1872), p. 151. At p. 153 he notices the doubt expressed in *Little* v. *Newton* as to the necessity of signing together, and adds: "But the later cases * * must be considered as conclusively overruling this doubt."

He cites a case to the contrary effect: *Maynard* v. *Frederick*, 7 Cush. 247 (1851).

The point strongly put in the later English authorities is hardly noticed. I refer to *Russell* on Awards, 124-5 (ed. 1882). See also p. 253: "All should execute at the same time, and in presence of each other."

This review of the authorities creates some difficulty.

The Court, in *Lord* v. *Lord*, 26 L. J. N. S. Q. B. 34. 5 E. & B. 404, declared the appointment of the umpire is "a judicial act," and that "what is true of the execution of the award by arbitrators, is equally true of the appointment of the umpire."

In *Re Hopper*, Cockburn, C. J., and Blackburn, J., say the signing the appointment "is not a judicial act," but they may agree on the umpire together, and afterwards sign his appointment separately, and that the judicial act was their previous agreement to appoint.

If this doctrine can be held equally to apply to the separate execution of the award, after a previous agreement by all together as to its terms, the award before me can be upheld. There is not much direct authority.

As already noticed, in *Little* v. *Newton*, Tindal, C, J., says that they would perhaps hesitate to set aside an award when the referees, after finally agreeing on its terms, signed it separately.

In *Stalworth* v. *Inns*, 13 M. & W. 466, that very high authority, Parke, B., notices the case in 8 East 319, *Battye* v. *Gresley*, where Lord Ellenborough upheld a warrant issued by bankruptcy commissioners, signed by them separately, but after they had together decided on granting. The learned Baron says, at p. 468: "That case seems to have proceeded upon the ground that the signing of the warrant was not itself a judicial act, but rather in the nature of an execution of a judicial act; but in the case of an award, the instrument is in itself the judgment which surely ought to be completed while the arbitrartors are together."

The text-writers seem to consider the later cases as

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clearly requiring a joint execution as imperative, notwithstanding the earlier doubts: *Russell* on Awards, 6th ed., pp. 224-5.

In the present case the objection resolves itself into this: Two of the referees, Marsh and Gordon, signed the award together. Two or three days after Major, the third man comes and executes it in presence of Gordon, but not of Marsh. There was therefore, in one sense, no simultaneous execution by the three.

If the actual execution of the award was a "judicial act," the three judges did not together join in it.

It seems to me very difficult, if we accept the views so clearly expressed by Parke, B., to hold this award to have been validly executed.

The decision in *Jones* v. *Reid*, 1 P.R. 247 of Burns, J., if correct, supports the award. But it strikes me it is hardly in accordance with subsequent authorities, and that it is not fully warranted by the preceding case of *Williams* v. *Squair*, 10 U. C. R. 24, on which he relies.

If an application had been made to refer this award back to be properly executed, I think we could have done so, as was done in *Anning* v. *Hartley*, 27 L. J. N. S. Ex. 145, 3 H. & N. 929, Amer. ed., already noticed. In the present case it may be urged that two referees executed together, first Marsh and Gordon, and on the second occasion Gordon and Major may be said to execute together; and therefore the law is complied with—this is the award of two of the three. If the third named had finally dissented, and required no further notice, and they awarded in his absence, it would be sufficient. But here he assented, and actually executed in presence of one of the other previous signers; and the objection is finally minimized to the point that one of the previous signers was then absent.

I feel most reluctant to hold this award invalid. At the same time I feel difficulty in not carrying out the principle so rigidly laid down in some of the cases to its apparently logical result.

If rightly understood, the principle laid down in the many cases cited it is this:

1. The award is a judicial act.

2. The signing of the award, and not any previous agreement or understanding, is the performance of such.

3. The arbitrators or judges performing such act must perform it together as their joint judgment and determination.

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Up to the last moment—that is, the actual execution of the award—the parties are entitled to the opinion and judgment of all who execute the award, and one who has previously doubted or dissented, may change his mind and join his fellows in performing their joint act.

4. The fact of a joint execution by two, although good, if the third finally refused to join, cannot make good an award designed for the three, and executed separately by the third, both of the others not being present and joining with him.

I confess that I regret feeling bound to arrive at this conclusion. Everything seems to me to have been fairly done.

I shall be glad to find that either a Divisional or an Appellate Court will be able to distinguish this case on the authorities, and uphold the award.

I need hardly say that I feel hesitation in arriving at my present conclusion.

I find in favour of the defendant, and dismiss the plaintiff's action, without costs.

During Michaelmas sittings *Marsh* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During Hilary Sittings, February 17, 1884, *Marsh* supported his motion.

C. Ritchie, contra.

The arguments and cases cited sufficiently appear from the judgment of the learned Judge at the trial.

March 7, 1884. GALT, J.—This is a motion made by Marsh to set aside a judgment ordered by the Chief Justice of the Queen's Bench Division, to be entered in favour of the defendant.

The action is on an award. The defence is, the arbitrators did not make an award.

The Chief Justice found that the arbitrators met and agreed on their findings, and a minute was made in writing, but not signed, and there was no expressed or apparent difference of opinion among the three. Gordon, the

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referee appointed by defendant, wrote down the terms of their agreement; they separated late at night; there was to be no further consultation, and they all understood there was nothing to be done except to have the award formally drawn up and executed. Next day Marsh (one of the arbitrators) called on Gordon, and suggested his drawing up the award. He suggested it should be drawn by Mr. Patterson, and the latter accordingly drew it up, leaving the amount in blank. Marsh took it to Gordon, who filled up the blank, and he and Marsh signed the award in presence of a witness. About two days after Major (the other arbitrator) signed the award in presence of Gordon, having been absent a couple of days from home.

The question is, whether, under these circumstances, the award is a valid award, the same not having been signed by all the arbitrators in the presence of each other. The learned Chief Justice has given a very elaborate judgment, expressing his regret that upon the result of a careful examination of the cases, all of which are set out in his judgment, he is constrained to hold that the award is invalid. On the argument before us no case was cited that had not been reviewed by the Chief Justice.

I have carefully reviewed his reasoning, and have arrived at the same conclusion. In order to prevent disputes of this kind in future, it may be well to lay down, as a rule for the guidance of arbitrators, that they should all be present when an award is made—that is, in cases in which they all agree; or in case of an award by a majority, that those constituting that majority should execute it in presence of each other.

WILSON, C. J.—The award was to be made by the three arbitrators, or any two of them. The execution by two of them, in the absence of the third, and without finally consulting him, cannot be supported: *Anning* v. *Hartley*, 3 H. & N. 929, Amer. ed.; *Wright* v. *Graham*, 3 Ex. 131. And *Re Beck* v. *Jackson*, 1 C. B. N. S. 695, 700; *Jones* v. *Reid*,

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1 P. R. 247, are to the like effect, that all the arbitrators should concur, or have an opportunity of concurring.

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The like rule applies to the three arbitrators concurring in the award, where they do concur, as when two out of the three concur, upon a reference that the award may be made by the three or by any two of them; that is, that they must all sign at the same time.

I refer to that, because in *Goodman* v. *Sayers*, 2 J. & W. 249, a different opinion is expressed.

I agree with my brother Galt in the judgment he has delivered, affirming the decision of the learned Chief Justice of the Queen's Bench Division.

The award might have been sent back to the arbitrators to finish their judicial duties by a joint and contemporaneous execution of the award: *Anning* v. *Hartley*, 3 H. & N. 929, Amer. ed.

ROSE, J.—I concur. I do so with regret, but no case has been cited which enables me to disregard the decisions adverse to the plaintiff's contention.

The reasoning in *Williams* v. *Squair*, 10 U. C. R. 31-32; *Jones* v. *Reid*, 2 P. R. 247, 253-4; *Re Hopper*, L. R. 2 Q.B. 367, 375-6, commends itself to my judgment, but these are not authorities I can act upon.

In *Williams* v. *Squair* the Court expressly state they are relieved from pronouncing an opinion on the disputed point by reason of the memorandum having been signed by all three arbitrators, prior to the signing and sealing of a document embodying the terms of the memorandum. *Jones* v. *Reid* is a Practice Court decision, and is founded on *Williams* v. *Squair*; and *Re Hopper* is confined to the appointment of an umpire, Blackburn, J., distinguishing by saying that there was no case precisely in point; that is, I take it, as to appointing an umpire.

I had hoped to have been able to find authority enabling the Court to hold that the judicial act in this case was not the signing of the award, but the previous determination

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of the arbitrators; but I have not been able to find any authority, and the above are the only ones cited. While I arrive at my decision with regret, I cannot say that, on the authorities, I entertain any doubt as to the law on the subject.

Motion dismissed, with costs.

[COMMON PLEAS DIVISION.]

DUCK ET UX. V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Drain—Accident—Negligence—Notice.

After a block pavement had been laid down on Queen street, one of the most travelled streets in the city of Toronto, a drain about two and a half feet wide was opened out across the street to the street railway track, and then tunnelled under the track. It was filled in with loose earth not rammed down. On Sunday it rained, in consequence of which the earth was washed down and sunk, leaving a very dangerous hole. On Tuesday or Wednesday some residents in the neighbourhood seeing its dangerous condition, took some cedar posts and placed them lengthwise in the hole. On Thursday night, about nine o'clock, it being very dark and no light at the drain, and the street lamps not being sufficient to shew it, the plaintiff, his wife, and another person, were driving along the road, and on reaching the drain the horse stumbled and fell, whereby the plaintiffs were pitched out of the waggon and injured. The jury found that the accident was caused by the wheels of the waggon coming in contact with the drain. The defendants contended that it was caused by the waggon coming in contact with the posts, and as they had not put them there they were not liable. It was agreed on the argument in the Divisional Court, that the Court might draw inferences of fact as a jury, and give such judgment as in its view the evidence might warrant.

Held, that on the evidence the defendants must be deemed to have had notice of the condition in which the drain was at the time of the accident; and therefore it was immaterial whether the accident was caused by the drain or posts.

Semble, that as the manner in which the drain was filled in, made it certain that in the event of a rain the earth would sink, the defendants must be assumed to know that some one to protect the public would place posts or other covering over the hole; and were liable for any injury resulting.

THIS was an action for negligence against the City of Toronto, tried at the Fall Sittings, before Cameron, J., and a jury.

The statement of claim set out that "on the evening of the 22nd day of August, last, the plaintiffs were driving homewards along the public highway called Queen street,

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in the city of Toronto and while so driving in a lawful manner, and at a short distance east of the point where the railroads cross Queen street, the plaintiffs were suddenly thrown to the ground from the carriage in which they were driving, by their horse and carriage falling into and striking an open drain and obstruction upon the said highway negligently and unlawfully left open, and placed there by the defendants, and without being guarded or indicated by any light, or other warning to the plaintiffs."

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It appeared that in the summer of 1883, a block pavement was laid down on Queen street west by the defendants. The drain in question, contrary to rule, was not opened until after the pavement was completed The drain was opened out from the north side to within about two feet of the street railway track, and from that point tunnelled under the track across the street. The drain was about two-and-a-half feet wide, and was filled in with loose earth, and the officials did not "ram it down," so that it was certain to sink in the event of a rain. A rain did occur, and the earth was washed down, leaving a very dangerous hole. This rain came on Sunday, and the accident happened on the following Thursday evening. On Tuesday or Wednesday evening some parties resident in the neighborhood, seeing the dangerous condition of the street, took three cedar fence posts about nine feet long, about four to five inches in diameter at the small end, and "a good deal" larger at the butt end, and laid them lengthwise in the hole, the small ends resting on the pavement adjoining the track, and the large ends resting in the hole at the north side, probably resting on the earth. There was no light placed at the hole, and the light from the nearest lamps was not sufficient to disclose the danger, the roadway being shaded by trees. The accident happened about nine o'clock. It was a very dark night and looked like rain. The plaintiffs and a Mr. Northcote and his wife were driving westward, seated in a light spring waggon, at a rate of probably five or six miles an hour, when reaching the place in question the horse stumbled and fell,

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the parties were pitched out of the waggon; the waggon remained on the east side of the hole, and the evidence pointed strongly to the probability of the accident occurring through the wheels coming into contact with the poles.

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The jury found the cause of the accident was the wheels of the vehicle coming in contact with the drain or hole, and not the poles put there for greater protection, and gave

Damages for Mr. Duck's personal injury.	$10 00
For loss of Mrs. Duck's services	375 00
And for Mrs. Duck's personal injury ..	1000 00
Total.....	$1385 00

The verdict was accordingly entered for the plaintiffs.

During Hilary Sittings, February 7, 1884, *Bethune*, Q. C., obtained an order *nisi* to set aside the verdict for the plaintiffs, and to enter a verdict for the defendants, on the ground that the findings of the jury were against, evidence, and the weight of evidence.

During the same sittings, February 13, 1884, *McWilliams* supported the order. There is not a particle of evidence to justify the finding that the wheel of the carriage struck against the side of the drain. The evidence shews that the accident was occasioned by the wheel coming in contact with the posts placed in the drain, and as the defendants did not place them there, they are not responsible for the accident. [WILSON, C. J.—The evidence would seem to shew that posts were there for a sufficient length of time to constitute evidence of notice to the defendants. They were there apparently for at least twenty-four hours, and that might be sufficient to constitute notice. It might be better therefore for the defendants to consent to the verdict standing instead of going to the expense of a new trial.] The learned counsel stated that he was not in a position to give any

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consent, but was willing that the Court should look at the evidence, and draw inferences of fact as a jury, and give such judgment as in the opinion of the Court the evidence might warrant, and that the pleadings should be amended to meet such view. The evidence given is not however sufficient to constitute notice. The plaintiffs attempted to shew that the policeman on the beat was informed of it, but the police are not officers of the corporation, and, therefore, notice to them is not notice to the corporation: *Dillon* on Mun. Corp., 2nd ed., sec. 975.

Osler, Q.C., and *J. T. Small*, contra. The drain was opened up by the city, and they are responsible for its dangerous state. It is quite clear that the drain as left by the defendants' servants was most dangerous, and the intervening act of a third party, namely in putting the posts there, cannot prevent the recovery of the damages sustained. The position in which the posts were shews that the wheel struck the side of the ditch and not the posts; but even if it struck the posts, it struck the side of the ditch also. There is no evidence to shew that if the posts had not been there the accident would not have happened. The case of *Clark* v. *Chambers*, 3 Q. B. D. 327, where all the cases are collected, clears up a hitherto rather unsettled point of law, and shews that where the defendant unlawfully placed a dangerous instrument on the road, he was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriage way, where the defendant had placed it, to the footpath. Under the authority of this case the defendants having placed the drain, the cause of danger, on the highway, are liable, even though the immediate cause of the accident was the posts placed there by a third party. The defendants having dug the drain in such a manner as rendered it certain that in the event of a rain the earth would sink, and the rain having occured so as to cause the earth to sink some time before the accident,

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they must be deemed to have had notice and knowledge of the whole being in such a condition as rendered it probable that some one would endeavour to protect the public by covering or filling up the hole, as for instance here, by putting in the posts, and they were therefore liable for any accident happening from or by reason of the posts being there. The learned Judge expressly left it to the jury to say how the accident happened, and they found that it was caused not by the posts, but by the wheel striking against the side of the ditch. The posts were, however, there for a sufficient time to constitute notice to the defendants; and there was express notice, for it was shewn that the policeman on the beat was informed of the condition of the drain, and reported it to the city. There was no light at the drain, and if one had been there the plaintiffs would have seen the drain, and the accident would have been avoided. They referred to *Sherman and Redfield*, on Negligence, 3rd ed., (1880), p. 10, sec. 10, p. 479, sec. 401; *Wharton* on Negligence, 2nd ed., sec. 145; *Smith* on Negligence, p. 15; *Powell* v. *Deveney*, 3 Cush. 300; *Sherwood* v. *Corporation of Hamilton*, 37 U. C. R. 410; *Brady* v. *City of Lowell*, 3 Cush. 121; *Mersea Docks Trustees* v. *Gibbs*, 11 H. L. Cas 686.

McWilliams, in reply. The law is clearly laid down in *Saunders* on Negligence, p. 9, and shews that the negligence of the defendants must be the proximate cause of the accident. Here the proximate cause were the poles placed on the drain, and not the drain itself. The case cited of *Clark* v. *Chambers*, 3 Q. B. D. 327, does not carry the law any further.

March 7, 1884. ROSE, J.—The finding of the jury has been moved against on the ground that it is against evidence and the weight of evidence.

On the argument it was agreed that the Court might look at the evidence irrespective of the pleadings, and draw inferences of fact as a jury, and give such

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judgment as in its view the evidence might warrant, and that the pleadings should be amended to meet such view. This relieves us from considering the very nice question argued by Mr. Osler on the authority of *Clark* v. *Chambers*, 3 Q. B. D. 327, as to the liability of the city for the act of the parties who put the post in the hole, if the accident occurred by means of the vehicle coming in contact with the posts.

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Mr. Osler argued that as the defendants had filled in the drain in such a manner as made it certain that in the event of a rain the earth would sink, and the rain having occurred with such a result some time before the accident, they had notice and knowledge of the hole being in such a condition as rendered it probable that some one would endeavour to protect the public by placing posts or other covering over the hole, and hence were liable for any accident happening from or by reason of the posts.

I am inclined to think that a judgment for the plaintiffs might be thus supported, but it is unnecessary to decide this, as I find that the posts having been placed there under the circumstances named on a highway described as being one of the leading thoroughfares of the city of Toronto, having a very large traffic passing over it, the defendants must be held to have had notice of their being so placed, and hence liable for any accident happening by reason thereof.

It will be observed that one of the witnesses speaks of the posts having been placed there on Wednesday evening, in which case they would have been there at least twenty-four hours, and there is some evidence that they were placed there on the 20th of August—the accident happening on the 22nd of August.

The pleadings should be amended accordingly. The damages are not complained of as being too large.

As the verdict is supported on a different finding of fact than that of the jury, in my opinion there should be no costs of this motion to either party.

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WILSON, C. J.—I am of opinion that as the highway was left in a dangerous state, the defendants must be held liable for acts done by others—although without the authority of the defendants—to remedy the dangerous state of the road, at any rate if such remedy have not made the way more dangerous than it was before.

When a road is left in a state unfit or unsafe for travel, the probability is, that those who are desirous of using it, or who are compelled to use it, or who think they can make it fit or better it for travel, will take some means to make it as they think fit for use; and if any such act be be done—although without authority—and an accident happen which may, or which may to some extent, be attributable to the act so unauthorizedly done, the blame should rest upon the original wrong-doer, and not upon those who attempted in good faith to better the road and to remedy the danger. The responsibility of the original wrong-doer may be carried even further than I have stated, according to the case of *Clark* v. *Chambers*, 3 Q. B. D. 327, which was referred to.

GALT, J., concurred.

Order discharged.

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[COMMON PLEAS DIVISION.]

McFARLANE v. GILMOUR ET AL.

Tramway—Accident—Negligence of fellow servant.

The defendants, the proprietors of extensive mills, constructed a tramway to carry lumber from one end of their yard to the other, the cars used being drawn by a steam engine. There was no passenger car, but the employees were permitted to be carried on the road. The track was laid on ties placed on wet ground, very little ballasting was done, and none where the accident happened, and there was other evidence of faulty construction. The plaintiff was going to his work on one of the cars, when it was thrown off the track by reason of a misplaced rail, caused by the defective construction: The defendants employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow servant of the plaintiff, and it was shewn that B. neglected to replace the rail, though he was aware of its being displaced.

Held, that the accident having been caused by the negligence of a fellow servant, the defendants were not liable.

Quære, apart from this, whether the plaintiff could have recovered, he being aware that the road was without ballast, the defects in construction being patent, and such tramways being known not to be substantially built or of a permanent character.

THIS was an action for negligence tried before Burton, J. A., and a jury, at Belleville at the Fall Assizes of 1883.

The facts so far as material were as follows.

The defendants, who were proprietors of extensive mills for the manufacture of lumber at Trenton village, in the Spring of 1882 constructed a railway or tramway to carry lumber from one end of their yard to the other. The cars employed were drawn by an engine propelled by steam. The track was laid on ties, which were placed on ground not very carefully prepared, and little ballasting was done prior to the accident. At the place where the accident occurred no ballasting was done until after the accident, and the ground was said to be very wet. One witness said the road bed and track were of very primitive construction. And an engineer, Charles Daley, who was in Court and heard the evidence, but never saw the work on the ground, expressed an opinion, "that the railway had not been constructed with reasonable regard for safety for the purposes for which it was used," but did not say how the improper construction led to the accident in question.

Although the tramway was constructed and used for

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carrying lumber, and no car was used for carrying passengers, the men were permitted to make use of it to go from one end of the yard to the other. One of the witnesses for the plaintiff said that he (the witness) had with others been warned that they used the train at their own risk. There was no evidence that the plaintiff received any such warning.

In May, 1883, the plaintiff was employed by the defendants to work in their yard, and on the morning in question, having occasion to go from the lower to the upper yard, got on the train then about going to the upper yard, for the purpose of saving time. This was on the 15th of May, about two weeks after he went to work for the defendants. The train consisted of an engine, one empty roller car, and a car with lumber piled on it.

It was said that the empty car was placed between the lumber car and the engine so that in case of the lumber pitching forward it would fall on the empty car and not on the engine. The plaintiff got on the empty car. When the train came to the place where the accident happened, the engine ran off the track, and the lumber pitching forward caught the plaintiff and so crushed one of his arms that amputation was necessary.

The accident happened at a place where there was a switch, and the cause of the accident was a misplaced rail.

The duty of overseeing the track at this point devolved upon one Brockman, who was employed by one Nicholson, the defendants' foreman.

The witness, William Michael, gave the evidence as to the cause of the accident. He said, 'The engine was off the track. * * I think it got off on account of the switch." Q. "Did you examine the switch?" A. "I did about a week beforehand. I saw the rails were bad The second tie from the edge of the switch was high about an inch and-a-half. I told Brockman, you will have to fix that or there will be a run off there. He said he would fix it, but he did not do it. * * The switch was closed." Q. "It was where the rail of the switch met the

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other rail that the ties were imperfect?" A. "There was a tie next the switch rail. It was low. The second tie back was an inch and a half high. I think that was the cause of the engine going off." Q. "What caused that?" A. "There was no ballast, and it was very soft for the ties to lie on." Q. "What was the effect of this jumping off the track." A. "It broke one tie." Q. "Did the track spread." A. "Not that I saw." Q. "Was it difficult to put the tie in its proper place; the tie you spoke to Brockman about?" A. "No it was not difficult to do it, but it seems he did not do it. * * He said he would fix it right off." Q. "He did not say he did not know how." A. "No." Q. "I suppose any man of brains would know how to." A. "I would judge so."

The defendant David Gilmour had been examined before the Master, and a portion of his evidence thus taken was read by the plaintiff. "Mr. Hall, our millwright, assisted by two McMullens built it, laid track, and ran locomotive over it in about half a day, but did not use it for mill for some little time. We shut down our little mill, and put all hands on to work. Hall would have charge of track in 1882. Nicholson, head yardsman, had charge of track this year. Hall was millwright and mechanic. Nicholson is a good general hand about a mill and yard, and has been in our employ a good many years. * * Did ballast good deal this year; had not time before; could not get men without taking our men from other work. No doubt a railroad is better for ballasting and we did it as soon as we could. Last year it was hard to get money. * * Hall and I laid out road. * * I think it more necessary to have yard ballasted when wet than dry, but for carrying lumber it does not make much difference. * * I was away from home at the time (of the accident) Richardson was in charge of the business."

Brockman gave evidence to the effect that he was unskilled and incompetent, but no evidence was given to show that either the foreman who employed him or the defendants knew of his incompetency, and it could hardly

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be contended that he was not competent to replace the rail.

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There was no suggestion that Nicholson was incompetent to superintend the keeping of the road in repair and employing assistants.

At the close of the plaintiff's case, the defendant moved for a nonsuit or judgment for defendants, on the grounds that the alleged negligence was that of a fellow servant of the plaintiff, and that the defendants had no actual notice of the facts constituting the negligence. To this motion the learned Judge acceded; but suggested that the defendants should call evidence to enable the jury to assess the damages. This was done, and the jury assessed the damages at $1000, but no facts were left to or found by them as the the liability of the defendants.

At the Michaelmas Sittings of the Divisional Court Dickson, Q. C., obtained an order *nisi* to set aside the non-suit and to enter a verdict for the plaintiff for $1000, and costs, on the grounds (1) that there was evidence on which the jury could reasonably have found negligence; and (2) that there was evidence which should have been submitted to the jury as to the liability of the defendants.

During Hilary Sittings, February 8, 1884, *Dickson*, Q. C., supported the order. The evidence shews that the railroad was improperly and defectively constructed: that the track was laid in a wet place without the ties being properly laid down and ditches made to drain off the water; and very little ballasting done, and none at the place where the accident happened; and that the defendants had knowledge of the improper construction. The defendant also employed incompetent men to construct the road and to keep it in repair, and did not furnish them with proper tools to do the work with. The evidence also clearly shews that at the time of the accident the road was out of repair. By reason of the defective construction of the road, the wet state of the bed, and the want of ballast, the ties sank into the ground, and the car was thereby

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thrown off the track and the accident caused. The evidence also shews that the defendants directed the men to use the road; at all events they were clearly permitted to do so, and that is sufficient under the authorities to render the defendants liable. The defendants contend that the defect was a misplaced rail at the switch, but even if this be so, it was the duty of the defendants to see that the track was in proper order, and they are therefore responsible for the damage sustained. The defendants set up that the negligence which occasioned the accident was that of a fellow servant; but the defendants should have further shewn that they employed competent persons to do the work, and this they have failed to do. He referred to *Bennett* v. *Grand Trunk R. W. Co.*, 3 O. R. 446, 453; *Heaven* v. *Pender*, 11 Q. B. D. 503; *Roberts* v. *Smith*, 2 H. & N. 212; *Hutchinson* v. *York, &c., R. W. Co.*, 5 Ex. 343, 352; *Clarke* v. *Holmes*, 7 H. & N. 937; *Britton* v. *Great Western Cotton Co.*, L. R. 7 Ex. 130; *Brydon* v. *Stewart*, 2 Macq. H. L. 30; *Wiggett* v. *Fox*, 11 Ex. 832; *Tarrant* v. *Webb*, 18 C. P. 797; *Murphy* v. *Smith*, 19 C. B. N. S. 361; *Ormond* v. *Holland*, E. B. & E. 102.

Bell, Q.C., contra. This was not a railway for the carriage of passengers, but merely a tramway with a dummy engine and trucks for the carriage of lumber. It was never intended for passengers, and the plaintiff had no right on the tramway at all. These kind of tramways are never built so as to be used permanently, but are moved about the yard from place to place, as circumstances may require. The evidence clearly shews that the accident was caused by the misplaced rail at the switch, and that the defendants employed a competent foreman who directed Brockman, a fellow servant of the plaintiff, to replace the rail but that he neglected to do so, and in consequence of his neglect the accident happened. There is no evidence to shew that the defendants had any knowledge of the defect. The authorities are quite clear that where the master employs competent persons to perform the duties, and through the default of persons so employed an accident happens,

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whereby any one occupying the position of a fellow servant to such person is injured, the master is not liable. This is laid down in *Priestly* v. *Fowler*, 3 M. & W. 1, and the principle has been followed in all the subsequent cases: *Morgan* v. *Vale of Neath R. W. Co.*, 5 B. & S. 570; *Allen* v. *New Gas Co.*, 1 Ex. D. 251; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 344; *Woodley* v. *Metropolitan District R. W. Go*, 2 Ex. D. 384; *Collis* v. *Selden*, L. R. 3 C. P. 459; *Tunney* v. *Midland R. W. Co.*, L. R. 1 C. P. 291; *Rourke* v. *West Moss Colliery Co.*, 2 C. P. D. 205; *Batchelor* v. *Fortescue*, L. R. 11 Q. B. D. 474; *Feltham* v. *England*, L. R. 2 Q. B. 33; *Howells* v. *Landore Siemans Steel Co.*, L. R. 10 Q. B. 62.

March 7, 1883. ROSE, J.—The grounds of the rule were rather grounds for a new trial than for judgment for the plaintiff, and the case was so argued.

In the way in which the case comes before the Court without any findings of fact, the defendants are compelled to admit every adverse conclusion which the plaintiff has given evidence to support. Being thus driven they rely upon the grounds: 1. That the alleged negligence was that of a fellow servant of the plaintiff. 2. That the defendants had no actual notice of the facts constituting the negligence.

The facts stated in the evidence would not have warranted the withdrawal of the case from the jury as to 1 The proper or improper construction of the road bed for the purposes for which it was to be used 2 The knowledge of the defendants as to its construction. 3 As to the employment of skilled or competent workmen in the original construction. 4 As to the cause of the rails getting out of order. 5 As to the plaintiff being on the train with the consent or allowance of the defendants.

It is clear that if the man Brockman had not neglected for a week to replace the rail the accident would not have happened, and that as soon as the accident did happen he was discharged from the defendants' employment for neglect of duty.

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It is also clear that there is no evidence of any actual knowledge by the defendants of the rail being out of place.

The nonsuit must therefore be upheld, if at all, on the ground that the accident happened through the negligence of the fellow servant, Brockman, in not replacing the rail: that faulty construction cannot be considered to be the proximate, immediate, or direct cause of the accident, and that the defendants are not liable, although the rail at that time, so far as shewn, would not have been misplaced but for original faulty construction. This, of course, assumes against the defendants the duty of constructing in a permanent manner such a railroad, a question which possibly may yet remain for consideration.

The evidence of the engineer, Daley, apparently was received without objection. It affords some evidence that "the railway was not constructed with reasonable regard for safety for the purposes for which it was used," and therefore it must be assumed that there was negligence on the part of the defendants in the original construction. There was also evidence that the workmen had not been furnished with proper tools, but this is merely evidence tending to support the inference of faulty construction.

Assuming this, however, did the accident happen through or by means of this faulty construction. If when the train had been running over the track the rail had suddenly sprung out of place, or some disarrangement of the track had occurred through the original faulty construction, without notice or warning, and the accident had happened, one would have little difficulty in concluding that the accident was caused by the original faulty construction. Here, however, the track had been in use for about a year. If the road bed at this point had been ballasted, if the ground had not been so soft, it is probable that the tie, which was lower than the others, would not have sunk, and that the rail would not have been misplaced.

On the evidence as against this motion, I must assume it was negligent on the part of the defendants not to have

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drained the ground, or not to have put on ballast; but was this the cause of the accident? The defendants employed Nicholson, foreman. Nicholson employed Brockman. Brockman's duty was to oversee the track, and it was his duty when he saw that this rail was misplaced to put it in place. He neglected his duty—neglected it for a week; it was simple and easy of performance. He neglected it, and the train was thrown off the track, and the plaintiff a fellow servant injured. Was not the proximate immediate direct cause of the accident his neglect. If so, can the defendants be held liable? See Brockman's evidence, reporters notes, p. 20, where he states it was Nicholson's duty to see that the rail was replaced, that he was employed by Nicholson, as I understand it to attend to such work; that the cause of the accident was his neglect, and the excuse he offers is, that he had no ballast "to make her stay," but according to Michael's evidence, this is not an excuse the jury would have been justified in accepting, even if its effect would have in any wise shifted the onus. It was his duty to have reported the condition of the track, and to have asked Nicholson for ballast, and if Nicholson had neglected to give it to him such negligence would still have been the negligence of a fellow servant of the plaintiff. Suppose that the engine driver had seen the rail as he came up and could easily have stopped the train, but recklessly drove over it, knowing it was dangerous, but running his chances of doing it without an accident, would the defendants be held liable to the plaintiff, if his injury had thus been received through a fellow servant. It is more than probable that the engine driver of this train knew of this rail, and ran his chances.

It seems to me clearly not, because it would seem clear that the accident was caused by the negligence of a fellow servant.

Many cases were cited by counsel on the argument, some not bearing on the point now under discussion, but on other questions which are not necessary for consideration.

I have examined amongst others the following, which

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are more or less applicable: *Priestly* v. *Fowler*, 3 M. & W. 1; *Waller* v. *South Eastern R. W. Co.*, 2 H. & C. 102; *Lovegrove* v. *London and Brighton R. W. Co.*, 16 C. B. N. S. 669; *Gallagher* v. *Piper*, 16 C. B. N S. 677; *Morgan* v. *Vale of Neath R. W. Co.*, 5 B. & S. 570; *Feltham* v. *England*, L. R. 2 Q. B. 33; *Howells* v. *Landore Siemans Steel Co.*, L. R. 10 Q. B. 62; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326; *Allen* v. *New Gas Co.*, 1 Ex. D. 251; *Tunney* v. *Midland R. W. Co.*, L. R. 1 C. P. 291; *Batchelor* v. *Fortescue*, 11 Q. B. D. 474, 478; *Heaven* v. *Pender*, 11 Q. B. D. 503; *Skelton* v. *Thompson*, 3 O. R. 11.

The case of *Tunney* v. *Midland R. W. Co.*, L. R. 1 C. P. 291, is similar to the case before us. There the plaintiff was a laborer, who with others each morning and evening rode to and from his place of labour on the gravel train of the defendants, with the consent of the company, for mutual convenience, the company being under no contract to convey the labourers, and receiving no compensation for so doing. Held to be in the employ of the company, at the time of carriage. The accident was caused by collision with a hand car on the track. Held, company not liable, as the negligence was that of a fellow servant.

In *Waller* v. *South Eastern R. W. Co.*, 2 H. & C. 102, the accident happened through the decayed condition of the trenails which fastened the chairs to the sleepers. It was the duty of the "ganger" of the plate-layers, a servant of the defendants, to see to and keep in proper repair. The defendant did not know of the defects, but the "ganger" ought to have known, and it was negligence in him not to know it. The plaintiff's husband, an employee of the defendant, was killed. Held, company not liable.

In *Lovegrove* v. *London and Brighton R. W. Co.*, 16 C. B. 669, the accident happened to an employee through negligent performance of work by plate-layers in not putting a sufficient number of sleepers under the rails, one of which was displaced by the weight of a truck, so that the plaintiff was injured. The defendants held not liable.

In *Gallagher* v. *Piper*, 16 C. B., at p. 677, an employee of

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the defendant suffered by reason of the insufficiency of supply of materials for safe performance of the work in which he was engaged. This was known to the manager, and to the foreman of the portion of the work on which plaintiff was engaged. Held, defendants not liable.

Allen v. *New Gas Co.*, 1 Ex. D. 251, is in many respects not dissimilar to this case. Certain gates were built into a frame work on the premises of the defendants where the plaintiff was at work. They had been out of repair for some time and had been gradually getting "from bad to worse." If closed or partially closed they were unsafe, but if left open and wedged up they were safe; the plaintiff an employee of the defendants passed through while open, returning one was open and the other shut. How this occurred was not shewn. While the plaintiff was preparing to set about his work the gates suddenly fell upon him. The defendants' manager had had his attention called to the unsafe condition of the gates a considerable time before the accident, and he had promised to have them seen to, but had not done so. The foreman of the blacksmiths had, however, given directions to one of his men to make a bar to go across the gates. This had not been done because there was not the right size of iron on the premises to make the bar. Such a bar was put up after the accident.

Baron Huddleston in giving judgment in favour of the defendants says, at p. 256: "If they had fallen into a state of decay; and *had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed,* and there was no evidence that such persons were not proper and competent for the defendants to employ." See also judgment of Hagarty, C. J., in *Skelton* v. *Thompson*, 3 O. R. 11, where he held that the accident was not caused by the wrongful discharge of water on the sidewalk, but by the ice which formed there; and the jury having found that the defendants were guilty of no unreasonable delay in removing the ice, the defendants were held not liable.

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Upon the best consideration I have been able to give this case, I am unable to say that there is any evidence to be submitted to the jury to fix the defendants with liability.

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I am of the opinion that the cause of the accident was the neglect of either Brockman, in not repairing the rail when his attention was called to it, or of the foreman Nicholson, in not more carefully overseeing the track and the performance by Brockman of his duty, or the negligence of both: that there is no evidence that Brockman was not competent to replace the rail and thus keep the track in order, or if there is any such evidence, there is no evidence that either Nicholson or defendants were aware thereof: that there is no evidence that Nicholson was not competent to perform the necessary duties the performance of which would have prevented the accident, or if he was not competent that the defendants were in any degree negligent in employing him as foreman or overseer; and that there is no evidence of the defendants having any knowledge of the rail being misplaced. It must not be overlooked that there is evidence by the plaintiff himself that he knew of the road being without ballast. The defects in construction complained of were patent, the work was not of a substantial character, the condition of the road bed was as well known to the plaintiff as to defendants, although it may be that the plaintiff did not think of the possible danger; and although these facts might not preserve the non-suit they do not tend to make me desirous of assisting the plaintiff to a new trial, which, in my opinion, would not end in his favour. There is, evidence for the defence which, if believed, would prevent the plaintiff recovering, but I have confined myself entirely to the evidence of the plaintiff and his witnesses.

It is well known that tramways such as this are not substantially built, and defendants could not be held bound to construct a road bed such as would be required of a railway carrying passengers and heavy traffic trains.

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In my opinion the order *nisi* must be discharged with costs.

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WILSON, C. J., and GALT concurred.

Order discharged.

[COMMON PLEAS DIVISION.]

VERRATT V. MCAULAY ET AL.

Principal and surety—General Inspection Act, 1874, 37 *Vic. ch.* 45, *secs.* 6, 11, *D.—Liability of inspectors' sureties for deputy's default—Disputes within sec.* 11*—Notice of action.*

The defendant M. was appointed an inspector under the General Inspection Act, 1874, 37 Vic. ch. 45, D. By sec. 6 each inspector and deputy-inspector is required to give security by bond to the Crown for the due performance of the duties of his office, and such bond shall avail to the Crown and to all persons aggrieved by any breach of the conditions thereof. By sec. 7 the inspectors are to appoint the deputy-inspectors, who are to be the deputies of the inspector for all the duties of his office, and their official acts shall be held to be his acts, and he is to be responsible therefor as if done by himself. A bond was given by the inspector, and the other defendants, as sureties for the faithful discharge of the duties of the said office, and for duly accounting for all moneys and property. A similar bond was given by the deputy-inspector. The deputy-inspector made a faulty inspection, and the plaintiffs' purchased, relying thereon, and were damnified.

Held, under the statute and the bond given thereunder, the inspector M.'s sureties were liable for the default of the deputy; and that the fact of the plaintiff having a remedy also on the deputy-inspector's bond was no answer to the claim against M.'s sureties.

Held, also, that the plaintiffs were persons aggrieved within the meaning of the statute.

Quære, whether the defendants were entitled to notice of action, but the question was not decided, as want of notice was not pleaded.

Sec. 11 provided that disputes between the inspector and the deputy-inspectors and owners, &c., of articles inspected through or relating in any respect to the same, were to be settled by the board of trade, or where there was no such board, by certain specified persons.

Held, that the claim in this action was not a dispute within this section.

THIS was an action against an inspector of fish, and his sureties, for default of his deputy.

The cause was tried before Osler, J., without a jury at the Toronto Summer Assizes, of 1883. The learned Judge entered judgment for the plaintiff, as against the defendant

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McAulay, for $337.37, and against the plaintiff in favour of the defendants, the Guarantee Company.

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The facts so far as material were as follows: The defendant McAulay having been appointed inspector of pickled fish, and fish oils, for the corporations of Grey and Bruce, gave a bond to the Crown under the provisions of "The General Inspection Act of 1874," 37 Vic. ch. 45, D. the defendant company being his sureties. The condition of the bond was, that if the principal "faithfully discharges the duties of the said office, and duly accounts for all moneys and property which may come into his custody by the virtue of the said office, this obligation shall be void." The penalty was $2,000 for the "principal," and $2,000 for the "sureties." The bond was dated 1st September, 1878.

The inspector having appointed one John S. Miller as his deputy, the deputy, under the provisions of the said section, on the 20th of October, 1879, gave a similar bond in a penalty of $500, with two sureties, J. W. Layton, and Andrew Post, the condition being in the same words as the bond of the inspector.

The plaintiffs were Montreal merchants, who had purchased relying on the inspection.

It was said the sureties of the deputy were not solvent at the time of the action.

The learned Judge found that there had been a wrongful, negligent, and improper inspection by the deputy inspector; and that the plaintiffs were entitled to recover against the inspector for the act of the deputy inspector.

At the Michaelmas Sittings, Creasor, Q.C., moved on notice, on behalf of the plaintiff, to set aside the judgment for the Guarantee Company, and enter judgment for the plaintiff against the company as well as McAulay.

Wink, for the defendant McAulay also moved on notice to set aside the judgment for the plaintiff, and enter judgment for the defendant McAulay.

During Hilary Sittings, February 6, 1884, *Creasor*, Q.C.,

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supported the plaintiff's motion and shewed cause to the defendants'. There was clearly evidence of default on the part of the deputy inspector, and the plaintiffs were persons aggrieved within the meaning of the statute, 37 Vic ch. 45, sec. 6, D. Under sec. 6, each inspector and deputy inspector has to give security for the due performance of the duties of his office. Sec. 7 then provides that the inspector is to appoint the deputy inspectors, and that they shall be held to be the deputies of the inspector for all the duties of his office, and their official acts shall be held to be the official acts of the inspector, and he shall be responsible therefor, as if done by himself. The official acts of the deputies are therefore made the acts of the inspector. Under the condition of the bond, whereby the sureties become responsible for the faithful discharge of the duties of the inspector, they are liable for the default of the deputy inspector here: *Newman* v. *Beckwith*, 5 Lansing N.Y. 80; *Andrews* v. *Bealls*, 9 Cowen 693; *McGehee* v. *Gewin*, 25 Ala. 176; *DeCollyar* on Guarantees, p. 230; *Brandt* on Suretyship, secs. 487-489, pp. 629-31; *Crawford* v. *Howard*, 9 Georgia 314.

Osler, Q. C., shewed cause for the Guarantee Company. The inspector and deputy inspector are distinct persons. The deputy on his appointment has to take oath of office, and has to give security for the due performance of the duties of his office, and after his appointment he becomes a Crown officer. The giving of separate security by each would shew that each is only to be liable for his own personal default. The bonds clearly limit the liability to the principal to the bond. The statute apparently makes the inspector liable for the acts of his deputy, but the liability does not extend to the sureties. The deputy inspector is required to give security to be approved of by the Crown, which has been done here, and it never could be intended that the persons aggrieved under the Act should have a double remedy: *Baylies* on Sureties and Guarantors, p. 112. This is the same as the appointment of the deputy sheriff in Algoma. The deputy sheriff at

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Thunder Bay is a distinct officer from the sheriff. The Court should, if necessary, reform the bond, so as to relieve the Guarantee Company.

Wink, shewed cause for the defendant the inspector. No default was proved, and the plaintiffs are not persons aggrieved under the statute. Sec. 21, provides the mode of inspection, and it is not shewn that there is any default under this section: *Regina* v. *Mowat*, 3 C. P. 228; *Oliver qui tam* v. *Hyman*, 30 U. C. R. 517; *Macklem* v. *Thorne*, 30 U. C. R. 464; *Regina* v. *Beekman*, 2 U. C. R. 57; *Bunnel* v. *Whitlaw*, 14 U. C. R. 241; *Bain* v. *Gooderham*, 15 U. C. R. 33; *Chisolm* v. *Proudfoot*, 15 U. C. R. 203; *Drewe* v. *Coulter*, 1 East 563 note; *Bromage* v. *Prosser*, 4 B. & C. 249, 255. The defendants were entitled to notice of action, and this objection is open under a plea of the general issue: *Marsh* v. *Boulton*, 4 U. C. R. 354; *Timon* v. *Stubbs*, 1 U. C. R. 347; *Dale* v. *Cool*, 4 C. P. 460; *McLeish* v. *Howard*, 3 A. R. 503.

Creasor, Q. C., in reply.

March 7, 1884. ROSE, J.—The provisions of the statute 37 Vic. ch. 45 sec. 6, D., are as follows:

Sec. 1, provides for the appointment by the Governor in council of places of inspection, and inspectors.

Sec. 2. That the board of trade at the cities named in the section shall appoint boards of examiners of applicants for position of inspectors, and deputy inspectors.

Secs. 5 and 6, provide forms of oaths of office for inspectors and deputy inspectors.

Sec. 6, provides for security, as follows: "Each inspector or deputy inspector shall, before acting as such, give security for the due performance of the duties of his office, in such sum as the governor may direct, by bond to Her Majesty, with two sureties to the satisfaction of the governor, to be bound jointly and severally with him, in the form and subject to the provisions prescribed by law, relative to the security to be given by persons appointed

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to offices of trust in Canada, and such bond shall avail to the Crown, and to all persons aggrieved by any breach of the conditions thereof."

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Sec. 7, provides for the appointment of deputies. "Each inspector may, and shall when thereunto required by the governor, in any inspection division, or by the boards of trade in any of the before named cities, appoint a deputy, or so many deputies as may be necessary for the efficient and speedy performance of the duties of his office, such assistants being duly examined and sworn, and giving security as above provided; and they shall be held to be the deputies of the inspector for all the duties of his office, and their official acts shall be held to be the official acts of the inspector, and he shall be responsible for them as if done by himself; and each deputy inspector shall make such returns and reports of his official acts as shall be required of him by the inspector whose deputy he is.

Sec. 8. "The said deputies shall respectively be paid by and shall hold their offices at the pleasure of the inspector; and no such inspector shall allow any person whomsoever to act for him about the duties of his office, excepting only his sworn deputy or deputies appointed as aforesaid."

Sec. 9, provides that "in the event of the death of any inspector, his senior deputy inspector shall perform all the duties of the inspector until his successor is appointed."

Sec. 11, provides for settlement of disputes between inspectors, or deputy inspectors, and owners or possessors of any articles inspected, "with regard to the quality and condition thereof, or relating in any respect to the same." In places where there is no board of trade other persons of skill and integrity are to be summoned in manner provided, and if the opinion of the inspector or deputy inspector be not upheld, then the costs and charges are provided to be paid "by the inspector, or deputy inspector."

By the same clause it is provided that where there are boards of trade they shall determine the dispute, and if the opinion of the inspector or deputy inspector be not confirmed, the costs and charges shall be paid "by the inspector, with all damages."

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The difference in the provisions as to payment of "costs and charges" is remarkable, and the expression "with all damages," being found in the portion of the section providing for reinspection where there are boards of trade but not where there are no boards of trade, is also peculiar, and cannot be explained from any intrinsic evidence.

The section seems to have been taken from the C. S. C., ch. 47, secs. 24, 25, each section providing for payment of "costs and charges * * by the inspector with all damages." The present confusion is apparently the result of careless compilation.

It is thus manifestly clear that the inspector is responsible for all acts of the deputy, "in the performance of the duties of his office," for all "official acts," as if done by himself; that he is to appoint and pay the deputy, who is to hold office at his pleasure, his appointment being only controlled as to the class out of which the deputy is to be appointed; and if he do not appoint as many as may be necessary, he may be required so to do by the governor; and that he is responsible for "costs, charges," and "damages," for error in inspection by the deputy.

The bond, it will be observed, is not in the condition in the same language as the statute. The statute, sec. 6, provides for the security for the "due performance of the duties of his office." This bond is "that if the principal faithfully *discharges the duties* of the said office and duly accounts for all moneys and property." The language of the bond is certainly as wide as that of the statute if not wider. See 31 Vic. ch.3 7, D.; 33 Vic. ch. 5, D.; 43 Vic. ch. 3, D., as to the form of the bond, &c.

The learned Judge entered judgment at the trial on findings of fact, that there had been wrongful negligent and improper inspection by the deputy, and that the plaintiffs were entitled to recover against the inspector for acts of the deputy, thus inferentially holding that the plaintiffs were "persons aggrieved" within the meaning of the statute; but doubting as to the liability of the sureties

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for the acts of the deputy, entered a judgment in their favour.

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The plaintiffs were Montreal merchants, who had purchased relying on the inspection.

Although it was formally contended before us that the evidence did not warrant the finding as to faulty inspection, and that the plaintiffs were not "persons aggrieved," these objections were but faintly urged, and we think the evidence is too clear to warrant serious argument that the findings were not correct.

As to the question of notice of action. It is not necessary for me to say whether in my opinion such notice was necessary, for the want of notice was not pleaded. We were referred to *Marsh* v. *Boulton*, 4 U. C. R. 354, as an authority that it was not necessary to raise such objection by plea. Reference to that case will shew, however, that the statute there prohibited the plaintiffs recovering without its being proved at the trial that notice of action was given.

Timon v. *Stubbs*, 1 U. C. R. 347, decided that the objection must be raised by plea, and could not be raised under the general issue. In *Dale* v. *Cool*, 4 C. P. 460, it was held the defence could be raised under the general issue by statute. In *McLeish* v. *Howard*, 3 A. R. 503, 509, it was assumed that it was necessary to plead want of notice. Rule of pleading, No. 147, does not support the defendant's contention.

It was urged that this was a dispute which should have been determined under sec. 11. In my opinion, it cannot in any sense be said to be a dispute within the meaning of that section. The plaintiffs purchased the fish, relying as they had the right to do upon the inspection, and suffered loss, or were "aggrieved" by reason of the inspection, as found by the learned Judge. For such loss or damage they bring this action, and unless some legal difficulty be in their way are entitled to recover. Upon reading of the section, it will be apparent that its provisions are not applicable to a case like this, where the fish have been removed to a distance.

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There remains to be considered the question of the liability of the sureties.

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Mr. Osler, for the Guarantee Company, admitted that the defendant McAulay was liable for the acts of the deputy in this case. Indeed, the statute is so clearly worded as to admit of no reasonable doubt. But he contended that the sureties are not liable for the acts of the deputy. His main argument was that as the deputy is required to give security to be approved of by the Crown, it was never intended to give "the person aggrieved" a double remedy. He illustrated by suggesting a possible case, viz.: that such default might happen by independent acts of the inspector and his deputy as to give rise to claims in each case exceeding the amount of the penalty, and suggested whether the person aggrieved by the deputy's acts to an amount beyond the amount of the penalty in his bond could also claim against the inspector's sureties to the exclusion of, or *pari passu* with the "persons aggrieved" by the inspector. I confess I do not see how the persons aggrieved by the inspector could complain if the person aggrieved by the deputy had a claim upon the sureties of the inspector for the amount of his claim in excess of the penalty in the deputy's bond, and that this result could be obtained under the wide provisions of the Judicature Act, I do not doubt.

The persons claiming from the inspector would have their position improved by the amount of security thus given by the deputy. If each deputy is obliged to give a bond, with independent sureties, it is in effect increasing the security given by the inspector to the manifest advantage of the inspector's creditors.

It seemed to me, at the argument, that counsel for the company would not have pressed his argument against the liability of the company had there not been the double security. Possibly I did not feel sufficiently the pressure of the objection that the liability of the surety was under the terms of the bond, and the wording of the statute, confined to the acts of the inspector.

Reference was made to the sheriff's liability for the acts

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of his deputy. The form of the covenant by the sheriff is that he "shall well and duly pay over * * all such moneys as he shall receive by virtue of his said office of sheriff, and that neither he nor his deputy shall wilfully misconduct himself *in his said office* to the damage of any person being a party in any legal proceedings."

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It will be observed that there is *one office*—"his said office," and the sheriff is liable for his own acts and the acts of his deputy. See 27 & 28 Vic. ch. 28, Form D.

It of course cannot here be doubted that the sheriff's sureties are liable under the covenant in which they thus join.

Counsel cited no authority directly in point.

Let us see what is the liability of the inspector on his bond. For this purpose read it as if the words of the statute were interwritten. Recite that he is bound to give security for the due performance of the duties of his office in such form as may be prescribed by law, that such bond shall avail to the Crown, and all persons aggrieved by any breach of the conditions thereof: that he may, and shall when thereunto required by the governor, or the boards of trade, appoint a deputy, or so many deputies as may be necessary for the efficient and speedy performance of the duties of his office: that these shall be his deputies for all the duties of his office: that their official acts shall be held to be his official acts, and that he shall be responsible for them as if done by himself: that these deputies are to be paid by him, and removed at his pleasure: that in case of certain deputies, as to the acts of the deputies which are decided adversely to the opinion of the deputy, he shall be liable for costs, charges, and all damages. Then the condition that if he, the inspector, faithfully discharges the duties of his office, and duly accounts for all moneys and property which may come into his custody by virtue of his office, then his obligation shall be void.

If after such bond were given, his deputy received moneys or property in the performance of the duties of his office, and did not account for them, and an action

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were brought against the inspector on the bond, could he successfully defend?

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It could scarcely be so contended. And if the deputy in the performance of the duties of his office, or his official acts, should be careless, faulty, or negligent, and damage should arise, what defence could the inspector raise to an action on the bond? If any, then if sureties join in such a bond such defences avail them; if none, then, apart from release or discharge, what defence could the sureties raise?

I have found two cases which may assist in coming to a conclusion: *Regina* v. *Stanton*, 2 C. P. 18, and *Regina* v. *Miller*, 20 U. C. R. 485.

The head note in the former is as follows: "A. having been appointed collector of customs, gave a bond to her Majesty, conditioned that he should in all things well and truly discharge his duty as collector, and account for and pay over all moneys which should come into his hands. He received written instructions that all entries were to be made by him, all permits were to be granted and signed only by him, and payment of all duties to be made by him, except under certain circumstances: *Held* *per cur*, "that having permitted the deputy collector rightfully to assume and perform duties entrusted to him alone, he was responsible under his bond for defalcations of said deputy."

The condition of the bond was: "That if he should in all things well, truly, and faithfully discharge his duties as collector aforesaid, and should well and truly account for and pay, or cause to be paid * * all moneys which he should receive and collect, or which might come into his hands by virtue of his office of collector as aforesaid, to and for the use of Her Majesty," &c.

Macaulay, C. J., in giving judgment, says at p. 31: "I * * entertain the opinion that as between the Crown and the defendant, the defendant constructively received (so far as essential to create a responsibility therefor) all those moneys for duties which, while the defendant himself was present in charge, and ought to have personally received,

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he tacitly permitted Roy to receive. The defendant and Roy, in relation to the payments so sanctioned, were virtually joint accountants."

McLean, J., said, at p. 34: "The collector may, if he thinks proper, appoint any clerk in the office to receive all moneys, but in receiving it such clerk would undoubtedly be only the agent of the collector, to whom the whole responsibility must necessarily belong * * * The surveyor of customs" (Roy) "gave security for the due accounting for such moneys as he might receive, and this security was probably exacted to guard against any defalcations which might arise in the paying over of any moneys received while in charge of the office in the absence of the collector. The security," *i.e.*, Roy's, "would no doubt be liable for any moneys received; they could not screen themselves by alleging that their principal received the money improperly or out of the line of his duty. The only question as to them must be, whether Roy did or did not receive and pay over certain moneys: But though Roy and his sureties would be liable, the defendant and his sureties would not be discharged."

It will be observed that these facts are singularly close to the facts in the case we are considering. In each case there are superior and subordinate officers, both giving security for the proper accounting for and paying over of moneys which come into their hands, and the sureties of the superior are held to be liable for the default of the subordinate officers.

Regina v. *Miller*, 20 U. C. R. 485, is only of interest as containing an expression of opinion by Robinson, C. J., as to the liability of a surety. After giving an illustration and drawing a conclusion, he proceeds, at p. 493: "If the government could legally appoint Acton to be a collector of customs for Upper Canada, not restricting his duty to any particular port, and if they did so appoint him, and if the defendant, seeing that he was so appointed, became surety in a bond for the due discharge of his duties under that commission, he can as little set up that he was not answerable

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for any breach of a duty which came within the scope of the appointment, or, in the words used in the plea, that he gave and executed the bond in respect to something less than that which the bond plainly imports."

I am of the opinion that the sureties, the Guarantee Company, are liable under the bond in question. I express that opinion with less diffidence, in view of the expressions of opinion in *Regina* v. *Stanton*, 2 C. P. 18—expressions which possibly are merely *dicta*, and yet entitled to the highest respect.

Mr. Osler did not overlook the pleading which asked for reformation of the bond, so as to release the company from this or any similar liability, but he did not suggest any evidence upon which such relief could be asked, or press us very strongly to grant it. It is apparent no case was made out for reformation, and if there had been, the question as to the Minister of Justice not being represented would necessarily arise. The remarks of Robinson, C. J., above quoted, are much in point as to this contention.

I am of the opinion that the judgment in favor of the plaintiff for $337.37, against the defendant McAulay, must stand, and his motion be dismissed with costs; and that the judgment in favour of the Guarantee Company must be set aside, and a judgment be entered for the plaintiff against the Guarantee Company for $337.37, with costs, including the costs of this motion.

The plaintiff's motion is allowed, with costs; and the defendant McAulay's motion dismissed, with costs.

WILSON, C. J., and GALT, J., concurred.

Judgment accordingly.

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[QUEEN'S BENCH DIVISION.]

IN RE ARBITRATION BETWEEN THE CORPORATION OF THE TONSWHIP OF DOVER EAST AND WEST AND THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Municipal Act—Drainage—Award—Report of Surveyors.

The report and plans of the surveyor made under R. S. O. ch. 174, secs. 529 *et seq.*, preparatory to the undertaking of drainage works affecting two municipalities, should be so specific as to indicate what is intended to be done in respect of which the servient municipality is to bear any expense.

The property owners petitioned that a certain drain should be deepened and enlarged. The surveyor reported that the work to be done would extend from a certain road in the township of Chatham to a little beyond a certain road in the township of Dover, but did not show the point where it would begin or the point where it would end; that the work would improve the drain, and would afford a much needed outlet to all the lands draining into a certain stream; and that the drain would benefit lands in both townships. He then gave an estimate of the cost, amounting to $1,096, and stated that the drain when so completed should be kept in repair by Chatham, at the joint expense of Chatham and Dover, and the lands in Dover assessed therefor; said municipalities and lands paying in the same relative proportion as for the work, and he assessed the cost of the work "as in the annexed schedule."

The by-law passed by Chatham for doing the work recited this report, adopted it, and provided for raising the money by assessment of the following rates, and then followed a schedule of assessment on lands and roads in Chatham "for the enlargement of Little Bear Creek drain," &c., and another assessment on lands and roads in Dover "for the benefit for outlet and for constructing a drain to carry off water brought down on lands to damage them." These schedules (which were assumed to be the schedules returned by the surveyor) shewed the lots and roads in each township to be assessed, and the sums assessed against each.

The township of Dover appealed, and this assessment having been confirmed by the award of arbitrators: *Held*, that the report was defective in not stating that the work was to be performed and maintained at the expense of both municipalities, and in what specified proportions, and in not shewing definitely the *termini* of the work; and because, taking the plans, profile, and report together, as set out below, the extent and character of the work to be done in Dover was not sufficiently shewn.

D, one of the arbitrators, having signed the award, not in fact concurring in the apportionment between the lands and roads in Dover, but holding that this was for the Court of Revision to remedy: *Held*, that this was the duty of the arbitrators, and therefore the award was bad, as D did not in fact concur in affirming the assessment.

Quære, however, as to the duty of arbitrators in this repect: *Corporation of Thurlow* v. *Corporation of Sidney*, 1 O. R. 249, questioned.

Quære, whether any obligation, on the part of another municipality, to pay part of the cost of the work arises, where the draining is not from, but to such municipality, as, in this case, to Dover from Chatham.

THIS was an appeal by the corporation of the township of Dover against an award made by A. E. Merritt and

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William Douglas, two of the arbitrators appointed pursuant to the Municipal Corporations Act R. S. O. ch. 174, confirming an assessment made by W. G. McGeorge, a Deputy Provincial Land Surveyor, at the request of the corporation of the township of Chatham, under section 529 of the said Act, of certain lands and roads in the township of Dover, benefited by deepening and enlarging a drain called LittleBear Creek drain West, as well as lands and roads in the township of Chatham.

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On the evidence and documents proved before the arbitrators it appeared, from the recital contained in the by-law of the corporation of Chatham for the doing of the work, that the majority in number of the owners, as shewn by the last revised assessment roll of the property thereinafter set forth to be benefited by the deepening of the Little Bear Creek drain West, had petitioned the council of the said corporation of Chatham, praying that the Little Bear Creek drain be deepened and enlarged from the Prince Albert road to the Chatham and Dover Town Line, and as much further as the engineer deemed expedient to make the said drain an effectual outlet: that the corporation procured an examination to be made by the said McGeorge of the said locality proposed to be drained by the deepening of the said drain, and had procured plans and estimates of the work to be made by him, and an assessment made by him of the real property to be benefited by the deepening of the said drain, stating, as nearly as could be, the proportion of benefit which, in his opinion, would be derived in consequence of such deepening by every road and lot and part of lot. The by-law then set out the report as follows:

"*To the Reeve, Deputy Reeves, and Municipal Council of Chatham Township:*

"GENTLEMEN.—Having received instructions from your honourable body to make a survey of *Little Bear Creek drain* in the township of Chatham, *for the construction of a proposed outlet to the Little Bear Creek drain*, and to examine the said drain from the Chatham and Dover town line to the Prince Albert road, I beg to report that I have

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made said survey and examination. and the work necessary to be done will extend from said Prince Albert road to a little beyond Baldoon street in the township of Dover East. The work, which will be in accordance with the accompanying plans and profiles, and with this report, will improve Little Bear Creek drain, and will afford a much needed outlet to all the lands draining into Little Bear Creek, and will benefit lands in the north by cutting water from them. The drain will greatly benefit lands in both townships, Chatham and Dover. I have made an estimate of the cost of the needed work, which estimate is as follows: From station O to station 240, a distance of 1,440 rods, $310; clearing out bars below station 240, $350; clearing and logging to the width of 100 feet in Dover, $300. To this add for bridges and repairs, $500; survey, plans, report, &c., $115; assistants in survey, $18; by-law, $100; letting and superintending, $400; clerks' fees, $100; registering by-laws and debentures, $3; making a total of $10,196: the drain, when completed, to be kept in repair by the municipality of Chatham Township at the joint expense of the said municipality of Chatham and the municipality of Dover, and of the lands in said municipality assessed for the work herein reported on, said municipalities and lands paying in the same relative proportion as for the work herein reported on. I assess the cost of the work as in the annexed schedule.

"I have the honour to be, gentlemen,

"Your obedient servant,

"W. G. McGeorge."

The report was not quite accurately set out in the printed copy of the by-law filed. The report gave the cost of the work from station to station, and total $8,960; to which it added the sums mentioned in the report as in the by-law, $1,236, making the complete total of $10,196.

The by-law then recited that the Council were of opinion that the drainage of the locality was desirable. The by-law then enacted, pursuant to the provisions of R. S. O. ch. 174, and amendments thereto, that the said report, plans and estimates should be adopted, and the said drain and works connected therewith should be made and constructed in accordance therewith: (2) that the reeve of the township might borrow on the credit of the said township of Chat-

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ham and North Gore the sum of $8,717, being the funds necessary for the work, and might issue debentures of the corporation to that amount in sums not less than $100 each, and payable within ten years from the date thereof, with interest at the rate of not more than seven per cent. per annum: (3) that for the purpose of paying the sum of $5,679, being the amount charged against the said lands sought to be benefited as aforesaid, other than roads belonging to the said municipality, and to cover interest thereon at the rate of not more than seven per cent. per annum, the following special rates, over and above all other rates, should be assessed and levied in the same manner and at the same time that taxes were levied upon the undermentioned lots and parts of lots, and the amounts of the said special rates and interest as aforesaid, against each lot or part of lot respectively, should be divided into ten equal parts, and one such part should be assessed and levied as aforesaid for each year for ten years after the final passing of this by-law, during which the said debentures had to run.

Then followed a schedule in these terms:

"Schedule of assessment on lands and roads in the township of Chatham *(for the enlargement of Little Bear Creek drain West of the Prince Albert Road and its extensions into Dover East)* for benefit for outlet, and for cutting off water that would flow upon them to damage them."

Then followed a list of the lands, described by concession and lot, thus:

	Lots and parts of lots.	Acres.	Value of improvements.
5th concession.	N. ½ 8.	100	$6 00,

and enumerating the lands in the several concessions, from the 5th down to the 15th, making apparently a uniform rate generally in respect of the lots in each concession, though in some concessions the rate would be higher in one concession than in another. In the 5th concession the rate was $6 on a hundred acres, and $3 on fifty acres, while in the 10th it was $40 on a hundred acres, and $20 on fifty acres, with some variations.

Then followed roads described thus: Roads between 5th

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and 6th concessions, lots 6 to 24, inclusive, $100. Then followed: "Schedule of assessment on lands and roads in the township of Dover East for benefit to outlet, and for constructing drain to carry off water brought down on lands to damage them, concession 10, lot 24, $10, &c.; then, road between 10th and 11th concession from town line to Baldoon street, $50."

Then followed a recapitulation, thus:

Total on lands in Chatham Township	$5,679
" on roads " "	3,038
" on lands in Dover Township.....	279
" on roads " "	1,200
Total	$10,196

The by-law then provided that for the purpose of paying the sum of $3,038, being the total amount assessed against roads in the municipality of Chatham, and to cover interest thereon for ten years, at not more than seven per cent. per annum, a special rate over and above all other rates should be levied in each year upon the whole ratable property of the township of Chatham and North Gore in each year for ten years. In the report the amount of the schedules was not added up.

The corporation of Dover on the 7th April, 1883, within the time allowed by section 540 of the Act, being within twenty days after service of a copy of the said report upon the corporation of Dover, gave notice of appeal on the following grounds:

1. A majority in number on the last revised assessment roll, as owners of the property to be benefited by the proposed drainage works, did not properly petition therefor.

2. The petition was signed by Chatham ratepayers only.

3. No by-law was passed or provisionally adopted for the construction of the said drainage works, nor published, nor notice thereof given, as required by law.

4. No proper reports, plans, &c., were made thereof.

5. The council of Chatham had no authority to carry the said works further into Dover than necessary to carry

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the water beyond Chatham, nor could it or the said engineer give power to assess or charge the Dover lands therefor.

6. Neither the said council nor the said engineer had power to assess the Dover lands, in the manner and for the purposes or benefit in the said pretended report and by-law.

7. The said report did not shew particularly enough for what the proposed assessment on the Dover lands was made, nor any facts giving power to the said council of Chatham to assess Dover lands.

8. The said report did not shew any facts or opinions upon which Dover East could be assessed for or on account of Dover roads or said town line, or to what extent, or how or for what purpose they were benefited or assessed.

9. The said report did not shew at whose expense or in what proportions the said drain should be made.

10. The assessment on the Dover lands and roads was too high proportioned to the benefit to be derived, and no assessment should be made on the said lands or roads, and the said drain would be injurious thereto.

11. The assessment on the town line between Dover and Chatham was too high proportioned to the benefit to be derived.

The notice further stated that the council of Dover had appointed Robert Fleck their arbitrator, and that the corporation of Chatham and North Gore was required to appoint an arbitrator upon its behalf within ten days after service of the said notice.

Upon this Albert E. Merritt was appointed arbitrator for the corporation of Chatham, Robert Fleck for the corporation of Dover, and William Douglas the third arbitrator. The arbitrators, being duly sworn as the Act directs, entered upon their duties, and after having heard all the evidence, which was reduced to writing, made in their minutes the following memorandum :

"The arbitrators have considered it best to decide against the legal objections, and to decide against Mr. Wilson's contentions, leaving him to bring them

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before the Courts if he thinks proper. The arbitrators all agree that Dover will be benefited by the work, Mr. Fleck holding on the evidence offered $500 should be taken off the assessment on the town line road, the other arbitrators holding that lands and roads in the township of Dover are benefited to more than the amount of the assessment, and that it should be confirmed; but one of the arbitrators, Mr. Douglas, holding that while the bulk sum assessed is not too great on the land and roads, parts thereof so assessed should be raised, which it is competent for the Court of Revision to do. As to costs, Mr. Fleck contends, as Chatham and its engineer have not presented their assessment and reports in proper form, they should pay all their own costs, including that of their arbitrators. The other arbitrators think the township of Dover should pay all the costs of the arbitrators and award, and that no other costs be awarded to either party; the costs being fixed at $260, which shall be paid by Dover, on demand, to Chatham, if the latter pay it. The arbitrators therefore agree to confirm the assessment as above, and that Dover pay the cost of the arbitrators as mentioned.

Mr. Fleck declines to sign the award. The arbitrators now adjourn till four p.m. this day, to sign the award at same place.

"(Signed) "A. E. MERRITT,
"WM. DOUGLAS."

Below this is written the following:

"Dissenting as above stated from the decision of the majority arbitrators, I decline to sign any award, and also decline to be present at the adjourned meeting to sign the award, if in accordance with the above memoranda."

The award, which was in accordance with the above minutes, was signed at the adjourned meeting by the arbitrators Merritt and Douglas, whereupon the corporation of Dover caused notice of motion to be given to the corporation of Chatham, that the Court would be moved on May 31st, 1883, or as soon after as counsel could be heard, that the findings and award made by the arbitrators, or two of them, A. E. Merritt and Wm. Douglas, be set aside or modified by the Court, on the grounds:

1. That after the execution of the first finding or award

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the said arbitrators were *functi officio*, and had no authority or power to make or execute the second or final award made by Merritt and Douglas, and the said final award was made in the absence of Fleck, and without discussion, and was not according to the decision arrived at even by the two arbitrators who signed the final award.

2. That said findings and awards do not set forth or shew, or assess or charge every road and lot, or portion of lot, according to the proportion of benefit the same in the opinion of the arbitrators derives from or will derive from the work, while it is clear therefrom that the arbitrators did not confirm or intend to confirm the different particular assessments, but only the total sum charged against Dover.

3. That said findings and award were contrary to law and evidence, and the weight of evidence.

4. That no proper report, plans, specifications, assessments, and estimates of the engineer for Chatham of the proposed work were made and served, as required by law.

5. That no proper by-law was passed or provisionally adopted for the construction of said proposed work, as required by by-law; the pretended by-law not charging Dover at all; but even if it did, it assumed to assess directly the particular lots and parts of lots and roads and parts of roads in Dover, for specific and various sums, instead of charging the corporation of Dover with a bulk total sum, or with one bulk sum for roads and one bulk sum for lands, leaving the township of Dover to levy and collect from the particular roads and lots the specific sums; and the by-law (if at all) charged and assessed such lots and roads for payment of moneys chargeable only against the lands and roads in Chatham; and the by-law did not shew or recite that the engineer reported or found that the lands or roads in Dover were liable to assessment; and said by-law did not determine what lands would be benefited by the proposed drain.

6. No petition upon which such by-law could be based, was produced or proved before the said arbitrators.

7. The council of the said township of Chatham and

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their engineer had no authority or power to carry the said drain further into Dover than sufficient to find fall enough to carry the water beyond the limits of Chatham, and neither the said council nor the said engineer had authority or power to assess or charge the township of Dover, or the land and roads therein therefor.

8. That neither the said council nor the said engineer had authority or power to assess the lands in Dover aforesaid, in the manner or for the purposes or for the benefits in the said engineer's report, and the pretended by-law therein set forth.

9. That the said engineer's report did not shew with sufficient particularity for what the proposed assessment upon the lands in Dover was made, nor did it shew any facts which would give authority or power to the said council of Chatham to assess the lands in Dover.

10. That the said pretended report did not shew any facts, circumstances, or opinions, upon which Dover could be assessed for or on account of its roads in Dover, or the said town line, nor did it shew to what extent, or how or for what purpose they were benefited or assessed.

11. That the said report did not shew at the expense of which municipality or municipalities, or in what proportions, the said proposed drains should be constructed.

June 22, 1883. *C. Robinson*, Q. C., and *M. Wilson*, for the appeal.

Pegley, contra.

March 8, 1884. CAMERON, J.—I regret to say this award cannot be supported.

The amount required to be expended in the construction of the work is very considerable, being $10,196; and while two of the arbitrators are of opinion that the aggregate amount required from the township of Dover is less than the benefit that will result to that township from the work, the third arbitrator, chosen by that township, only dissents in respect to the value of improvement to the

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town line between the two townships, and the improvement of this road is charged to an equal amount against the township of Chatham. Mr. Fleck thinks the charge ought not to be more than $500, the assessment by the engineer having been $1,000, and the other arbitrators do not think as a whole the assessment unreasonable.

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One is, under such circumstances, led to suppose, so far as amount is concerned, only substantial justice has been done, and the award ought to be upheld if possible, though I must say my examination of the evidence before the arbitrators quite fails to convince me that by this particular work Dover is to be benefited to the extent charged against it. A knowledge possessed by the arbitrators of the locality may enable them to see benefits that I do not, and I would therefore, on the mere question of amount of benefit, defer to them.

But the corporation of Dover claims the right to have its complaint considered from the standpoint of its legal rights, which is undoubtedly the case, and the Court cannot concern itself with any other consideration than the legal merits. The work is certainly pretty costly, and to have it thrust upon the corporation and the landowners whose lands are benefited, though for their benefit, against their will, can only be justified by its being done strictly in accordance with law.

It was objected before the arbitrators, and the objection has been renewed before the Court, that the proceedings of the engineer, on whose report, if at all, liability rests on the corporation of Dover and the landowners therein, do not so conform to the requirements of the Act as to create any liability upon that township and the landowners therein. Certainly where a work of such extent, affecting the rights of a separate municipality and ratepayers therein, is to be undertaken, one would suppose extreme care would be taken in the observance of the statutory requirements preliminary to an interference with such rights.

The first requisite of the statute is, that a majority of

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the owners of the property to be benefited should petition the council of the municipality in which their property lies, for what they require, which may be the deepening of a stream, creek, or water course, or draining of the property, which they describe. Then, in accordance with what has been petitioned for, the council may procure an examination to be made by an engineer or provincial land surveyor of the stream, creek, or water course proposed to be deepened, or of the locality proposed to be drained, and may procure plans, and estimates to be made of the work by such engineer or surveyor, and an assessment to be made by him of the real property to be benefited by such deepening or drainage, who shall state as nearly as may be in his opinion the proportion of benefit to be derived by such deepening or drainage by every road and lot, or portion of lot; whereupon, if the council is of opinion that the deepening of the stream, creek, or water course, or the draining of the locality described, would be desirable, it may pass by-laws (1) for providing for the deepening of the stream, creek, or water course, or the draining of the locality; (2) for borrowing on the credit of the municipality the funds necessary for the work, although the same extends beyond the limits of the municipality, and for issuing debentures of the municipality for the requisite amount; (3) for assessing and levying, in the same manner as taxes upon the real property to be benefited by the work, a special rate sufficient for the payment of the principal and interest of the debentures; (4) for regulating the times and manner in which the assessment shall be paid; (5) for determining what real property will be benefited. The by-law before its final passing must be published for four weeks.

These are the requirements to be observed before any liability attaches to the property owners whose lands may be benefited. By these provisions it is manifest the deepening of a stream, creek, or water course, though done with the same object, is different from the drainage of a locality That being so, there has been singular want of care in the preparation of the petition, the engineer's report, and the by-law.

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The property owners petitioned, not for the deepening of a stream, creek, or water course, all which I take to mean natural channels for water to flow in, but that Little Bear Creek drain be deepened and enlarged from the Prince Albert road to the Chatham and Dover town line, and as much further as the engineer deems expedient to make the said drain an effectual outlet. A drain, as I understand it, is an artificial channel or ditch.

Then the surveyor reported that, having received the instructions of the council to make a survey of Little Bear Creek drain in the township of Dover East for the construction of a proposed outlet to the Little Bear Creek drain, and to examine the said drain from the Chatham and Dover town line to the Prince Albert road, he had made said survey and an examination, and that the work necessary to be done would extend from said Prince Albert road to a little beyond Baldoon street, in the township of Dover East: that the work would be in accordance with the plans and profiles accompanying the report, and would improve Little Bear Creek drain, and would afford a much needed outlet to all the lands draining into Little Bear Creek, and would benefit lands assessed to the north by cutting water from them: that the drain would greatly benefit lands in both townships, Chatham and Dover East. Then follows the cost of the work in detail. The report goes on to provide that the drain, when completed, is to be kept in repair by the municipality of Chatham at the joint expense of Chatham and Dover, and the lands in Dover assessed for the work reported on, in the same relative proportion as for the work reported on.

Then it is enacted by the by-law that the said report plans, and estimates be adopted, and the said drain and the works connected therewith be made and constructed in accordance therewith, and the necessary provisions for issuing debentures, &c., are made. Then, without its being stated that it is the assessment made by the surveyor, appears in the body of the by-law a list of lands, showing the quantity benefited, and the value of improvements so

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called, under the following heading: "Schedule of assessment on lands and roads in the township of Chatham, for the enlargement of Little Bear Creek drain west of the Prince Albert Road, and its extension into Dover East, for benefit for outlet, and for cutting off water that would flow upon them to damage them." Then follows: "Schedule of assessment on lands and roads in the township of Dover East for benefit for outlet, and for constructing a drain to carry off water brought down on lands to damage them."

Looking at these documents without extrinsic evidence, I think it would be impossible to define the real nature of the work to be done—whether it was intended to be the deepening of a natural stream or water course, or the enlargement of an old drain called the Little Bear Creek drain, or a work to prevent water flowing to the lands said to benefited.

From the evidence of the surveyor it appears that in fact the Little Bear Creek drain is artificial in Chatham, running into the Little Bear Creek in Dover, and that Dover was not so much directly benefited by this work as by previous drains made by Chatham taking water away. He said, on page 6: "I think less water goes down Little Bear Creek than before any ditching was done, because at the Prangley tap at the east side of Chatham all the water is cut off and has cut a large ditch, and it cuts off all the water from Camden and Zone, which would otherwise come down through Dover, through Little Bear Creek. I thought if that water came down with what comes now an effectual drainage could not be got in Chatham; and since that the Prince Albert road drain has been made, I think, 14 feet in bottom, 3 to 3½ deep in places, and 20 feet in top, also the Town Line drain; and I think more water used to go down the Little Bear Creek than now. It was a very wet country before any drainage. The creek has banks in Dover." From the work estimated to be done there is work of a character not embraced in the word deepening.

The stations marked on the profile number from 0 to

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240. No. 135 is on the town line, and the estimate includes a sum of $350 for clearing out bars below station 240: $300 clearing and logging to the width of 100 feet in Dover; $500 for bridges and repairs; survey, plans, and reports, $115. The mere deepening of a stream would not include building of bridges, and would not involve repairs to old ones, and I do not see how such expenditure is to any extent to be made at the cost of Dover, or the owners of the lands therein which might be benefited by the deepening. The surveyor further stated in his evidence that his plans and profile do not shew what was to be done in the 240 rods below Baldoon street: it is to be widened and straightened.

I only make these extracts from the evidence to shew how difficult it would be for the Dover Council to ascertain from the plans, profile, and report, the extent of the work to be done and its precise character.

The provisions of the statute that I have as yet referred to apply only to work within a municipality for the benefit of property owners therein, and I will now make some extracts from and consider those that extend to municipalities and the owners of the land therein outside of the municipality in which the work is originated.

Section 534 R. S. O. ch. 174, provides that wherever it is necessary to continue the deepening or drainage aforesaid beyond the limits of any municipality, the engineer or surveyor employed by the council of such municipality may continue the survey and levels into the adjoining municipality until he finds fall enough to carry the water beyond the limits of the municipality in which the deepening or drainage was commenced.

By section 535 it is declared that where the deepening and drainage do not extend beyond the limits of the municipality in which it was commenced, but in the opinion of the engineer or surveyor aforesaid benefit lands in an adjoining municipality, or greatly improve any road lying within any municipality, or between two or more municipalities, then the engineer aforesaid shall charge the lands

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to be so benefited, and the corporation, person or company whose road or roads are improved, with such proportion of the cost of the work as he may deem just, and the amount so charged for roads, or agreed upon by the arbitrators, shall be paid out of the general funds of such municipality or company.

By section 536 the engineer or surveyor shall determine and report to the council by which he was employed whether the deepening or drainage shall be constructed and maintained solely at the expense of such municipality, or whether it shall be constructed or maintained at the expense of both municipalities, and in what proportion.

By section 537 the engineer or surveyor, where necessary, shall make plans and specifications of the deepening or drainage to be constructed, and charge the lands to be benefited by the work as provided therein.

By section 538 the council of the municipality in which the deepening or drainage is to be commenced, shall serve the head of the council of the municipality into which the same is to be continued, or whose lands or roads are to be benefited without the deepening or drainage being continued, with a copy of the report, plans, and specifications of the engineer or surveyor [so far as they affect such last mentioned municipality.] The words between brackets are not in the Act now in force (ch. 18, 46 Vic.). And unless the same is appealed from it shall be binding on the council of such municipality.

By section 539 the council of such last mentioned municipality shall, within four months from delivery to the head of the corporation of the report of the surveyor, as provided in the next preceding section, pass a by-law or by-laws to raise such sum as may be named in the report, or, in case of an appeal, for such sum as may be determined by the arbitrators, in the same manner and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned, as provided in the 529th section of the Act.

By section 542 it is provided that after such deepening

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or drainage is fully completed it shall be the duty of each municipality in the proportion determined by the engineer or arbitrators, or until otherwise determined by the engineer or arbitrators, under the same formalities as nearly as may be as provided in the preceding sections, to preserve, maintain and keep in repair the same within its own limits, either at the expense of the municipality or parties more immediately interested, or at the joint expense of such parties as to the council, upon the report of the engineer or surveyor, may seem just.

All these provisions were fully reviewed and considered by the present Chief Justice of the Common Pleas when a member of the Court of Queen's Bench, and the proper course to be pursued indicated under the several clauses affecting only the owners of the property in one municipality, and where several municipalities or several interests were involved, *In re The Corporation of Essex and The Corporation of Rochester*, 42 U. C. R. 523.

The conclusion arrived at was, that where the appellate tribunal was composed of arbitrators, all the parties interested should be parties to the arbitration. There several township municipalities, a county municipality, and the Canada Southern Railway Company, were affected, and it was held there should have been a joint arbitration, and an award made between two of the municipalities only was set aside.

The decision did not, in terms, determine that the owners of the property assessed should be made parties to such arbitration; but if the arbitrators are to decide as to whether the amount assessed against the property owners and the municipality, in respect of its roads, is relatively right or wrong, it is difficult to see on what principle that question is to be determined, unless the property owners have a right to be heard before the arbitrators; and it is difficult to see also in what different position an individual property owner would be from the Canada Southern Railway Company.

But it is also clear that no provision whatever is made

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for bringing the property owners before the arbitrators, the statute only requiring that the head of the municipality into which the work is continued, or whose lands or roads are to be benefited, should be served with a copy of the engineer's or surveyor's report. What is the meaning of "whose" in this connection? It is plain enough when relating to roads; but when applied to lands, what is meant? Does it mean lands belonging to the municipality or must it be read as meaning "in which?" The municipality may have land of its own, as was pointed out in the case just referred to, that may be benefited by the work, and when that is the case, can the Court properly give a different effect to the word? With reference to the right of appeal by the property owners in the non-originating municipality, the learned Chief Justice said, at p. 548: "The statute is not very clear on the subject, * * and I presume, although the Act does not expressly say so, that these persons may appeal from the assessment to the Court of Revision or Court of Appeal, as in ordinary cases, to have the assessment more equitably apportioned among themselves, not varying the aggregate amount which the municipality has been obliged to pay or assume. I think there may be such an appeal before the by-law is finally passed, because it is to be passed in the same manner as if it were passed under section 447" (of the Act of 1873, 529 of ch. 174, R. S. O.) "and by that section there is the right of appeal to the Court of Revision and to the Court of Appeal."

The by-law referred to here is the by-law to be passed by the non-originating municipality to raise the money to pay its proportion of the assessment. I find very great difficulty in seeing how the interests of the property owners can be fully protected by the notice of appeal, and I see as great difficulty in bringing them before the arbitrators. Mr. Douglas, the arbitrator, was evidently of opinion it was by the appeal to the Court of Revision that these interests could receive consideration, and that the arbitrators had only to deal with the question, was the

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amount assessed against the non-orginating municipality for roads and lands benefited fair in relation to the relative benefit derived by it and the originating municipality? If this is the correct view it is difficult to uphold the surveyor's report, because it does not name the proper sum to be raised by the township of Dover, nor does it in terms, in so many words, require Dover to raise or pay any sum. Assuming that the schedules embodied in the by-law are the schedules returned by him, and the evidence shews they are the same, except that in the report the amount is not added up, they do not name any sum as a sum to be paid by or assessed against Dover. All that is stated is, "Schedule of assessment on lands and roads in the township of Dover East for benefit for outlet, and for constructing a drain to carry off water brought down on lands to damage them." Then, after the mention of individual lots and roads with the amount set opposite each lot and road, follows the recapitulation: "Total on lands in Dover township, $279; total on roads in Dover township, $1,200." This falls short of what section 536 requires, namely, that the engineer or surveyor shall determine and report to the council employing him whether the work shall be constructed and maintained at the sole expense of such municipality, or at the expense of both municipalities, and in what proportion.

To have fulfilled the requirement of the section, he should have in terms declared that the work was to be constructed and maintained at the expense of both municipalities, and should have stated expressly the proportion to be borne by each; thus, Chatham, $\frac{7}{8}$, and Dover, $\frac{1}{8}$, or whatever the true proportion would amount to. In the report he defines that the drain, when completed, shall be kept in repair by the municipality of Chatham at the joint expense of Chatham, Dover, and the lands in the said municipality, meaning, I presume, Dover, paying in the same relative proportion as for the work reported on; but as I have already stated, this proportion is not defined.

It is to be observed clauses 536 and 542 do not seem to

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be quite consistent with each other. 536 makes no provision for any parties other than the municipalities bearing the expense of construction and maintenance, while 542 provides that each municipality, in the proportion determined by the engineer or arbitrators, either at the expense of the municipalities or parties more immediately interested, or at the joint expense of the municipality and such parties, as to the council upon the report of the engineer may seem just, shall bear the expense. This obligation is different from that imposed by the report of the engineer in the present case, as he required the township of Chatham to keep the work in repair, but at the joint expense of Chatham and Dover, and the property owners benefited.

Section 542 does not seem to permit one municipality to interfere with the repairs in the other; at all events, until the engineer at some subsequent time, and after observing the same formalities, determines otherwise. It may be that a determination by him in the first instance would be sufficient if the word otherwise may relate to the party to do the work, and not merely to the proportion of the expense or cost of the repairs.

In the case of *The Corporation of Thurlow* v. *The Corporation of Sidney*, 1 O. R. 249, the Queen's Bench Divisional Court held it was the duty of the arbitrators to specify the lands in the township of Sidney that the drainage in Thurlow would benefit, and how much each lot or part of lot should be assessed, the amount of benefit reported by the engineer not having been affirmed but changed. The decision, therefore, while it does not cover the circumstances of this case is to the effect that the arbitrators do not deal with the aggregate amount merely, but must apportion the amount according to the benefit derived from each lot, and of course by each road. I concurred in the judgment in the case, but am not, having regard to the facts and further consideration presented by this case, thoroughly satisfied that a right conclusion was then arrived at; but it and the case of *Essex* and *Rochester*, already cited, would seem on principle to control this case.

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Therefore, the arbitrator, Mr. Douglas, not in fact, as the minute of the arbitrators shews, concurring in opinion that the amount assessed by the surveyor was correctly apportioned between the property owners and the township of Dover, there was no valid award or decision arrived at, as there was not the concurrence of the mind of any two of the arbitrators in the result reached if it was the duty of the arbitrators to readjust the amount payable by the property owners and by the municipality respectively, and therefore the award could not be allowed to stand.

If this were the only ground I would direct the award to be referred back to the same arbitrators for reconsideration, but I am of opinion the foundation of the entire proceedings, a proper report from the surveyor, is wanting, and that it cannot properly be sent back to them.

There would seem to be no right whatever for one municipality to invade the territory of another for drainage purposes, beyond the point where fall sufficient to carry the water beyond the limits of the municipality commencing the deepening or drainage, is found.

Suppose the stream was a river with considerable fall but it was dammed or obstructed by snags, a jam of drift wood, or other obstruction, the Act has not made provision for an adjoining municipality sending men in to remove the obstruction. That may have been a *casus omissus*, or the Legislature may have properly withheld such authority, as in that case the right of the riparian proprietor to pen back the stream for milling or other purposes, might be interfered with by a municipality seeking to use such stream as a part of its drainage system. I am not prepared to say that an adjoining municipality would have a right to interfere with the level created in a stream by an artificial dam constructed by a riparian proprietor. This case does not present such a question, except incidentally from the fact that the surveyor went below the point where he found sufficient fall to remove obstructions from the stream, and charges for work so to be done $350, which, though a work quite as beneficial as the deepening of the

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channel would have been, yet is one not coming within the terms of the Act.

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I think the surveyor's report ought to shew in terms the extent of the work, that is, its termini, so that the servient municipality, so to speak, might know the extent of the obligation sought to be imposed upon it, and whether more was not sought than the right given by the Act, that is to say, to carry the deepening or drainage to a point where sufficient fall would exist to carry the water beyond the dominant municipality. Thisexpression, "fall sufficient to carry water beyond the limits of such municipality," I take to mean to make it running and not stagnant or dead water at that point.

The contention of Mr. Wilson, on behalf of Dover, that it is only where the draining is from a municipality and not to or into it, that an obligation to pay a portion of the cost of the work arises, is of much weight. There seems in this respect to have been an oversight in framing section 534, which provides for the draining into an adjoining municipality, because it omits all mention of the cost and the manner in which it is to be defrayed, while in section 535, where the draining from is provided for, the manner in which the expense is to be borne is expressly indicated.

It may be the right to invade the adjoining municipality was intended by the Legislature as a sufficient equivalent to the invading municipality for the benefit its work conferred on its invaded neighbour; but the language of sections 537 and 538, which must be read with section 534, rather tend to displace this view.

I do not at present express any positive opinion on the point, as I think the other grounds referred to are sufficient to invalidate the award. I do not think the want of a by-law is an answer to the validity of the award.

If no by-law were finally passed by Chatham the work of course could not be proceeded with, and Dover would not be bound to raise its proportion of the needed amount. The provisional passing of the by-law I think is sufficient to give to Chatham the right it exercised, of serving the

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Reeve of Dover with the surveyor's report, &c., and then Dover became the actor in taking the appeal.

I am of opinion, on the whole case, that the award cannot be supported, and should be set aside. The defects in the surveyor's report are, that it does not disclose the beginning or end of the work. Saying "from station 0 to station 240," without indicating where stations 0 and 240 are situated, is not sufficient to shew where the work begins or ends. This is all the information the report gives. A reference to the profile shews station 0 is at Prince Albert Road, station 135 at the town line. This profile does not shew station 240. The last mentioned is 239, with the remark, "continued 300 rods further, clearing bars and timber." This profile professes to be profile of the Little Bear Creek drain in Chatham township from Prince Albert Road westward, and of its extension into Dover. The plan gives no precise information, but merely shews a brown streak running through certain lots and concessions. The report and plans should be so specific and clear as to indicate what was intended to be done in respect of which the servient municipality was to bear any expense.

I do not at present understand how Dover was to be benefited by the deepening of Little Bear Creek drain, treating that as an artificial ditch, unless it comes under section 535, when the lands and roads benefited in Dover might have to contribute; but then there would be no work done in Dover. Here the work apparently contemplated is to be done within Dover, except the deepening and enlargement of the existing drain in Chatham. Now, as to the expense of this deepening, there seems no reason why Dover should contribute, the flow of the water being through Dover and from Chatham. The work of deepening Little Bear Creek in Dover is what Dover and the lands benefited therein should share in the expense of, and I think the estimated cost of that work, unconnected with the work in Chatham, should have been shewn separate and distinct from the cost of the entire work, and the proportion of that cost is what ought to have been assessed

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by the surveyor against Dover and the lands benefited therein. www.libtool.com.cn

It is, of course, quite possible that deepening a drain in Chatham and giving to it a better outlet through Dover, would benefit other and quite different lands in Dover from those which the mere deepening of the Little Bear Creek would benefit. The statute only makes provision for two cases, that is, under sections 534 and 535. Where the deepening is continued into the adjoining municipality the benefit is to be derived from such deepening or the drainage thereby created in such adjoining municipality. The work to be done in Dover, exclusive of bridges, according to the evidence of the surveyor Mr. McGeorge, was $3,770, and the cost of bridges $500. From his evidence, he, in making his report, assumed to have the right to widen the bridges, and thus to interfere with the roads and bridges in Dover, which it is scarcely possible was a right intended to be conferred under the expression deepening of a stream, creek, or water course; and he does not appear to have made his assessment as against Dover, merely in respect of the work done in Dover.

What the petitioners prayed for was that Little Bear Creek drain should be deepened and enlarged, the effect of which, if beneficial at all, would be to lead a larger quantity of water, or the same quantity more rapidly than before to Little Bear Creek, and to make for such drain an efficient outlet. The surveyor had no right to go beyond this against the will of Dover and the owners of lands therein, and Dover and the land owners ought not as a matter of equity, to be charged, with more of the expense than would be warranted by the direct benefit that they would derive from the work if no larger quantity of water were thereby brought upon them by the works It would be unjust to make them pay to be relieved of the excess of water thrown upon them by the works in Chatham.

The conclusion to be deduced from the decision of the Queen's Bench Divisional Court, in the case of *The Cor-*

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poration of Thurlow v. *The Corporation of Sidney*, 1 O. R is that the arbitrators stand in reference to the duties they have to perform to the two municipalities and land owners in the same position as the surveyor or engineer, and the land owners have the right of appeal, as between them and their own municipality, to the Court of Revision, and further to the County Judge; therefore the arbitrators should have apportioned the amounts between the land-owners in Dover and that municipality, according to their view of what was the just assessment of each; and it follows that the award must be set aside on the two grounds I have already stated, the want of a concurring mind on the part of the arbitrators, and the insufficiency of the original report. No costs to either party.

Judgment accordingly.

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[QUEEN'S BENCH DIVISION.]

HERRING AND NAPANEE, TAMWORTH, AND QUEBEC RAILWAY COMPANY.

Consolidated R. W. Act, 42 Vic. ch. 9, D.—Submission, rule of Court—Communications with arbitrators after evidence closed.

The railway company served a notice on H. under 42 Vict. ch. 9 (D.), offering a sum of money as compensation for land to be expropriated by them, and naming an arbitrator. H. served a notice on the company, naming his arbitrator, and the two appointed a third.

Held, that the notices of appointment of arbitrators and the appointment of the third arbitrator might be made a rule of Court under C. L. P. Act, sec. 201.

Re Credit Valley R. W. Co. v. *Great Western R. W. Co.*, 4 A. R. 532, distinguished.

After the evidence had been closed the construction committee of the railway company wrote a letter, addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the company before the award was made and by him to the umpire, but was not communicated to H. until after the award, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, and reduced the sum awarded, while the other two arbitrators swore it had no effect upon their finding.

Held, that the award was bad.

Remarks as to the caution to be observed by arbitrators in such cases in considering or acting upon such agreements made pending the arbitration.

February 12, 1884. *Langton* obtained an order *nisi* to set aside an award made under the provisions of The Consolidated Railway Act, 1879, 42 Vic. ch. 9, D. fixing the compensation payable to Herring for lands appropriated by the railway company on the following grounds:

1. That the said railway company without the said Herring's knowledge or consent improperly caused to be sent to said arbitrators, after the evidence had been closed and before award made, a communication on the subject of the reference before the arbitrators and while the matter had been taken into consideration by them, viz.: the letter referred to in the affidavit of said Herring, intending thereby to influence said arbitrators, and the arbitrators who signed said alleged award were influenced thereby, and in consideration of the privileges supposed by said arbitrators to be thereby granted by said railway, awarded a different

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and less sum as compensation to said Herring than but for said writing they would have done.

2. The construction committee had no authority to bind the company as they assumed to do in said writing, nor had said company any authority or power to enable them so to do, nor did said Herring accept said order, nor was said company bound thereby, nor had the arbitrators any right nor were they justified in taking into consideration at all said matters therein referred to in the manner in which they did.

3. That said arbitrators had no authority to direct said railway to make suitable drains to carry off any water that might be caused by said railway on said lands, but should have computed and allowed the damages present and prospective occasioned by the omission to construct proper drains.

4. That said arbitrators did not allow and should have allowed compensation (1) for increased risk of fire and increased insurance (2) for flooding caused by said railway (3) for depreciation of the premises by having to convey glass across the railway from cutting room to warehouse, when but for said railway the storehouse could and would have been placed conveniently near said cutting room and connected therewith by tramway (4) in depreciation of the premises by cutting off one portion from the other (5) depreciation of the prospective value of the vacant lands as town lots (6) damages by being compelled to cross and re-cross said track.

5. That the said award was made at a meeting of the time and place of which John Stevenson, one of the arbitrators, did not have due notice according to the provisions of the statute in that case made and provided.

6. That the said arbitrators had no power to set off against the disadvantages caused by the said railway any supposed or prospective advantages to the premises afforded by said railway.

7. That said arbitrators were wrong in setting off against any supposed increased value of the lands in

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question any supposed or prospective advantages to the premises afforded by said railway, as the evidence shewed that the lands were not increased in value, and the disadvantages resulting from the premises in consequence of said railway running through them, being direct resulting damage, could not properly be set off by any prospective advantage which might arise by way of traffic in the future from said railway.

8. That in any event, if said award was allowed to stand, the said railway company should be directed to pay the costs, as said arbitrators on the face of the award placed a value on the privileges assumed to be granted by said railway company, and thereby the award gave more than the company offered Herring before the matter was referred to the arbitrators, and thereby entitled him to the costs of the arbitration under the provisions of the statute in that behalf.

The proceedings were commenced by notice, dated 24th September, 1883, served by the railway company on Herring, offering $800 as compensation for such damages as he might sustain by reason or in consequence of the exercise of the statutory powers with reference to the expropriation of the land set out in the notice. The notice also informed the owner, Herring, that in the event of his not accepting the offer James C. Huffman, of the town of Napanee, "is to be appointed and will be the arbitrator" of the company.

On the 2nd of October following Herring, the owner, served the company with the following notice:—

"We have to express our regret that your company do not see fit to offer what we think is a fair compensation for the right of way through the Glass Works property. To arrange the matter as speedily as possible, to prevent delay we name as arbitrator John Stevenson, Esq., who will act in conjunction with the gentleman named in your notice to me of the 25th of September. Whenever convenient for the company we will try and meet you to make arrangements for further hearing.

"Respectfully yours,

"JOHN HERRING."

The two arbitrators on the 15th of October met, and by

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writing under their hand reciting their own appointment and by virtue of the powers vested in them by the Act 42 Vic. ch. 9, appointed Reuben J. Wright as third arbitrator. Evidence was taken and consultations between arbitrators had, and on the 18th January the three arbitrators met, and after deliberating Huffman and Wright signed a paper which Stevenson refused to sign. It was in words following:—

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"The arbitrators appointed to decide as to compensation to Mr. John Herring for right of way taken by the Napanee, Tamworth, and Quebec Railway Company, across the property known as the Glass Works property, have decided that taking into consideration the privileges granted by the company, viz., allowing the right of way to remain unfenced as long as desired by Mr. Herring, and permission to build a tramway across said railway: that the sum of $800 is a fair and reasonable compensation for said right of way, and that any disadvantages caused by said railway are fully compensated by the advantages afforded by said railway. The railway company are to make suitable drains to carry off any water that may be caused by the railway on the said premises.

"(Signed) J. S. HUFFMAN, } *Arbitrators.*"
" R. G. WRIGHT, }

Dated at Napanee this 18th day of January, A.D. 1884.

On the same day the same two arbitrators caused to be served on the third—Stevenson—the following notice:—

"JOHN STEVENSON, ESQ.

"DEAR SIR,—You will please meet us, R. J. Wright and Jas. C. Huffman, at the office of T. A. Huffman, druggist, Napanee, on Monday, the 21st January, 1884, at the hour of three o'clock, p.m., for the purpose of finally signing and making the award between Napanee, Tamworth, and Quebec Railway Company, and John Herring.

"Yours, etc.,

"JAS. C. HUFFMAN,
"R. J. WRIGHT."

Napanee, January 18, 1884.

Stevenson did not attend on the 21st, and the other arbitrators having consulted counsel, and being advised that the paper of 18th was their award and unalterable, acknowledged their signatures in presence of Mr. Wilson, solicitor for the company, who, on the 22nd, made an affidavit that the award was *signed* and *published* on the 21st.

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Herring, being dissatisfied with the award, on the 12th of February obtained a rule making the notices of appointment of arbitrators and the appointment of the third arbitrator a rule of Court. On the same day the company caused to be served upon Herring the following letter and notice:—

"NAPANEE, ONT., February 12, 1884.

"JOHN HERRING, Esq., Napanee, Ont.

"DEAR SIR,—Enclosed letter was intended for you embodying suggestions made by the company and put in writing on the suggestion of Mr. Clute.

"I wish also to inform you that the company are prepared to execute an agreement securing to you, or the owners of the property, the carrying out the propositions contained in such letter.

"This is irrespective of any award.

"Yours very truly,

"WILLIAMS & WILSON,

"Solicitors for the N. T. & Q. R. W. Co., Napanee, Ontario."

JOHN HERRING, Esq., Napanee, Ont.

"DEAR SIR,—The Napanee, Tamworth, and Quebec Railway Company, agree not to fence right of way across the Herring property as long as Mr. Herring, or in place of Mr. Herring the owner, objects, also consents that Mr. Herring can construct a tramway not above the level of the railway track, and use same for transporting manufactured glass; all to be subject to engineer of Napanee, Tamworth, and Quebec Railway.

"(Signed) "ALEXANDER HERRING. "WM. R. AYLESWORTH. "J. W. RATHBUN. } *Construction Committee.*"

This notice was not dated, but was given by the company to the arbitrators after the close of the evidence and before the making of the award.

On the 29th of February *Langton* moved for an order order absolute, and *Cassels*, Q. C., shewed cause, taking a preliminary objection that there was no "agreement or submission by consent" to be made a rule of Court within the provisions of sec. 201 C. L. P. Act. R. S. O., Ch. 50—that the reference was compulsory—and cited *Re Credit Valley and Great Western R. W. Cos.*, 4 A. R. 532; *Rhodes and Airedale Drainage Commissioners*, L. R. 1 C. P. D. 402.

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Langton, contra, urged that the notices and appointment of a third arbitrator constituted an agreement or submission to arbitration by consent, which could be made a rule of Court, and relied on *Lea* v. *Ontario and Quebec R. W. Co.* (*a*); *Freeman* v. *Ontario and Quebec R. W. Co.* (*a*); *Re Ex parte Harper*, L. R. 18 Eq. 539, S. C. 20 Eq. 39; *In re Dare Valley R. W. Co.*, L. R. 4 Ch. 554; *Rhodes* v. *Airedale Drainage Commissioners*, L. R. 1 C. P. D. 402. He also cited several other cases, which are referred to in the judgment.

April 17, 1884. ROSE, J.—I have given the objection raised by Mr. Cassels careful consideration. If I am not bound to yield to it, I am not inclined to do so.

The Lands and Railways Consolidation Clauses Acts, so far as important, may be found in the last edition of *Russell* on Awards, p. 104, *et seq.* Sec. 25 provides for appointing arbitrators, one by each party, "and such appointment shall be delivered to the arbitrator *and shall be deemed a submission* to arbitration on the part of the party by whom the same shall be made." These words are not found in our Railway Act, and it is contended that their absence prevents the cases decided in England applying.

The words of sec. 201 C. L. P. Act, are carelessly chosen. They are, "Every agreement or submission to arbitration by consent, * * may * * be made a rule or order of any of the Superior Courts," &c. Of course the word "agreement" should be followed by some apt words, such as "to refer," &c., or other words of limitation, and we so read them. Then do not the documents in question, which are made a rule of Court, evidence an agreement or submission by consent? It is true there is no consent to the expropriation: that is arbitrary; but the owner may either consent to refer and nominate his arbitrator, or the Act provides machinery for accomplishing the same end without his consent. It seems to me it is not a forced construc-

(*a*) Not yet reported.

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tion to put upon the language of the Act to hold that it covers the case in question.

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This view seems to have been assented to in *Freeman* v. *Ontario and Quebec R. W. Co.* (*a*), by the learned Chief Justice of the Common Pleas Division, in January of this year, and in *Lea* v. *Ontario and Quebec R. W. Co.* (*a*), by Proudfoot, J., decided in November last in the Chancery Division If, however, it should turn out that this view of the law is incorrect, the responsibility of its being so stated in the *Lea* case rests, I fear, with myself, as I as counsel for Lea so asserted it, the very learned counsel for the Railway Company not disputing; and the point not being at all necessary for the decision, it is quite possible the learned Judge did not feel it necessary to analyze the cases, and it may be it thus appears as a statement of law agreed upon by counsel.

Mr. Cassels urged that the point had been decided in *re Credit Valley R. W. Co.* v. *Great Western R. W. Co.*, 4 A. R. 532, and that this objection must therefore prevail. It would have relieved me of much responsibility if it were so, but upon examining the judgments in that case, I find that the arbitrators were appointed not by the parties, but by Proudfoot, V. C., under the provisions of R. S. O. ch. 165. It was held that this appointment was not a submission. It certainly was not an "agreement."

Burton, J. A., says, p. 538: "It appears to me that it cannot be regarded as a submission in any sense of the word. In the case referred to on the argument, and which has gone much farther than any previous case, (*Rhodes* v. *Airedale Drainage Commissioners*, L. R. 1 C. P. D. 402), the facts and the enactments relied on were materially different."

Osler, J., p. 540, agrees that such an appointment is not a submission, and after stating the result of the Rhodes case as follows—"In England it has been held under the compensation clauses of the Clauses Consolidation Act, where both parties have appointed an arbitrator, that the appoint-

(*a*) Not yet reported.

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ment being by section 25, a submission to arbitration on the part of the party by whom it is made, the arbitration is an arbitration by consent within the C. L. P. Act,"—then adds, "The language of our Railway Acts is very different." This can hardly be said to be an opinion that where both parties agree to appoint arbitrators. such an agreement is not an agreement within the C. L. P. Act. I do not think the learned Judge would consider himself in any way concluded from examining and deciding the point in question by reason of his remarks as above quoted. See also the judgment of the same learned Judge in *re Cruickshank and Corby*, 30 C. P. 466-471, where many cases are collected and discussed as to what constitutes a parol or written submission, from which it appears that in some cases the Courts have gone much further than I am asked to do here to support this motion. Had I found a clear expression of opinion from that learned Judge, adverse to the motion, having in view his very wide experience in such questions, I think I would have sheltered myself behind it even though it was only an *obiter dictum*, and have left the parties to carry the case to a full Court where there would be opportunity for consultation. Finding however no contra authority and two judicial opinions which seem to take the law to be as claimed by Mr. Langton, and my own opinion turning in the same direction, I overrule the objection, and proceed to consider the motion on its merits.

The first objection is to reception and consideration by the arbitrators of the letter or notice from the Construction Committee to Herring, and which was drawn up after the evidence was closed and the arbitrators had entered upon their deliberations, and without its contents being in any way communicated to Herring, and without any notice or knowledge by him handed to Huffman, the arbitrator named by the company, and by him brought and produced at a meeting of the three, where its use was protested against by Stevenson, the dissenting arbitrator.

It appears from the affidavits of both Huffman and

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Wright that they considered the letter was put in to remove an objection raised by Mr. Clute at the hearing, that verbal promises by the railway officials would not bind the company, and they evidently thought it had some such effect. They both swear that it had no effect upon their finding, and yet we find its provisions inserted in the award. Stevenson swears it had, and that the damages were reduced thereby, and a fair reading of the award would lead one to a like conclusion. It is, of course, immaterial that the arbitrators say it did not influence them, if its reception was improper and it might possibly have influenced them. The Court will not stay to weigh the possibilities in such a case. It was not communicated to Herring until the 12th of February, nearly a month after the award, and after proceedings commenced to set it aside. It then came to him, not from the arbitrators, but from the company's solicitors. Surely there is ground here to warrant complaint. It is apparent that running a track through the plaintiff's grounds, separating his works, dividing them by fences on both sides of the track, cutting off any access, must seriously damage the claimant's property. The company evidently thought so, for on this being pointed out they at once say, "We will not fence; you may build a tramway across the track." To this counsel naturally replies, such promises oral and not under seal avail nothing. And here, so far as we know, the matter drops until the evidence is closed, when, as it seems to me, fearful of the effect on the minds of the arbitrators a *letter* is signed *addressed to Herring but not communicated* to him, given to the arbitrator chosen by the company, and after being used by the arbitrators not communicated to Herring until he moves the Court for relief. In my opinion, on the authority of *Dobson* v. *Groves*, 6 Q. B. 647-8; *Waters* v. *Daly*, 2 P. R. 202; *McEdward* v. *Gordon*, 12 Gr. 333; *In re Lawson* and *Hutchinson*, 19 Gr. 84; *Re Cruickshank and Corby*, 30 U. C. C. P. 466; *Pardee* v. *Lloyd*, 26 Gr. 374—cited by Mr. Langton, the use made of the letter as above set out was

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improper and vitiates the award. If the letter had been shown to Mr. Clute it is possible he would have claimed that it did not bind the company any more than the oral promise; that the company itself, and certainly the Minister of Railways, might subsequently require the road to be fenced; that tramways such as indicated were not provided for by the statute, and that the reference to the company's engineer was a provision he would not advise his clients to submit to. See *Ayr Harbour Trustees*, v. *Oswald*, L. R. 8 App. Cas. 623.

I also observe in Herring's affidavit made on the 22nd of February, and filed on the 25th, that he charges both Huffman and Wright with consulting with counsel for the company and other counsel after the close of the evidence and before making the award. This is neither answered nor explained. If true, the award could not be upheld against such an objection. It is not formally taken in the notice of motion.

There is a clause in the affidavit of Huffman of the 16th of February, which strikes me unfavourably. In clause 10 he is endeavouring to explain away the charge of the letter having influenced him in making his award. He adds: "The provisions in said award relating to draining, fencing, and liberty to construct a tramway, were inserted in said award at the instance and at the request of said Stevenson, *and so far as I am concerned my award was $800 and no more.* I did not object to the other provisions of the award, *because I considered them immaterial*, and it was only out of consideration for Mr. Stevenson that I did not urge my objection to the said provisions." It will be remembered that Huffman was the arbitrator appointed by the company—that their offer was $800. Then did he mean that it was immaterial to Herring whether his property was divided by a railway with fences on both sides and no passage way, and that it was also immaterial whether his land was drained or not, and that he would not increase the damages in any event? Or was it immaterial what provisions were placed in the

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award, because in his opinion they were not binding? Or did he mean that as arbitrator for the company his sole duty was to see that Herring obtained no higher sum than $800, no matter what damages were shewn? It is not at all impossible that he has proven that the letter did not influence him, and it may be the other evidence offered did not cause his mind to vary from his supposed duty of keeping the third umpire from excessive liberality.

It seems to me this case presents the objectionable features of arbitrators endeavouring to perform work not committed to them, and directing one or other of the parties to do what there is no authority to enforce. How could Herring enforce the provision as to drainage? See the Railway Cases in 12 U. C. R., commencing p. 106: *The Great Western R. W. Co.* v. *Baby*, v. *Hunt*, v. *Dougall*, v. *Dodds*. I endeavoured to point this out in a judgment recently delivered in *Re Smith and Walker* (*a*), where I referred the matter back for further consideration. There I suggested the great hesitation arbitrators should have in considering and acting on agreements entered upon pending the arbitration, in no case to act upon them unless settled by counsel engaged in the matter, and signed and sealed by the parties. This is the more necessary in railway arbitrations, where sometimes at the last moment the railway company offers to do something or make some concession to lessen the damage, the proprietor gladly accepts, and the arbitrators make their award as if the act or concession were absolutely secured; and the damages thus named are found to be a sum less than that named in the notice, while the cost of the work thus agreed to be done, or the value of the concession thus made, added to the amount awarded, would amount to more than the sum named in the notice, as is said to be the case here. In such a case a grave question arises as to who is to pay the costs, a question now raised in another case now before the Courts and awaiting adjudication (*b*). Many other ques-

(*a*) Not yet reported.

(*b*) Ontario and Quebec R. W. Co. v. Philbrick, not yet reported; but see 4 C. L. T. 193.

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tions were raised on the motion attacking the award, but I leave them to be relied upon if the company should desire to have the case further considered, and on such consideration it shall be determined that the grounds upon which I rest my judgment are untenable.

Something was said about reference back, but since the argument I am informed that the arbitrator Stevenson has died.

I therefore allow the motion setting aside the award, with costs.

Order nisi absolute, with costs.

[QUEEN'S BENCH DIVISION.]

WILCOCKS v. HOWELL.

Libel—Privileged communication—New trial.

The defendants and others signed a petition to the license commissioners of the city of Hamilton, praying that a license might not be granted to the plaintiff, and stating that his tavern was one of the worst drinking holes in the county: that it was kept very disorderly: that there was no suitable accommodation, and that the landlord was very much given to drinking:

Held, that the occasion of the presentation or publication of the petition was not absolutely privileged, but that the onus lay upon the plaintiff to prove express malice, and that the defendants used the occasion for some indirect or wrong motive.

The jury gave a verdict for the plaintiff for $1000, and the Court was of opinion on the evidence, verdict, and general merits, that there should be a new trial, CAMERON, J., before whom the case was tried, dissenting.

LIBEL.

The case was tried at Hamilton before Cameron, J., and a jury, and a verdict was rendered for the plaintiff for $1,000.

The alleged libel consisted in the signing of a petition by defendant and many others to the License Commissioners, that a license should not be granted to plaintiff, stating that plaintiff's tavern was one of the worst drinking holes in the county: that it was kept very disorderly, that there was no suitable accommodation, and that the landlord was very much given to drinking.

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November 23, 1883. *Osler*, Q.C., obtained an order *nisi* for a new trial, on the following grounds: 1. That the alleged libel in question was an absolutely privileged communication, and that the learned Judge should have so ruled and nonsuited, or so charged the jury. 2. That if the occasion was one of qualified privilege, the learned Judge should have ruled on the motion for nonsuit, or should have charged the jury that evidence of express malice was necessary to be proved by the plaintiff, and that there was no evidence of such express malice on the part of any of the defendants, and in any event none whatever against the defendants Horning and Cochrane; and upon the ground that the said verdict was against evidence, and the weight of evidence, the evidence shewing that the allegations contained in the alleged libel were substantially true; and for excessive damages.

November 27, 1883. *Osler*, Q. C., supported the order *nisi*, contending it was a case of absolute privilege, and that there was the right of petition, referring to *Stanton* v. *Andrews*, 5 O. S. 143; and that there was no evidence of express malice, citing *Woodward* v. *Lander*, 6 C. & P. 548; *Waterbury* v. *Dewe*, 6 S. C. 21; *Odger*, 277; *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262; *Spill* v. *Maule*, L. R. 4 Ex. 232; *McIntee* v. *McCulloch*, 2 Err. & App. 390; *Harrison* v. *Bush*, 5 E. & B. 344.

Robertson, Q. C., contra. It is not a case of absolute privilege. Defendants exceeded any privilege which might have existed, for they took round the petition for signature and thus published it abroad. He referred to *Stevens* v. *Sampson*, 5 Ex. D. 53. The evidence proves express malice, for the privilege was exceeded: *Odger*, 199; *Tuson* v. *Evans*, 12 A. & E. 733; *Cooke* v. *Wildes*, 5 E. & B. 328.

February 16, 1884. HAGARTY, C. J.—We cannot accede to Mr. Osler's contention that there is any absolute privilege attachedto a petition or document of this nature.

For reasons of general policy certain matters are held to

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be absolutely privileged; for example, speeches in Parliament, addresses of Judges and counsel, evidence given by witnesses on trials, affidavits on legal proceedings. See *Odger*, 2nd ed. 183.

But no such unlimited protection seems to be accorded to such documents as that before us.

We rule that the occasion of its presentation or publication is privileged, and the law then compels the person complaining of its statements to prove malice on the part of the publishers. The fullest explanation of the law on this subject of late years seems to be in the case of *Clarke* v. *Molyneux*, L. R. 3 Q. B. D. 237, in Court of Appeal, December, 1877.

Bramwell, L. J., at p. 244, says: "A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it;" and at p. 245: "If the defendant was actuated by some motive other than that which would alone excuse him, the jury may find for the plaintiff."

At p. 246, Brett, L. J., says: "If the occasion is privileged, it is so for some reason, and the defendant is entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive * * Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false no one need enquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive the defendant has stated as true that which he does not know to be true, and he has stated it, whether it is true or not, recklessly by

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reason of his anger or other motive, the jury may infer that he used the occasion not for the reason which justified, but for the gratification of his anger, or other indirect motive * * I apprehend the moment the Judge rules that the occasion is privileged, the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff * * the only question was, whether the defendant did in fact believe what he said, and not whether a reasonable man would have believed it."

Cotton, L. J., takes the same view: "The only question for the jury to consider was, whether the defendant acted from a sense of duty, or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, was on the plaintiff." See this case fully noted in *Odger*, 266.

In *Spill* v. *Maule*, L. R. 4 Ex. 235, Cockburn, C. J., says: "We are all agreed * * that it may be that the language used in a libel, though under other circumstances justifiable, may be so much too violent for the occasion and circumstances to which it is applied as to form strong evidence of malice upon the issue of whether the communication is covered by the privilege, and that an inference of actual malice may be drawn from its use." He then notices that plaintiff in his evidence disclosed a fact which was capable of a two-fold construction, one freeing the plaintiff from any moral censure, the other warranting the application of the epithets complained of. The Court held that the Judge under the circumstances was right in directing a verdict for defendant. With great submission I may say that it would appear in such a case to be safer to leave the question to the jury with a proper direction.

In *Stevens* v. *Sampson*, L. R. 5 Ex. D. 53, two years after *Clark* v. *Molyneux*, the subject is again considered. Bramwell, L. J., repeats his view, that it must be shewn that the defendant did act under the privilege. The

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defendant, not being a reporter on the staff of the paper, sent a true account of proceedings in a Court of justice to a newspaper. It was held not to be privileged absolutely, and if sent with a malicious motive, an action would lie.

Brett, L. J., says: "The defendant, in order to establish his defence, must shew that the report was substantially correct, and that this substantially correct report was made without malice. It is said that the publication of the proceedings in a Court of justice is a case of absolute privilege; but there is no authority for that statement, and the case comes within the general rule."

I have read with very great attention, and more than once, my brother Cameron's very careful charge.

The objections urged were, firstly, that there was an absolute privilege; secondly, that there was no evidence to shew express malice.

This was at the close of all the evidence. After the charge Mr. Osler renewed the objections taken at the close of the evidence, and that the jury should have been told that there was no evidence of express malice against defendants Horning and Cochrane, and no sufficient evidence against Howell.

We agree there was no absolute privilege. We also think the Judge ought not to have stopped the case, but that it had to be left to the jury. There is nothing in the charge beyond these objections to which the learned Judge's attention was called, nor any expressions which he was asked to qualify or explain.

Looking at the whole case, the evidence given and the verdict given by the jury, I come to the conclusion that there ought to be a new trial.

At the next trial I think the law, as explained in the well considered case of *Clarke* v. *Molyneux*, from which I have cited largely, should be very prominently brought to the jury's attention, especially on the main point, viz., granted the privilege, whether the defendants used the privileged occasion for some indirect or wrong motive.

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Also as to the question of honest belief; and also, that the whole burden of proving malice is cast upon the plaintiff, and not on the defendant to disprove such malice.

I fully agree that in a libel suit we ought not, without a grave reason, to disturb the verdict.

If the attention of my learned brother had been specially called to the principles laid down in *Clarke* v. *Molyneux*, I think we should have had to interfere on the general complexion of his charge, as not coming up to the views of the law there laid down, and not bringing more distinctly before the jury the principles which should govern their decision.

ARMOUR, J., concurred.

CAMERON, J.—At the trial I was of the opinion the plaintiff was entitled to a verdict. I had the opportunity of seeing and hearing the parties and their witnesses, and entertain not the slightest doubt that the plaintiff's case was fully sustained by the evidence, and though I should have been better satisfied if the jury had felt themselves justified in finding smaller damages, I am quite unable to say the sum they have thought fit to award to the plaintiff is unwarranted by the evidence. I had, as my brother Armour is wont to express himself, the misfortune of seeing and hearing the witnesses, and am therefore less qualified to form an opinion upon the merits than those who have been so fortunate as to be spared those useless aids to arriving at a correct conclusion. But so aided, I thought the plaintiff a fairly respectable man who had been most wantonly defamed, and that the evidence offered to rebut malice on the part of the defendant relating to the character of the house, conduct and habits of the plaintiff, was, while not totally devoid of foundation, highly colored and exaggerated. The action of libel is one more wholly within the province of a jury to deal with than any other kind of action, and the disturbing of their verdict, in the absence of any misdirection or other miscarriage of the cause

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at the trial, by the discretionary power of the Court, such verdict having the approval of the Judge before whom the cause was tried, will be establishing a precedent that is without a parallel in the history of that action. I am therefore of opinion the order *nisi* should be discharged.

Order nisi absolute.

[QUEEN'S BENCH DIVISION.]

ATKINS v. PTOLEMY.

Action for penalty under Municipal Act of 1883, *sec.* 167—"*Person aggrieved.*"

The plaintiff was a ratepayer of the township and a candidate for the office of reeve, but was not elected. He brought this action under sec. 167 of the Consolidated Municipal Act, 1883, against a deputy returning officer, who was also clerk of the township, to recover the penalty for a contravention of sections 154, 142, and 245 of the Act. There was no allegation that the plaintiff lost his election, or any votes, or suffered any personal grievance by the acts complained of.

Held, on demurrer to the statement of claim, that the plaintiff was not, by reason only of his being a candidate, a "person aggrieved" within sec. 167, and that he was thereupon not entitled to recover.

Held, also, that an action for the penalty under that section lies only for a breach of sections 118 to 166, inclusive, of the Act.

DEMURRER to statement of claim.

Lash, Q.C., for the demurrer.
Teetzel, contra.

The pleadings and cases cited on the argument appear in the judgment.

April 26, 1884. ROSE, J.—This is a demurrer to a statement of claim, under which the plaintiff seeks to recover the penalty provided by sec. 167, Municipal Institutions Act, 46 Vic. ch. 18, O. It is as follows: "Every officer and clerk who is guilty of any wilful misfeasance or any wilful

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act or omission in contravention of secs. 118 to 166, inclusive, of this Act, shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act or omission, a penal sum of $400." The defendant is described as the Clerk of the Township of Binbrook, and Deputy Returning Officer in one of the polling subdivisions of that township at the election of Reeve and Councillors for the said township on the 7th day of January last. The plaintiff is described as a ratepayer of said township and a duly nominated and qualified candidate at the said election for the office of Reeve, but was not elected to said office. The complaints are for contravention of sec. 154, the defendant having, as it is alleged, wilfully broken open a sealed packet of ballot papers; also of sec. 142, in wilfully delivering ballot papers to two persons whose names were not on the voters' list, and receiving the marked ballot papers from these persons and placing them in the ballot box; also of the same section, in unlawfully, wilfully, and fraudulently inserting in the assessment roll and the voters' lists the name of one Samuel Harris; also of sec. 245, in unlawfully and wilfully refusing to permit the plaintiff to inspect the assessment roll. There is no allegation of any injury to the plaintiff in any form, he basing his right to recover as being a "person aggrieved,' by reason of his being a ratepayer and candidate.

The questions raised and argued before me were:—

1st. Does the plaintiff by his pleading shew himself to be a "person aggrieved?"

2nd. Does sec. 167 refer to any misfeasance or any wilful act or omission of any section other than "secs. 118 to 166, inclusive?"

The plaintiff does not say that he lost his election by reason of any of the acts complained of; nor that he was deprived of any votes, nor that in any way he suffered any personal grievance which the whole body of electors did not also share. Unless therefore his being a candidate makes him a "person aggrieved," it would appear he can-

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not sue for the penalty. The case of *Pickering* v. *James*, L. R. 8 C. P. 489, cited by Mr. Lash, is a clear authority in the defendant's favour. There was a difference of opinion among the Judges in that case as to whether the concluding words of the declaration, alleging that by reason of the clerk having delivered unmarked ballot papers to certain voters the plaintiff was prevented from succeeding in his election, were an allegation of fact or conclusion of law; but there was no difference of opinion as to its being necessary to make such an allegation and to support it by evidence. The further cases cited by Mr. Lash support his contention: they are *Boice* v. *Higgins*, 14 C. B. 1; *Hollis* v. *Marshall*, 2 H. & N. 755, *Rochfort* v. *Atherly*, L. R. 1 Ex. D. 511; *Ex parte Sidebotham*, 14 Ch. D. 465, and *Ex parte Ditton*, 11 Ch. D. 56.

Mr. Teetzel cited *Couch* v. *Steel*, 3 E & B. 411-414; *Atkinson* v. *Newcastle &c., Waterworks Co.*, L. R. 6 Ex. 404; *Ashby* v. *White*, Sm. L. C. (Vol. I.) 264, (8th ed.).

These cases seem to me most clearly to show that the person aggrieved is one who has suffered a personal injury. In *Couch* v. *Steel*, it was held that the count was good, alleging "that the defendant neglected to supply and keep on board the vessel a proper supply of medicines, *whereby the plaintiff's health suffered*," the statute 7 & 8 Vic. c. 112, sec. 18, making it the duty of the shipowner to have on board such medicines. It was there contended that because the statute provided for recovery of a penalty there was no right of recovery for personal injury; but it was otherwise held. It is apparent from the perusal of the judgments that the terms "a person injured" and "a person aggrieved" were used as having the same meaning. See also *Atkinson* v. *Newcastle and Waterworks Co.*, L. R. 6 Ex. 404, following *Couch* v. *Steel*, to the same effect. If I therefore read the cases correctly the plaintiff is not shewn on this record to be a "person aggrieved."

There remains to be considered the construction to be placed upon clause 167. The plaintiff submits it should be read as if the words "in contravention of secs. 118 to

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166, inclusive," only applied to "any wilful act or omission," in which case the section would read: "Every officer and clerk who is guilty of any wilful misfeasance * * of this Act * * shall * * forfeit a penal sum of $400." By this reading the plaintiff claims the penalty under this section for violation of the provisions of sec. 245, as he admits that there is no section from 118 to 166, inclusive, which provides for the inspection of the assessment roll. Mr. Lash pointed out that sec. 167 is taken from 38 Vic. ch. 28, s. 31, O. That section reads: "Every officer and clerk who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of this Act, shall," &c. That Act is intituled "An Act to provide for voting by ballot at municipal elections," and is apparently confined to such purpose. The meaning of the clause in that Act was therefore to provide a penalty for misfeasance, &c., as to duties to be observed in reference to voting by ballot. This Act, 38 Vic., is consolidated almost verbatim in the R. S. O. with the Municipal Act, and it is contended that the reference to secs. 118 and 166 was to confine the operation of the penalty clause to the clauses with respect to which it was originally enacted. I think this contention must prevail. The reading contended for by the plaintiff seems to me a forced one and unnatural. I cannot see why "misfeasance" or "wrong done" should apply to every clause in the Municipal Act providing for duties to be performed by any officer or clerk, trivial or important, and "any wilful act or omission" should be confined to secs. 118 to 166.

It therefore follows from the opinion I have thus expressed, that the plaintiff is not entitled to recover the penalty under sec. 167, because he is not shewn to be a person aggrieved, and further is not entitled to recover the penalty provided by sec. 167 for breach of the provisions of section 245, as that is not one of the sections to which sec. 167 applies.

As these were the only points argued before me, and as

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I have arrived at a conclusion adverse to the plaintiff, judgment must go for the defendant with costs.

If plaintiff wishes to amend and endeavour to sustain a cause of action for refusal of permission to inspect the roll, claiming general damages apart from the penalty under sec. 167, I will hear further argument whenever it is convenient to counsel to attend before me. Of course it is not clear under *Couch* v. *Steel* that the plaintiff would not have to allege and prove some personal loss or injury to sustain his action. The Statute of Westminster 2, c. 50, gives a remedy by action on the case to all who are *aggrieved* by the neglect of any duty created by statute. See 2nd Inst., p. 486, and in Com. Dig. Tit. "Action upon Statute," F., it is laid down that "in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the the same statute for the thing enacted for his *advantage*, or for the recompense of *a wrong* done to him contrary to the said law." In *Ashby* v. *White*, Holt, C. J. seemed to think that the refusal to receive a vote was an actionable wrong and injury. In his forcible language he says, (1 Sim. L. C. 8th Ed. at p. 297): "Let all people come in and vote fairly: it is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him pay well for it: it is denying him his English right; and if this action be not allowed a man may be forever deprived of it."

Whether refusing to allow a person to inspect the roll can be put upon as high ground as that upon which Holt, C. J., puts the refusal to receive a vote is a matter which it may be necessary to consider carefully before forming any opinion, and whether a jury would be so impressed as to give substantial damages might also be a question. I express no opinion until the point is argued before me, if so be that the plaintiff desire to have it determined.

Judgment for defendant on demurrer.

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[COMMON PLEAS DIVISION.]

HAMILTON PROVIDENT AND LOAN COMPANY V. CAMPBELL.

Interpleader—Right to growing crops—Mortgagee—Execution creditor—Recovery in ejectment.

The plaintiffs were mortgagees of land on which the crops were grown. On the 15th April, 1882, the mortgagor being in default, the plaintiffs, in consideration of the mortgagor giving them a chattel mortgage on some of his goods, agreed that he should remain in possession as if there had been no default. In June the plaintiffs took proceedings in ejectment against the mortgagor, recovered judgment by default on 30th September, and on the same day placed a writ of *hab. fac. poss.* in the hands of the sheriff, who took possession thereunder. On 2nd July possession of the land had been taken under the mortgage on behalf of the plaintiffs, but it did not appear that they continued in actual possession. On 11th July the defendant obtained a judgment against the mortgagor for $860, and on the 17th July execution was placed in the hands of the sheriff, who, on the same day, seized the growing crops thereunder. In an interpleader issue, to determine the title to the crops at the time of seizure.

Held, that by virtue of the agreement of the 15th April the mortgagor was entitled to the possession of the crops as against the plaintiffs, and so, therefore, was the defendant; and that the plaintiffs recovery of judgment on the 30th September did not relate back to the 15th June, the date of the issue of the writ of ejectment, so as to estop the defendant from shewing his right to the crops on the said 17th July.

INTERPLEADER issue, tried at Peterborough, before Wilson, C. J., without a jury, at the Spring Assizes of 1883.

The issue was to determine the title to certain growing crops seized at the suit of the above defendant under an execution against one Irwin Cochrane, at the time of the seizure, which was on the 17th July, 1882.

The facts, so far as material, are set out in the judgment,

At the Michaelmas Sittings *G. H. Watson* moved to set aside the verdict for the plaintiffs, and enter a verdict for the defendant.

During the same sittings, December 13, 1883, *G. H. Watson* supported the motion.

Muir (of Hamilton), contra.

March 7, 1884. ROSE, J.—The plaintiffs were mortgagees under a mortgage of the land upon which the crops were growing at the time of seizure.

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The evidence does not disclose what the crops were, nor when they became ripe, nor when they were removed.

The mortgage, being in arrear, the company obtained from the mortgagor a chattel mortgage for $500, dated 15th April, 1882, payable in a year, which chattel mortgage was current at the date of the seizure and the proceedings hereinafter set out.

The learned Chief Justice found that in consideration of giving the chattel mortgage, Cochrane obtained from the company an agreement to allow him to remain in possession as if there had been no default under the mortgage on the realty. Had he found against the existence of such an agreement there would have been evidence to support such a finding.

On 15th June, 1882, proceedings in ejectment, claiming the land under the mortgage, were commenced, and on the 30th of September, 1882, judgment by default was obtained in that suit. A writ of *Hab. Fac. Poss.* was placed in the sheriff's hands on the same day.

Davidson Carlow in July, probably on the 2nd, went to the premises in question, and took possession on behalf of the mortgagees, the plaintiffs. It is probable that he was not in actual continuous personal possession for any length of time, although he stated in evidence that he held possession about four or six months, but from the evidence of the sheriff it is probable he did not remain on the farm during the whole of that time. There seemed, however, to be no doubt he did, on the 2nd of July, take formal possession for the plaintiffs.

On the 11th of July, 1882, the defendant Campbell obtained judgment by default against Cochrane for about $860, and on the 17th of the same month execution was placed in the sheriff's hands to levy that amount. On the same day probably the sheriff seized the growing crops, and sold them some time in August; the exact date was not given. The sheriff stated that he told his bailiff White to remain in possession. It was very doubtful if he did. His possession and that of Carlow for plaintiffs was probably much of the same character.

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At the sale one Dumble became the purchaser of the crops, and by consent gave a note for the purchase money. The crops were not then ripe, so far as appeared, nor did it appear when they ripened or were cut. The note, probably by agreement, although it is not so stated, was to represent the purchase money, and it or its proceeds were to be handed over to the successful party in this issue.

The learned Chief Justice at the trial found that by virtue of the above stated agreement the crops were as between Cochrane and the plaintiffs the property of Cochrane, and therefore liable to seizure and sale under Campbell's writ, unless the effect of the proceedings in ejectment was to take the property out of Cochrane, by relation, from the date of the writ of ejectment, namely, the 15th of June, 1882. He formally decided this point in favour of the plaintiffs, but stayed proceedings until the next Divisional Court Sittings to have the point satisfactorily considered.

The effect of the taking possession by Carlow on the 2nd of July, 1882, was not discussed, and as to it no opinion was given.

The questions argued before us by the defendant were, (1) As to the effect of the agreement; (2) As to the effect of the judgment in ejectment.

Assuming the existence of the agreement, and that its effect, apart from any other question, was to enable the defendant to recover in this issue, the remaining question is as to the effect of the judgment in ejectment.

It does not appear from the evidence whether the crops were removed before the 30th of September, the date of the judgment and writ of *Hab. Fac. Poss.*

If they were not, it seems clear from the cases that, apart from the effect of the agreement, at the time of the removal the mortgagees, the plaintiffs, were entitled to them.

In *Laing* v. *Ontario Savings Co.*, 46 U. C. R. 114, at p. 123, Mr. Justice Cameron thus states the law: "There

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can be no doubt that if the mortgagee enters while the crops are growing, and before they are severed from the land, they belong to him."

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I have found no case shewing that a sale of the crops before such entry would affect the mortgagee's right, and on principle it would appear clear that it would not.

Even if the mortgagees, the plaintiffs, could have taken the crops if not removed on the 30th of September, which on the facts of this case it is unnecessary to decide, it still remains for us to determine the right of possession at the date fixed by the issue, namely, the date of seizure, *i. e.*, the 17th of July, 1882.

At that date it is clear, on the findings, that the mortgagor was as against the mortgagees entitled to the crops under the terms of their agreement, and therefore the defendant, the execution creditor, would have been entitled to them at such date.

Then did the recovery in ejectment by the mortgagees, the plaintiffs, against the mortgagor on the 30th September take away such right of possession: (1) As against the mortgagor; (2) As against the execution creditor?

It may be that even if the mortgagees were entitled to recover in ejectment against the mortgagor, yet the mortgagor was by the agreement entitled to harvest the crops, and enter on the land for such purpose. If so, the judgment in ejectment would not have prevented him setting up such agreement.

Without however considering that question, the other question still remains: Can the execution creditor, the defendant, be estopped or prevented from shewing that on the 17th of July the crops were his as against the mortgagees, the plaintiffs, because the mortgagees on the 30th of September following recovered a judgment in ejectment against the mortgagor, which judgment on the findings as to the agreement either should not have been obtained, or if the agreement was no defence, would not prevent the mortgagor or the execution creditor from setting up and enforcing such agreement?

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Upon the best consideration I am able to give the questions, I am of the opinion, (1) That on the 17th of July, the date of seizure, the mortgagor, Cochrane, was entitled to the possession of the crops as against the mortgagees. (2) That therefore on that date the defendant was entitled to their possession as against the mortgagees, the plaintiffs. (3) That the recovery in ejectment on the 30th of September, did not estop the defendant from shewing the right of possession in the mortgagor on the 17th July.

On this point see *Richards* v. *Johnson*, 28 L. J. N. S. Ex. 322. Pollock, C.B., says at p. 323: "Clearly a judgment creditor is not bound by an estoppel which would prevent the judgment debtor from claiming the goods seized under the execution."

Martin, B., says: "The sheriff represents and is to enforce the legal rights of the judgment creditor; he is to seize the goods of the debtor for the creditor, and is a stranger to an estoppel only affecting the debtor. He seizes by virtue of a purely legal title independently of any estoppel. The creditor claims not 'under' the debtor; he acts adversely."

Watson, B., says: "Is the execution creditor bound by an estoppel on the debtor? Surely not. Test it thus: suppose an action of trespass or trover against the sheriff, (and this interpleader procedure is only the substitute for such an action), would it not be open to the sheriff to contest that they were the goods of Hord or Richards? The question is, whether *bonâ fide* the goods were the property of the execution debtor as against the judgment creditor."

This leaves undecided the question much discussed before us, as to a judgment in ejectment without possession taken under it relating back to the date of the writ, so as to entitle the mortgagee to growing crops uncut and unremoved at the date of judgment.

A passage in *Herman* on Execution p. 341, was cited as shewing the necessity of possession to give the judgment such effect.

The case cited *Hodgson* v. *Gascoigne*, 5 B. & Al. 88, is hardly authority for such a proposition.

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Abbott, C. J., says: "The property in the growing crops in fact was not vested in the tenant at the time of the seizure, *for after the judgment was obtained* in ejectment the defendant is to be considered in point of law as a trespasser from the day of the demise laid in the declaration."

Laing v. *Ontario Savings Society*, 46 U. C. R. 114, 123; *McDowall* v. *Phippen*, 1 O.R. 143; *Foster* v. *Foster*, 10 U. C. R. 607, and cases cited in these three cases, might be referred to on this point.

In my opinion, therefore, the judgment for the plaintiff should be set aside, and a verdict entered for the defendants, with costs and costs of this motion.

GALT, J., concurred.

WILSON, C. J., was not present at the argument, and took no part in the judgment.

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[CHANCERY DIVISION.]

SIMPSON V. CORBETT.

Administration—Account—Illegitimacy—Escheat—Grantee of crown—Constitutional law—Executor—Trustee—Statute of Limitations—Parties.

C. M. died in 1869 entitled to real and personal estate, which by will he devised and bequeathed to his two illegitimate children D. & E., in the event of either dying, his share to go to the survivor, and he appointed C. executor and guardian of D. & E. who were infants. C. forthwith took possession of the estate and managed the same for the benefit of the infants. Both D. & E. died in 1871, D. surviving E. C. afterwards, also in 1871, paid off a mortgage outstanding upon the realty, and took a conveyance of the land from the mortgagor to himself in fee. On July 24th, 1880, the plaintiffs procured a grant from the Crown under the seal of this Province, of real and personal estate of which D. died entitled, upon certain trusts therein set forth, and as such grantee, on October 20th, 1880, procured letters of administration to D.'s estate.

Held, that the plaintiffs as such administrators were entitled to an account of the defendant's dealings with the real and personal estate of C. M.

Held, also, that although the original mortgagee might, under the circumstances, have become entitled to hold the mortgaged lands freed from the equity of redemption, yet that the defendant, standing in a fiduciary relation to the lands in question, could not set up the title acquired from the mortgagee adversely to the plaintiffs, but was a trustee thereof for the plaintiffs.

Held, also, that notwithstanding *Attorney General* v. *Mercer*, 5 S. C. R. 538, the plaintiffs' right to an account as administrators of D.'s estate was not affected by the alleged invalidity of the grant to them of the escheated estate, and neither the *cestuis que trustent* named in the grant from the Crown, nor the Attorney General for the Dominion were necessary parties.

Held, also, that the Statute of Limitations was no bar to the action.

THIS was a suit brought by William Simpson and Roderick Mitchell, against Robert Astley Corbett, seeking an account from the defendant of his dealings as executor of a certain estate, and a declaration that he was a trustee of certain property, under the circumstances set out in the judgment.

The case was heard at Toronto, on December 12th, 1881, before Ferguson, J.

J. Maclennan, Q. C., and *Riordan*, for the plaintiffs. There is no case in which a debtor to an estate when sued has been permitted to question the authority or title of the plaintiff, when the latter comes into Court with letters of

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administration in his hands. The defendant here does not claim that he is the person entitled to administration, but only sets up the *jus tertii*, viz., the right of the Dominion Government. We refer here to B. N. A. Act, sec. 92, sub-sec. 13; 40 Vic. ch. 3; R. S. O. ch. 94, sec. 6. In any case the defendant cannot hold the mortgage for himself. If the mortgagee had said, I will keep the estate, I claim nothing on the mortgage, he might probably have done so: *Will.* on Exec. 8th ed., p. 1662 seq.; also *Ib.* p. 1849; *Keech* v. *Sandford*, 1 W. & T. L. C. 4th Am. ed., p. 48. The executor is a trustee, and must account for all profits: *Sugden* v. *Crossland*, 3 Sm. & G. 192.

J. Bethune Q.C., for the defendant. The mortgage debt here was by the statute R. S. O. ch. 106, secs. 36, 37, cast upon the mortgaged lands. There is no expression of a contrary intention in the will; consequently, the administrator of the personal estate has nothing to do with the matter really in contention, for there are no debts remaining unpaid, except a debt due to us. In the hands of the mortgagee the mortgage was irredeemable; and, under any circumstance, to get in to redeem, the plaintiffs would have to pay the debt: *Beale* v. *Symonds*, 16 Beav. 406; *Burgess* v. *Wheate*, 1 Bl. 123. The rights of the plaintiffs can be no greater now than they would have been on the death of Duncan; and, if the plaintiffs had come into Court at that time, they could only have had administration of the personal estate, and an account of rents and profits of the lands, the latter because the defendant was guardian, The guardianship, however, had come to an end before the defendant made his purchase. He was liable merely as executor for what he had received, and did not pay over; but at the time he got the mortgaged lands he was not trustee for anyone. He is in the same position as that of the mortgagee after the death of Duncan. See *Prescott* v. *Tyler*, 1 Jur. 470. Then, as to the letters of administration, the grant should be held to be void. The Dominion Government alone had the right to make it: B. N. A. Act, secs. 102, 108, 109, 117. The result of these enactments is that

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the *bona vacantia* belong to the Dominion. These letters are part of the patent, but the Court is bound to hold the patent void on the authority of the *Mercer Case*, 5 S. C. 538 (*a*). The letters of administration shew on their face there was not jurisdiction to grant them. The duty of the Court is to protect the revenues of the Crown. We refer also to R. S. O. c. 46, secs. 19, 57, 58. The Statute of Limitations began to run from the death of Duncan, who died more than ten years before action brought. See *Kingsman* v. *Rouse*, L. R. 17 Ch. D. 104; *Forster* v. *Patterson*, Ib. 135.

J. Maclennan, Q.C., in reply. The title to the goods of any deceased person is in abeyance till the Court interferes. They are not *bona vacantia*. *Will.* on Exec, 8th ed., p. 417; and see, also, R. S. O. ch. 46, sec. 51. It is to be presumed, moreover, that the Surrogate Judge notified the Attorney-General of the Dominion, and gave all necessary notices. But it is no answer in the mouth of the defendant to say the Dominion is entitled. It is the same to him, for he would have to account to the Dominion. But the plaintiff's title depends on the jurisdiction of the Surrogate Court, and on nothing else; although the right as between the two governments may depend on the B. N. A. Act. As to the *Mercer Case supra*, a case like it cannot now arise, since the Act R. S. O. ch. 94, sec. 6. The defendant paid a debt for which he was liable to be sued, and thereby got the estate. The trust to which he was subject did not come to an end, because he had not accounted. The right of the defendant cannot depend upon whether there are debts or not. No one knows whether there are debts. The answer does not impeach the letters of administration, and as to the letters patent, even if they were set aside, the plaintiff's title would still be the same. Moreover, the defendant could not file a cross bill to set aside the letters patent; the

(*a*). Judgment of Supreme Court reversed on appeal, and judgment of the Judge of first instance, and of the Court of Appeal for Ontario affirmed. L. R. 8 App. Cas. 767.

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person to do that would be the Attorney-General of the Dominion.

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The following cases were also referred to in the argument: *Cotton* v. *Vansittart*, 20 Gr. 244; *Van Wagner* v. *Findlay*, 14 Gr. 53; *Northwood* v. *Keating*, 18 Gr. 643; *VanKoughnet* v. *Denison*, 1 O. R. 349; *Lewin*, on Trusts, 7th ed. p. 730; *Story*, on Equity Jurisp. sec. 410.

May 19th, 1883. FERGUSON, J.—One Charles Munroe, in his lifetime of the township of Clarke, in the county of Durham, died in the month of October, 1869. At the time of his death his real estate consisted of the east half of lot number one in the fifth concession of Clarke, 100 acres, which was encumbered by a mortgage in favour of one Williams, for $200 and interest on the same. By his last will he, in effect, gave and bequeathed all his real and personal property after payment of his debts, &c., to his infant children Duncan Munroe and Ellen Munroe, the will containing a provision that upon the death of either of the children the share of the one dying should belong to the survivor, and by the will he appointed the defendant, who by the will appears to be a doctor by profession, sole executor of his estate and sole guardian of his infant children Duncan and Ellen. After the death of the testator the defendant took charge and possession of the real and personal estate so belonging to these infant children, and managed the same on their behalf, and received the rents and profits, and applied the same or part thereof in and towards the maintenance of the children, and in keeping down the interest on the mortgage. The infant Ellen Munroe died on January 24th, 1871, and the other infant died on February 2nd, 1871, both intestate. These chidren were in fact illegitimate, and it was on the argument conceded (taken as granted) that at the time of the death of Duncan he was entitled to the property, and that he had no heirs or next of kin. On February 22nd, 1871, the defendant wrote to one Charles Munroe, a relative of the testator, as follows:

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"PERRYTOWN, February 22nd, 1871.

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"CHARLES MUNROE, Esq.

"SIR,—I have to inform you that the children of the late Charles Munroe of the township of Clarke, Ontario, are dead, and as the will does not specify to whom the property shall go, it follows that the nearest relative will be the heir-at-law. I understand from Mr. Simpson of Port Hope that you are the nearest relation, and, as soon as convenient for you, I would like to be relieved of the management of the estate. There is a mortgage of two hundred dollars, and accounts and notes amounting to about one hundred and fifty dollars, or thereabouts, of encumbrances, on the said estate. The property is worth about sixteen hundred dollars. I am prepared to hand over to yourself or your agent all books, papers, and accounts belonging to the estate at any moment. Hoping to hear from you soon.

"I am yours respectfully,

"R. ASTLEY CORBETT,

"*Executor.*"

On the 17th day of April, 1871, the defendant paid to Williams, the mortgagee, the sum of $206.80, and obtained from him an assignment of the mortgage. This assignment appears to be in the ordinary form. The defendant says it is a conveyance to him of the land for an estate in fee simple, and that the consideration paid by him to Williams was his own money, and not money of or in any way belonging to the estate, and he claims and contends that he is the owner of the land.

On the 24th day of July, 1880, His Honour the Lieutenant Governor of the Province of Ontario, acting under the provisions of R. S. O. ch. 94, by Letters Patent, after reciting the facts of the case at length, granted, sold, aliened, conveyed, and assured to the plaintiffs, their heirs and assigns, the said lands upon certain trusts in the grant specified and declared, and also transferred, assigned, and set over to the plaintiffs as such trustees all the personal estate which was by the will of Charles Munroe given to Ellen and Duncan Munroe. In this grant certain (the

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usual ones, I think,) reservations are made in favour of the Crown, but they need not be further referred to here.

On the 20th day of October, 1880, letters of administration of all and singular the personal estate, &c., of Duncan Munroe were granted to the plaintiffs by Her Majesty's Surrogate Court of the united counties of Northumberland and Durham. On the face of these letters it is stated that the deceased Duncan Munroe was an infant and illegitimate son of Charles Munroe and Sophia Hoovey, and that his estate and effects, real and personal, had escheated to Her Majesty, and had been by Letters Patent granted to the plaintiffs (referring to the aforesaid grants.)

The plaintiffs bring this suit, asking that an account may be taken of the estate and effects of the deceased Charles Munroe that came into the hands of the defendant as executor, and for administration if necessary, and that an account may be taken of the dealings of the defendant as guardian with the estate and effects of the deceased Duncan Munroe, and that it may be declared that the defendant is a trustee of the estate of Charles Munroe, deceased, and subject to the claims, if any, of that estate, a trustee for the estate of the deceased Duncan Munroe, deceased, represented by the plaintiffs, of the said mortgage estate and debt, and of all gains and profits and advantages that have accrued to him by virtue of his executorship and guardianship, and that the defendant may be ordered to transfer, assign, and pay to the plaintiff whatever may be found in his hands on the taking of such accounts, and for general relief.

The defendant defends on the ground that he has duly administered the personal estate of the testator that came into his hands as executor: that there is a balance due to him, and that he is not in any way indebted to the estate, that there are no creditors of the estate of Charles Munroe, deceased, or of Duncan Munroe, deceased, but the defendant himself, and as to the real estate, that it became irredeemable in the hands of Williams the mortgagee (it not having been redeemed by the testator, or by Duncan

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or Ellen Munroe), and that by the deed of assignment of the April 14th, 1871, between Williams and him he became and is now entitled to an estate in fee simple, in the lands free from any claim of the plaintiffs, or of any other person whomsoever. He also contends that the letters of administration to the plaintiffs were granted by the Surrogate Court on the faith of the letters patent, and that the letters patent are void, because the Lieutenant-Governor in Council had no right to issue the same. The defendant also contends that the suit is not properly constituted, because the *cestuis que trust* named in the letters patent should be parties, as should also the Attorney-General, and he places reliance on the case of *Mercer* v. *The Attorney-General for the Province of Ontario.* In that case it was decided (5 S. C. R. 538) that the Province of Ontario does not represent Her Majesty in matters of escheat in the Province, and that the Attorney-General for Ontario could not appropriate the property escheated to the Crown in that case for the purpose of the Province, and also that the Act R. S. O. ch. 94, was *ultra vires*, and if that were the point on which this case is to be decided, there would be little or perhaps nothing for me to determine. I am of the opinion, however, that the decision in that case does not affect the matter really to be determined here.

The defendant, as the executor of the will of the late Charles Munroe, was certainly a trustee. As guardian of the infant, the deceased Duncan Moore, having the possession and control of his property, he was also a trustee. In either or both of these capacities he was liable to account. He contends that, as to the lands, the title became absolute in Williams, the mortgagee, upon the death of Duncan Munroe, and that as he derived title in the manner shewn from Williams, the title is also absolute in him. I think, however, that the authorities shew that the defendant having been a trustee in respect of the lands, even though it be conceded that Williams could not have been redeemed, yet that, when these lands were acquired by the defendant, they became and were again impressed with the same

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trust: *Lewin* on Trusts, 7th ed., pp. 730, 731; *Story's* Eq. Jur., sec. 410; *VanWagner* v. *Findlay*, 14 Gr. 53, S. C., in App. ib. p. 56, and many other authorities, as I understand them, shew this, and I think the defendant is a trustee and liable to account both in respect of the real and personal property. It is to be remarked also that the defendant did not pay Williams the value of the lands, but only about the amount due on the mortgage, perhaps the exact amount. The defendant, however, objects that the plaintiffs have no title. They have and bring before the Courts letters of administration of the estate of the deceased Duncan Munroe, and it appears by the will, which is admitted by the defence, and the death of Ellen Munroe also admitted, that he was entitled to the estate of the late Charles Munroe. This estate was taken possession of by the defendant soon after the death of Charles, and has ever since been under his control. He has been receiving rents, issues and profits, and no doubt paying sums of money. It is stated by the defence that there are no creditors excepting the defendant, but that, no matter how sincerely said, does not shew in a legal sense that there are no other creditors, and for any thing that has appeared before me I think I must assume that there may be creditors other than the defendant.

The defence says that these letters of administration were granted on the faith of the Letters Patent granted by His Honour the Lieutenant-Governor of Ontario, which Letters Patent are void, and the Letters of Administration are therefore void. Now I do not see that in this suit I can go behind the letters of administration. Until they are revoked or set aside, or in some way vacated, they are, I think, a good title, and give the plaintiffs a proper standing before the Court. The defendant is, I think, not in a position to have these letters revoked or set aside. He is simply a defendant against whom it is alleged that he is indebted to the estate, and as against him I do not see why the letters of administration are not a good title, and I do not see that any of the parties referred to in the defen-

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dant's answer as being necessary parties, are necessary parties to this suit, and I do not see that the defendant can succeed upon his defence of the Statute of Limitations. (*a*) The defendant is, in my opinion, a trustee liable to account, and it can make no difference to him who is entitled to the estate.

I think the plaintiffs are entitled to the judgment or decree that they have asked, inclusive of the declaration asked, and to their costs of suit (*b*).

A. H. F. L.

(*a*) This defence was, amongst others, pleaded by the defendant.—REP.

(*b*) See article in 19 C. L. J. 102.—REP.

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[CHANCERY DIVISION.]

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BALL ET AL. v. THE RECTOR AND CHURCHWARDENS OF THE CHURCH OF THE ASCENSION ET AL.

Will--Construction—Charitable bequests--Particular residuary gift followed by general residuary gift—Cumulation and substitution—Testamentary expenses—Costs.

One S. by his will directed his estate, real and personal, to be sold, except certain stocks, lands, and securities thereinafter specifically devised, and that his debts and "testamentary expenses" should be paid out of the first moneys that should come into the hands of his executors; and after making certain pecuniary bequests, (which he charged primarily on the fund to be produced by the sale of his real estate as aforesaid, and secondarily on the proceeds of his personal estate,) he directed that "as to the residue of my personal estate which may be exclusively devoted by me to charitable purposes, I bequeath the same to the churchwardens of the A. Church, to be invested by them for the purpose of forming an endowment for the support of the said church."

Afterwards, by a codicil, S. bequeathed to three persons named by him $30,000 as an endowment for the A. Church, to be invested by them in their own names as trustees for the said Church, and to be disposed of for the benefit thereof as therein mentioned, but in certain contingencies to merge in his residuary estate, and be disposed of under the last clause of his will, by which he devised all the rest, residue and remainder of his estate, of which he should die possessed to A. and L., to be equally divided between them, share and share alike.

Held, that on a proper construction of the will and codicil, $30,000 of the pure personalty was to be held by trustees on the trusts as defined for the benefit of the A. Church; and as to the residue of that fund, it was to be held generally by the churchwardens for the support and maintenance of that Church.

A legatee is entitled to take both a pecuniary gift and a residue, whether given in a will or in a combined will and codicil, and the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift.

Held, also, that although testamentary expenses, which include the costs of a suit for construction and administration, are usually payable out of the general personal estate; yet here the provision that the testamentary expenses were to be paid out of the first money which should come into his executors' hands, showed the testator contemplated the payment of such expenses out of a mixed fund of pure and impure personalty derived from the conversion of his real estate; and there being nothing else in the will to affect or alter this, the costs of this action must be borne ratably by the pure and impure personalty, and the proceeds of land directed to be sold.

THIS was an action brought by the executors and trustees of the will of one Samuel B. Smith, deceased, for the purpose of having it declared whether the legacies devised by the testator to the Corporation of Wycliffe College, the Women's Christian Association, the Haven,

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or Prison State Mission of Toronto, and certain persons as trustees for the Church of the Ascension, should be paid by the plaintiffs, or whether the said legacies were void under the Statutes of Mortmain, and should merge in the residuary estate of the testator, and should be disposed of by the plaintiffs as directed by the testator in the last clause of a certain codicil of May 17th, 1882, hereinafter referred to; and for general relief.

The will in question was dated March 2nd, 1880. The testator began by directing that all his estate, real and personal, except the stocks, lands, and securities thereinafter mentioned and specifically devised, should, as soon after his decease as possible, be sold and disposed of for its reasonable value; and he vested his executors with full power to sell and convey his said real estate, except the lands thereby specifically devised in fee simple or otherwise. He then directed that all debts due and owing to him, save and except dividends accrued on the stocks thereinafter specifically devised, should be with all speed after his decease collected in by his executors. He then directed that his just debts (if any at the time of his decease), and his funeral and "testamentary expenses" should be paid out of the first moneys that should come into the hands of his executors. And after payment of all debts and expenses, as aforesaid, he devised and bequeathed the said stocks and all moneys and securities, and the produce or proceeds of the said sales and debts due to him as follows:—

First, he bequeathed certain pecuniary legacies to sundry persons, and proceeded thus:—

"I hereby charge all the foregoing bequests and legacies primarily upon the fund to be obtained by my said executors from the sale of my real estate as hereinbefore directed to be sold, and secondarily upon the proceeds of my personal estate. My will is that for the purpose of satisfying the foregoing bequests, and legacies the proceeds of the sale of my real estate, except the portions thereof specifically devised by this my will, shall be exhausted before applying

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any of the proceeds of my personal estate in payment of the same."

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He then gave and devised to his executors certain shares in the Canada Permanent Loan and Savings Company upon trusts in favour of the children of a deceased brother of his during their natural lives, and he directed that on the death of the said children the said stock not required to pay the dividends or income coming to the survivor should be sold, and should thereupon become and be dealt with under that his will as part of the residue of his said personal estate, provided that all prior charges and bequests had been satisfied. He then devised certain lands to a sister of his. He then bequeathed pecuniary legacies to each of certain charitable institutions in the city of Toronto, such sum to be paid to each of them exclusively out of such portions of his personal estate as might be legally devoted by him to charitable bequests. Then came the following residuary bequest:—

"And as to the rest and residue of my said personal estate which may be exclusively and legally devoted by me to charitable purposes, I give and bequeath the same to the churchwardens of the said Church of the Ascension, to be invested by them for the purpose of forming an endowment for the support of the said Church."

He then lastly nominated and appointed the plaintiffs trustees for the purposes thereinbefore provided.

By a codicil to his said will, dated May 17th, 1882, the testator devised and bequeathed to the Protestant Episcopal Divinity School the sum of $5,000, and then made certain pecuniary bequests, including a bequest to the Women's Christian Association of Toronto, and a bequest to the Prison Gate Mission of Toronto. He then continued:—

"To my friends, the Reverend H. G. Baldwin, F. A. Ball, and C. R. W. Biggar, all of the city of Toronto, I give and bequeath the sum of $30,000 as and for an endowment for the Church of the Ascension in the said city of Toronto, to be invested by them in their own names as trustees for the said Church, the interest, dividends, and emoluments arising from such investments to go into

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the general funds for the maintenance of the said Church formed by the pew rents and the offertory, and to be applied in connection with the latter in payment of the salaries of the incumbent and other officers of the said Church, and in the maintenance and support of the services of the same Church;" which sum was, however, in certain contingencies to merge in his residuary estate, and be disposed of by and under the next succeeding clause in this codicil, which was as follows:—

"Lastly, all the rest, residue, and remainder of my estate, of whatever kind or nature it may be, of which I may die possessed or in any way entitled unto, I give, devise, and bequeath to the grandchildren of my sister Anne Nelles, and my godchild Lela McDonell, the daughter of my nephew Samuel Smith McDonell, to be equally divided between them, share and share alike. In witness whereof I have hereunto set my hand to this codicil of my said last will and testament this 17th day of May, in the year of our Lord 1882."

The statement of claim mentioned that the Protestant Episcopal Divinity School had, since the making and executing of the above will, become incorporated under the corporate name of Wycliffe College.

The defendants were certain of the beneficiaries under the will.

The matter came up on motion for judgment before Boyd, C., on June 6th, 1883.

S. H. Blake, Q. C., and *H. D. Gamble*, for the plaintiffs. The chief question is, whether the Church of the Ascension takes what is given by the will in addition to what is given by the codicil, or not—whether the bequests are substitutional or cumulative. The two residues are different in character, and would seem to be substitutionary.

J. Maclennan, Q.C., and *Biggar*, for the Church of the Ascension. The testator carefully indicates as to each of the charitable bequests, that it is to be paid out of funds

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properly applicable thereto. They are a first charge on the pure personalty: *Beaumont* v. *Oliveira*, L. R. 4 Ch. 309. Under the will the church is to get the whole of the pure personalty, after paying all the legacies, charitable and otherwise; but there is no disposal made in the will of the general residuary estate. In the codicil the $30,000 is not given to the churchwardens, but to certain specified persons. The first residue named is in the nature of a specific residue, being the residue of a particular fund, and it would not be covered by the general residuary clause: *Wilson* v. *O'Leary*, L. R. 7 Ch. 448. We refer to *Williams* on Exec., 7th ed., p. 1289; *Theobald* on Wills, 2nd ed., p. 114-116; *Hurst* v. *Beach*, 5 Madd. 351; *Mackenzie* v. *Mackenzie*, 2 Russ. 262.

D. McCarthy, Q. C., and *T. S. Plumb*, for certain infant beneficiaries, interested in the general residue. A gift of a residue of pure personalty is not specific: *Theobald* on Wills, 2nd ed., p. 113. The codicil is incorporated with the will, and they must be read as one instrument, and if this is done it cannot be argued that there are two separate gifts to the Church of the Ascension. The bequest of the $30,000 is not given to individuals as such, but as trustees of the endowment and of the trust. The legacies to the charities in the codicil should be paid out of the pure and the impure personalty, and to the extent of the latter they fail. We refer to *Gordon* v. *Anderson*, 4 Jur. N. S. 1097; *Brine* v. *Ferrier*, 7 Sim. 549; *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636; *Fenner v. Taylor*, 2 R. & M. 190; *Moggridge* v. *Thackwell*, 1 Ves. Jr. 473; *Roberts* v. *Walker*, 1 R. & M. 752; *Robinson* v. *Geldard*, 3 M. & G. 746; *Benyon* v. *Benyon*, 17 Ves. 34; *Russell* v. *Dickson*, 2 Dr. & War. 139; *Lee* v. *Pain*, 4 Ha. 219; *Williams* on Exec. 8th ed., pp. 1296, 1298; *Theobald* on Wills, 1st ed., p. 39.

J. Maclennan, Q. C., in reply. A will and a codicil are to be viewed as two instruments, and the execution of them is no incorporation of one with the other. The charitable legacies should be paid first out of the pure personalty.

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See *Johnstone* v. *The Earl of Harrowby*, 1 DeG. F. & J. 183 190.

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C. Moss, Q. C., and *McCaul*, for Wycliffe College. There is here a general intention to marshal in favour of the charities, and the Court will give effect to it: *Roberts* v. *Walker*, *supra*, is distinguishable. We refer also to *Miles* v. *Harrison*, L. R. 9 Ch. 316; *Wills* v. *Bourne*, L. R. 16 Eq. 487; *Wigg* v. *Nicholl*, L. R. 14 Eq. 92; *Gaskin* v. *Rogers*, L. R. 2 Eq. 284; *Anderson* v. *Kilborn*, 22 Gr. 385.

D. McCarthy, Q.C. *Johnstone* v. *Earl of Harrowby*, 1 DeG F. & J. 183, does not carry out what it is cited for, because it was the case of an added legacy, which distinguishes it from the present case. As to costs, the pure personalty will not be absolved from its liability to bear, costs in such a case as this, in the absence of testamentary direction: *Tempest* v. *Tempest*, 7 DeG. M. & G. 470; *Beaumont* v *Oliveira*, L. R. 4 Ch. 309. *Miles* v. *Harrison*, L. R. 9 Ch. 316, which is invoked in favour of throwing the costs upon the impure personalty, was a case where the assets were directed by the testator to be marshalled in favour of the charities. There is no such direction here.

June 9th, 1883. BOYD, C.—There are two principles of construction which shew that the doctrine of cumulation or substitution does not apply to the legacies now in question. One is, that a legatee is entitled to take both a pecuniary gift and a residue, whether given in a will or in a combined will and codicil, as here; and the other is, that the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift. There is nothing inconsistent in holding that the bequest given by the will of the residue of pure personalty to the churchwardens of the Church of the Ascension may well stand with the gift in the codicil of $30,000 to be held by trustees for the benefit of that church. According to *Johnstone* v. *Earl of Harrowby*, 1 DeG. F. & J. 183, this $30,000 would be payable out of the pure personalty, being referable to the same fund as is designated in the will for the

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benefit of this church. It is thus in effect a declaration that as to $30,000 of his pure personalty it shall be held by trustees on certain defined trusts for the benefit of the Church of the Ascension, and as to the residue of that fund it is to be held generally by the churchwardens for the support and endowment of the same church. Upon this line of construction I refer to *Kirkpatrick* v. *Bedford*, L. R. 4 App. Cas. 96, and *Gordon* v. *Anderson*, 4 Jur. N. S. 1097. Again, the two residues may well stand together, and reading the will and codicil so as to give effect as far as possible to what is contained in each instrument, it would appear that the testator contemplated disposing of his residuary estate consisting of pure personalty in one way, and the rest of his residuary estate, consisting of realty and mixed personalty, in another way. Full operation can thus be given to both clauses without expunging that which relates to the residue of the particular fund. The pure personalty is separated from the rest of his estate and dealt with by itself, and there is no *express* alteration or revocation of the disposition which is made of it by anything contained in the codicil. See *Guy* v. *Sharp*, 1 My. & K. 607; *Champney* v. *Davy*, L. R. 11 Ch. D. 949, 953; *De Trafford* v. *Tempest*, 21 Beav. 564; *Aston* v. *Wood*, 43 L. J. Ch. 715, (*Bacon*, V. C. 1874); *Jull* v. *Jacobs*, L. R. 3 Ch. D. 703.

This view of the will renders it unnecessary to consider the question of marshalling discussed by some of the counsel, as it is conceded that the charitable bequests are to be paid out of the pure personalty concurrently with the $30,000 to the trustees for the church, before the residue of that fund payable to the churchwardens is ascertained.

Afterwards on June 20th, 1883, the learned Chancellor gave judgment as to costs, as follows:

"Testamentary expenses," it is now settled, include the costs of a suit for construction and administration, and these are usually payable out of the general personal estate: *Ripley* v. *Moysey*, 1 Keen 578. Had this will

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contained no reference to the payment of testamentary expenses, the ordinary practice would prevail, and the costs of this action would be borne ratably by the pure and impure personalty. That is the ground of the decision in *Tempest* v. *Tempest*, 7 De G. M. & G. 470, and *Beaumont* v. *Oliveira*, L. R. 4 Ch. 309. In neither of these cases did the testator direct that his testamentary expenses should be paid, and no fund other than that which the law provides was therefore available, although in both cases the will directed that the charitable legacies should be paid out of the pure personalty. In this case, as in *Miles* v. *Harrison*, L. R. 9 Ch. 316, there is a direction of the testator as to testamentary expenses which disturbs the usual order of administering the assets. In this case the testator's first direction is, that all his estate, real and personal, should be sold as soon after his decease as possible, and his next direction is, that all his debts shall be collected by his executors with all speed after his decease, and then he provides for the payment of his debts, funeral and testamentary expenses out of the first moneys that shall come into the hands of the executors. And then, after payment of all debts and expenses, he deals with his moneys and the proceeds of the said sales and debts. He thus evidently contemplates and directs the payment of his testamentary expenses out of a mixed fund of pure and impure personalty derived from the conversion of his real estate. The question is, does anything in the will affect or alter this direction.

In *Miles* v. *Harrison*, there was a charge of the aggregate fund in the hands of the trustees with debts legacies, and administration expenses. But two of the Judges, Lord Cairns and Sir W. James, thought that the terms of the residuary clause were equivalent to a direction to marshall the assets so that the pure personal estate was to be in the first instance exonerated from the payment of testamentary expenses. As construed by Lord Cairns that direction amounted to this, "I direct that the part of my personal estate which lawfully can be applied

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to the payment of charitable bequests shall be reserved by my trustees for the purpose of paying and satisfying the bequests in question." That direction to reserve modified the earlier charge of the expenses upon the mixed fund, and that I take to be the point of the decision. Sir George Mellish is of opinion that the result would be the same even if the reservation clause had been omitted, in which case, he says, the judgment of Lord Selborne in *Wills* v. *Bourne*, L. R. 16 Eq. 487, would have been directly in point. But the charging clause in that case was very different from what is found in *Miles* v. *Harrison*. In *Wills* v. *Bourne*, the will directed that the real estate should be sold, and that payment should be made thereout of debts and testamentary expenses, and after that the personal property was given to the executors, and out of it they were to pay such parts of the debts and expenses as the land would not extend to pay, and the residue was given to charities, with a declaration that only such part of his estate should be comprised in the residue as might, by law, be given to charitable purposes. *Wills* v. *Bourne* is just an illustration of what is referred to in Jarman, that in order to make charitable legacies effectual, as far as possible, the debts, funeral and testamentary expenses should be expressly and exclusively charged on the personalty savouring of realty: 5th Am ed. Vol. I., p. 442.

Apart from any clause as to the payment of testamentary expenses, the testator's direction that the charitable bequests are to be paid out of personal estate lawfully applicable thereto is only intended to provide for their being paid thereout in preference to other legacies: *Beaumont* v. *Oliveira*, L. R. 4 Ch. 318. I find nothing in the language of the residuary or other charitable gifts to countervail the first part of the will, in which the expenses are to be paid out of the first moneys obtained by his executors from the mixed fund. *Adoph* v. *Dolman*, 26 W. R. 53, and *Lewis* v. *Boetefeur*, 38 L. T. N. S. 93, which was affirmed by the Court of Appeal (W. N. 1879 p. 11) throw

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some light upon the points I have been discussing. But after all, the cases must not be allowed to control the intention of the testator where that can be ascertained. In this case I think the fund he designates in the earlier part of the will must be resorted to.

The costs will, therefore, be borne ratably by the pure and the impure personalty and the proceeds of land directed to be sold.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

HUGHES ET AL V. BOYLE ET AL.

Appeal bond—Discontinuance—Liability of surety.

The condition of an appeal bond in which the defendant was a surety was that the appellant would effectually prosecute his appeal and pay such costs and damage as might be awarded in case the judgment appealed from was affirmed. The appellant discontinued the appeal pursuant to R. S. O. ch. 35, sec. 41, which enacts that "thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the Court below, and may take all further proceedings in that Court as if no appeal had been brought." The Registrar, to whom the matter was referred, assessed the damages at the respondent's costs of opposing the appeal.

Held, affirming his finding, that the judgment had been affirmed by the discontinuance, and that these costs had been awarded to the respondent by virtue of section 41.

Quære, as to the meaning of of the expression "effectually prosecute."

THIS was an appeal from the Registrar of the Queen's Bench Division, to whom it was referred to assess the damages suffered by the plaintiffs, the obligees in a bond given by the defendants as sureties for an appeal to the Court of Appeal. The condition of the bond was, that the appellant "will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is affirmed," in accordance with R. S. O., ch. 38, sec. 26.

The defendants discontinued the appeal under the pro-

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visions of section 41 of the same Act, which provides that "thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the Court below, and may take all further proceedings in that Court as if no appeal had been brought."

The defendants admitted that the appeal had not been effectually prosecuted, and that they were therefore responsible for the breach of the condition, but urged that as no costs had been awarded by the Court of Appeal the damages were only nominal.

May 2, 1884. *Donovan*, for the appeal.
Millar, contra.

The cases cited are referred to in the judgment.

May 9, 1884. ROSE, J.—The defendants' contention was, that the bond contained two distinct conditions. 1. To effectually prosecute. 2. To pay costs awarded by the Court of Appeal.

It will possibly not be necessary to determine what "effectually prosecuting" means. If it means to prosecute to a successful event it is difficult to conceive how the respondents could ever be damnified by a breach; for how could such successful event entitle them to costs and damages to which they were not entitled by the judgment appealed from, unless in the hardly probable case of the appeal being allowed and appellants ordered to pay respondents' costs? Were there no decisions on the point I should have had but little hesitation in reading the condition to be to carry the suit to judgment, (see query of LeBlanc, J., in *Brackenbury* v. *Pell*, 12 East 585,) and pay such costs and damages as might be awarded in case the judgment appealed from is affirmed. The cases are collected by Draper, C. J., in *Johnson* v. *Parke*, 12 C. P. 182, but it seems to me that

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the learned Judge refrains from expressing an opinion. It was not necessary for him to do so, as the suit had not proceeded to judgment and the plaintiff had put it out of his power to further prosecute it, so that it was at an end.

In *Welsh* v. *O'Brien*, 28 U. C. R. 408, Richards, C. J., reviews the authorities, and unless the sentence, "Prosecuting the suit with effect means with success or rather to a not unsuccessful termination," is his opinion and not a statement of what appears in *Williams* Saunders, vol i., p. 195, i. k., note p., he also leaves the matter undecided, as do the cases he reviews, there being opinions both ways. The question is much discussed in *Perrear* v. *Beavan*, 5 B. & C. 284.

Whether "effectually" means to a successful event or merely to judgment, there is a breach here; but for the reason above given I have difficulty in concluding that for not prosecuting to a successful event respondents could suffer any damage. If it means to judgment, which would if not in appellant's favour, entitle the respondents to obtain the costs of such proceedings as they have been called upon to take to oppose the appeal, then it seems to me the respondents have suffered damage, the measure of which would be the costs incurred to date of discontinuance.

As I above suggested, it may not be necessary to determine this point if we can come to the conclusion that costs have been awarded.

I have quoted the words of section 41. It is argued that this section in effect is an award of costs, and *Bolton* v. *Bolton*, 3 Ch. D. 276, is cited as an authority. In that case counsel argued as follows: "The Rules of Court, 1875, contain no provision for signing judgment for costs to be recovered on a discontinuance, but the words in Order 23, 'thereupon he shall pay the defendant's costs of the action,' must be considered as equivalent to a judgment or order for their recovery." The application was to issue the *fi. fa.* in a form to meet the facts, and Hall, V. C., granted the application. The form as thus settled contains these words: "Whereby the said A. B. gave notice

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to the said C. D. of discontinuance of the said action, and upon the certificate of one of the Taxing Masters of our said Court filed, &c., *adjudged* to be paid for the costs of the said action," &c.

It seems to have been assumed that the effect of the Order (23) of Court was an adjudging by the Court.

In this case, reported as *Hughes* v. *Hughes*, 19 C. L. J., p. 10, the full Court, Chancery Division, held that no order was necessary to entitle the respondents to costs.

I think I may, in the spirit of the Act and of the bond, hold that the costs incurred by the respondent in opposing the appeal were by virtue of section 41 awarded to the respondent. The defendant's counsel argued as if the bond were to secure such costs as the Court of Appeal should award. It will be observed that neither statute nor form of bond so provides, but merely "such costs and damages as may be awarded." Then, has the judgment appealed from been affirmed? I find that "affirm," "confirm," and "establish," are synonyms. Other meanings are, "to make firm, or certain," "to make free from doubt." Taking the word "affirmed" in its ordinary natural meaning, it is clear that the judgment appealed from has been by the discontinuance and ending of the appeal confirmed, established, made certain, and free from doubt. It is again to be noted that the affirmance is not said to be by the Court, or rule or order thereof. It seems to me no other conclusion than one fixing the sureties with liability for these costs will effectuate the intention of the parties.

If the view that I have taken be not sustainable, then it will remain to be considered whether even under the condition to prosecute with effect, or effectually, the plaintiffs, (respondents) are not entitled to their costs. For this purpose I have looked at many cases as to the liability of sureties under replevin bonds. Almost without exception the liability of the sureties for the costs of an unsuccessful suit in replevin, where the condition is in practically the same words, *i. e.*, to prosecute the suit with effect, has been assumed without question. It is true that the plaintiff in

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an action on a replevin bond was entitled to have a verdict for the full amount of the penalty unless relieved on application to the Court; but in many of the cases the liability of the sureties is stated, and almost invariably as including costs of the unsuccessful action.

Yea v. *Lethbridge*, 4 T. R. 433, seems to affirm a contrary doctrine; but that case has not been followed, and may be considered overruled. See *Paul* v. *Goodluck*, 2 Bing. N. C. 220; also *Ward* v. *Henley*, 1 Y. & J. 285; *Gingell* v. *Turnbull*, 3 Bing. N. C. 881: *Bartlett* v. *Bartlett*, 4 M. & G. 269; *Perreau* v. *Beavan*, 5 B. & C. 284.

Mr. Donovan referred me to *Reeves* v. *Andrews*, 7 Ind. 207, cited in *Sutherland* on Damages, vol. 2, p. 97. The condition there was, "that the appellant will prosecute his appeal with effect and without unnecessary delay, and pay the full amount of the condemnation money and costs which may be adjudged against him in the Circuit Court."

The decision was, that special damage must be claimed and proved, to be recovered. The statement of facts was to the effect that the evidence did not shew any amount of costs adjudged against the appellant in the Circuit Court on the dismissal of the suit, and hence there was no special damage shewn. This case, therefore, does not assist the defendants.

As there was only one ground of appeal argued, and it fails, the appeal will be dismissed, with costs.

Appeal dismissed, with costs.

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[QUEEN'S BENCH DIVISION.]

REGINA v. YOUNG.

Conviction—Depriving of the use of property—32-33 Vict. cap. 21, sec. 110. Jurisdiction of magistrate.

The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half interest to C. The horse-power had been hired from one M., and at the time of the sale, the term of hiring had not expired. At its expiry, M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept, and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32-33 Vict. c. 21, sec. 110, D.

Held, that the conviction was bad, there being no offence against that section, and no jurisdiction in the police magistrate to try summarily; and that it was bad also in not showing the time and place of the commission of the offence.

Remarks upon the improper use of the criminal law in aid of civil rights The conviction was quashed, with costs

April 25, 1884. This was a motion by *Clement* to quash a conviction by the Police Magistrate at Tilsonburg.

It appeared that the defendant sold his half interest in a butcher business to one Campbell for $200. According to Campbell's evidence defendant took him to the shop, and shewed him the chattels there, then to "Kelso Barn," to shew him the machinery for making sausages, and there shewed him a horse-power, and put on a belt connecting it with the sausage machine; then back to the shop, and then to the slaughter-house. Having agreed on the terms of the bargain they went to a conveyancer, and had a bill of sale drawn, conveying to Campbell defendant's "half interest therein, *i.e.*, the butcher shop and premises, and the articles enumerated herein." The bill of sale then specified certain articles, "and everything in connection with the butchering business now carried on in the town of Tilsonburg, * * all of which said goods, chattels, and effects, are contained in a dwelling-house situate and being West Broadway street, Tilsonburg, and the slaughter-house as before mentioned." No mention was made of the barn, but in the enumeration the sausage machine, which with the horse-power was in the barn, was described. It also appeared

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that the "horse-power was rented by the defendant and his partner from one Mills for four or five months from October, 1883, with right of purchase, which was not exercised. When the time expired, and Mills desired its return, Campbell claimed that he had bought it from Young. Young denied this, and went with Mills to see Campbell, and asked Campbell to look at the writings. Campbell still claimed that he had bought it, but did not know whether it was mentioned in the bill of sale or not. The defendant stated that he would abide by the writings, and if the horse-power had been sold to Campbell he would pay for it, but that he must return it to Mills. No arrangement was come to, and defendant employed a man to take it out of the barn and carry it back to Mills, which he did, whereupon Campbell swore out an information before the Police Magistrate of Tilsonburg, charging "that Young, at the town of Tilsonburg, in the county of Oxford, within the space of four days, to wit, on the 24th day of March, in the town of Tilsonburg, in the county aforesaid, did feloniously and unlawfully take and carry away from the possession of the complainant one horse-power and belt valued at $20, contrary to the statutes made and provided." It appeared from the papers that the defendant attended before the Police Magistrate, and elected to be tried summarily, and after the evidence for the prosecution had been taken was formally warned, and his own statement taken down in writing, whereupon the Police Magistrate found him guilty, and fined him $1, "and damages $17.30, with costs, the same to be paid on or before the 20th day of April, A.D. 1884, or two months in gaol." The formal conviction was drawn up stating that the defendant "is convicted * * for that the said James Alexander Young did fraudulently take and carry away from the possession of Charles L. Campbell one horse-power, valued at $17.30, contrary to the statutes made and provided."

Holman appeared in support of the conviction.

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April 26, 1884. ROSE, J.—This is apparently another of the class of cases becoming of late years much too numerous, where the criminal law is invoked for the purpose of enforcing civil rights. The Magistrate makes an affidavit stating that defendant's counsel objected that no crime had been committed, but that he overruled the objection, being of the opinion that there had been a misdemeanor under 32-33 Vic., ch. 21, sec. 110. This section presents most anomalous features, and is one of the most curiously wrought pieces of legal machinery. As to it see the history of its birth in Mr. Taschereau's able work on Criminal Law, p. 622, where amongst other peculiarities he points out that for unlawfully appropriating the *possession or use* only of a property worth $300 a man is guilty of a misdemeanor, and is liable to be sent to the penitentiary for fourteen years; and by the same clause larceny of $300 worth of property is a felony, and subjects the offender to an outside punishment of ten years in the penitentiary. Then, again, this wonderful clause applies to *real* as well as personal property. The clause is worthy of careful analysis, and, with the history given in Mr. Taschereau's work, will afford entertainment to the lovers of curiosities in legal literature. But this clause with all its breadth does not extend to cover the charge in question. If no other difficulty stood in the way of finding shelter within its wide provisions—and there are many—the fact that the Police Magistrate proceeded to exercise summary jurisdiction is insurmountable. Looking at the Summary Jurisdiction Act we seek in vain to find any provision which might give even colour of jurisdiction. The first class is that of simple larceny, larceny from the person, embezzlement, or obtaining money or property by false pretences, or feloniously receiving stolen property; but this clause could not have suggested jurisdiction, as we find it is confined to cases where the value of the property does not exceed $10, and here the value is fixed with the minutest care at $17.30, if we are to take the "damages" to be assessed on the value, and the information fixes the value at $20.

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The conviction does not state time when, or place where, the offence was committed, departing from the wording of the information in both respects, and we do not find evidence to determine these essentials. We look in vain for the authority empowering the Magistrate on the facts here disclosed to fine, award damages, to direct levy by distress of the fine, damages and costs, and imprisonment in default of payment. All this may seem of little moment, save the unfortunate defendant, who may be a sensitive man, to whom a trial and conviction before a Magistrate may give poignant suffering. It seems to me it is about time some check was put upon such careless use of the criminal law, and I will endeavour to assist by inflicting the penalty of costs in cases such as this whenever they come before me. Parties innocent of any violation of criminal, and in this case probably also of civil, law, must not be harrassed by criminal prosecutions, which tend to produce an irritation that should not follow the adjudication of disputes between litigants.

The conviction will be quashed, with costs.

Conviction quashed, with costs.

NOTE.—The learned Judge desires it to be stated that since the above went to press his attention has been called to the provisions of 38 Vict. cap. 47, D., empowering Police Magistrates to try upon consent such offences as might be tried at the General Sessions of the Peace; which statute was not cited on the argument, the case being discussed upon the provisions of 32-33 V. ch. 32; but that this statute did not warrant the conviction, which, for the other reasons assigned, was unsustainable.—REPORTER, Q. B. D.

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[CHANCERY DIVISION.]

MARTIN v. MILES.

Right of tenant to redeem—Waiver—Confirmation of lease by mortgage—Action of redemption—Costs—Tender after action commenced.

Held, over-ruling the decision of WILSON, C. J. C. P., that the right of a tenant for years to redeem a mortgage is absolute, and the Court has no discretion to grant or refuse redemption.

Held, accordingly in this case, where a tenant for years under a demise made subsequently to a mortgage, sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the present plaintiff was not a party, the plaintiff had a right to redeem in the advent of the mortgagee refusing to accept him as a tenant.

Held, also, that although the plaintiff had at one time, before commencing this action, offered to give up possession on payment of $40, yet inasmuch as this offer had been accepted by the defendant or acted upon at any time, the plaintiff had done nothing to waive or prejudice his right of redemption as such lessee by such offer.

After action brought, however, the defendant offered to confirm and adopt the plaintiff's lease, though before action she had refused to do so, and had, indeed, sold the property to a purchaser, without making the sale subject to the lease, of which, nevertheless, the purchaser had full notice.

Held, (*per* WILSON, C. J. C. P.,) that the lateness of the defendant's assent to affirm the lease only affected the costs; she had done nothing that debarred her from now confirming the lease of which the plaintiff was still claiming the benefit, and accepting the plaintiff as tenant, on behalf of herself and as representing the purchaser, and as she was willing now to do so, the plaintiff could not redeem.

Held, also, that in action for redemption, if tender is made after action commenced, it must be enough to cover the costs of the plaintiff already incurred; and if it be so, the plaintiff is bound to accept it, and any litigation afterwards must be at his expense.

Per WILSON, C. J. C. P.—It may be said as a rule that everyone having an interest from the mortgagor in the land can redeem the mortgagee.

THIS was an action brought by John Martin against Frances Miles, claiming a right to redeem certain mortgaged lands, of which the defendant claimed she had foreclosed the equity of redemption, under the following circumstances:

Ewan H. Cameron by two conveyances, dated respectively the 7th of April, 1880, and the 7th of June, 1880, mortgaged to the defendant in fee lot 8, in the 7th concession of the township of Mara, containing 200 acres; and also village lot No. 11, on the south side of Simcoe street, in the village of Beaverton, in the township of Mara, to secure the repayment of $2,225 and interest.

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Ewan H. Cameron afterwards, on the 8th of May, 1881, by conveyance made by him to the plaintiff of that date, demised the north-half of the said lot of land in Mara to the plaintiff for the term of seven years, at the yearly rental of $1 per acre upon all cleared land fit for cultivation, after measurement at the time of each payment, and paying taxes and performing statute labour.

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The plaintiff also covenanted to clear and make fit for cultivation, after the first year, at least four acres per year on the face of the 8th concession southward: to fence the same in ten acre fields, and in squares, the fencing to be along the same concession, and to be of cedar or black ash logs, four logs high, staked and capped, and not less than five feet high, and the remainder or cross fences of rails or logs as the above, the said fences to be seven rails high, staked and ridered: also to build a log fence the same as along the concession between the said lot and the adjoining north-half of lot No. 9, to the end of the clearing at the expiration of the lease. And the lessor covenanted to pay the plaintiff $1 per rod for all log fences, and $12 per thousand for all good rails used in fencing as aforesaid; and also $12 per acre for each of the said four acres to be cleared, namely, twenty-four acres as aforesaid.

The plaintiff entered into possession at the making of the lease, and had continued in possession ever since.

The defendant afterwards, by action commenced on September 8th, 1881, and by a final order made therein on September 12th, 1882, foreclosed the said Ewan H. Cameron, to which action the plaintiff was not a party, and of which he had no notice.

And the defendant had since then required the plaintiff to give up possession of the land.

The plaintiff thereupon offered to pay the full claim of the defendant upon and in respect of the said mortgages; but the defendant refused to accept of such offer; and the plaintiff claimed he was entitled to redeem the defendant.

The defendant stated she was not aware of the plaintiff's lease when the foreclosure proceedings were taken or

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pending, as the lease was not registered: and that after the final order, that is, from about the end of September, till the beginning of October, 1882, a correspondence and negociations were carried on between the plaintiff and the sclicitors of the defendant, the result of which wa that the plaintiff agreed to give up the possession of the said land at any time he was requested to do so upon receiving the sum of $40, which sum the defendant agreed to pay upon the plaintiff giving up the possession: that afterwards on or about November 3rd, 1882, relying upon the agreement so made with the plaintiff to give up possession, she agreed with one Peter Kelly to sell him the said lot No. 8, for the sum of $3,150; $1,000 down and $2,150 in five years, with interest at 6½ per cent: and the plaintiff had by this action, and by his registration of the same, prevented the defendant from carrying out the same agreement with Peter Kelly: and that she, the defendant, had not, save as above stated, taken or threatened to take any proceedings against the plaintiff. She admitted the solicitors of the plaintiff tendered to her $2,730, on or before September 25th, 1882, claiming the right to redeem the said mortgages, which tender she declined to receive, as she alleged, under the circumstances hereinbefore set forth, she was justified in so doing; and she counter-claimed for damages by reason of the non-completion of the contract made with Kelly by reason of the plaintiff's conduct and proceedings. The plaintiff replied that the promise by him to take $40 and give up possession, was made by reason of the defendant's solicitors telling him his lease was worthless, and that the defendant could under the decree turn him out of possession in forty-eight hours without any compensation, and that they would do so: that he asked to be allowed $40 for his improvements, but the defendant's solicitors would not agree to this, and that they desired him to write to say what he would do: and he afterwards wrote to them he would take $40 and give up possession; but the defendant's solicitors had never accepted the said offer nor paid

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the $40, and he was not, as he alleged, from the circumstances stated, and from having had no independent advice, bound by his said offer.

On April 7th, 1883, an application was made by the plaintiff to make Peter Kelly a party to the action, but upon the solicitor of Kelly stating Kelly did not desire to appear in the suit to oppose the claim of the plaintiff as set forth in the statement of claim, and submitting to be bound as between the plaintiff and the said Peter Kelly, by any judgment or decree the Court might pronounce in this action in respect of the plaintiff's claim, without his being joined as a party or being represented at the trial of the questions herein—the application was discharged.

This action was begun on November 17th, 1882.

On the 14th of that month, the plaintiff and the said Cameron by deed—after reciting the said foreclosure, and that the plaintiff had been threatened by the defendants to be dispossessed, and that he had required Cameron to fulfil his covenant for quiet enjoyment—agreed that the plaintiff would exercise his right to redeem upon Cameron finding the money for the purpose, and would assign the property to the person advancing such money, and would allow his name to be used for the purpose of redemption, and would not extinguish the lease nor give up possession before redemption; and that Cameron would pay all costs of such proceedings, and would pay the plaintiff $80 as compensation for his loss of time; but such sum was not to be paid to the plaintiff in case he elected to remain in possession for the remainder of his term.

The case was tried before Wilson, C. J. C. P., at Toronto, on May 8th, 1883.

F. Arnoldi, for the plaintiff.
Beck, for the defendant.

The questions raised were: 1. That the plaintiff as lessee had not the right to redeem: 2. That if as lessee he had such a right, he had waived it by the agreement he

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made with the defendant's solicitors to give up possession upon request upon being paid $40: 3. That the right to redeem is discretionary with the Court, and will only be granted where the estate of the party seeking relief is liable to be forfeited, and to the extent that is necessary to protect such estate, and that the plaintiff had not such right to redeem, as the defendant and Peter Kelly, the purchaser from the plaintiff, were each willing to continue the plaintiff in his possession as lessee under the lease he had from Cameron. 4. That the defendant, having foreclosed the mortgagor, her mortgage merged in the equity of redemption and consequently the mortgagee was now in the position of absolute owner of the land, subject to the plaintiff's lease, and there was therefore no existing mortgage to redeem: 5. That the lease having been made after default in payment of the mortgage moneys, the mortgagor not being entitled to possession, he could not make a valid lease so as to entitle the lessee to redeem.

The following authorities were cited on the argument: *Gillatley* v. *White*, 18 Gr. 1; *Pearce* v. *Morris*, L. R. 8 Eq. 217, S C. in App., 5 Ch. 227; *Canada Permanent Loan and Savings Society* v. *Macdonell*, 22 Gr. 461; *Keech* v. *Hall*, 1 Dougl. 21; *Rushbrook* v. *Lawrence*, L. R. 5 Eq. 25, S. C. in App. 3 Ch. 3; *Story's* Equity Jurisprudence, sec. 1023; 1 *Wh. & T.* L. C., 4th Am. ed., 1968; *Hart* v. *McQueston*, 22 Gr. 133; *Toulmin* v. *Steere*, 3 Mer. 210; *Platt* v. *Ashbridge*, 12 Gr. 105; *Trinity College* v. *Hill*, 2 O. R. 348; *Long* v. *Long*, 16 Gr. 239, S C. in App. 17 Gr. 253; *Campbell* v. *Holyland*, L. R. 7 Ch. D. 173; *Johnston* v. *Johnston*, 9 P. R. 259; *Skae* v. *Chapman*, 2 Gr. 534.

June 6th, 1883. WILSON, C. J. C. P.—[After stating the facts and referring to the questions raised by the case.] I shall state as much of the evidence as may be material in disposing of these questions, and refer to such authorities as may be applicable.

1. A tenant for years may redeem the mortgagee. The case of the *Canada Permanent Loan and Saving Society*

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v. *Macdonell*, 22 Gr. 461, is a decision upon the very point, and refers to all the cases on the subject. There the tenant for years, claiming by lease made by the mortgagor after the execution of the mortgage, was made a party to the forelosure suit, along with the widow and heirs-at-law of the mortgagor, and it was objected that he was not a proper party to it, but it was held he was.

1. There is no absolute right of redemption. It rests in the discretion of the Court to grant it or refuse it according to circumstances: *Smyth* v. *Simpson*, 7 Moore P. C. 205. The lease must be a beneficial one to the tenant. And this lease, I think, is a beneficial one.

2. Has the plaintiff by his conduct or agreement waived his right of redemption?

The evidence of the plaintiff is, that he was told his lease was worthless, and he could be turned out of possession at any time by the defendant; and that he then asked to be allowed $40 for improvements he had made, and that payment of that sum being refused to him, he thought he could be turned out without any compensation, but he was told to go home and to send in to the defendant's solicitors what his claim was.

It appears that on September 25th, 1882, the defendant's solicitors wrote to the plaintiff asking him when he went into possession, and under what agreement he entered, and informing him the defendant had become owner of the land.

On the 28th the plaintiff answered saying he had a lease of the place from Cameron at the rent and on the conditions before mentioned. The postscript is:

"Kindly let me know whether I am to acknowledge Miss T. Miles as landlady, or Mr. Cameron as landlord."

On the 29th the defendant's solicitors wrote to the plaintiff saying they could not recognizes the plaintiff's lease, "but if you feel disposed we would be glad to enter into an agreement with you either as tenant or purchaser. We would rather sell than rent, but if you will let us hear from you

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at once we may be able to make some arrangement that will be mutually satisfactory."

Then the plaintiff brought his lease in, and the conversation took place between him and the defendant's solicitors which he has spoken of.

The account given of that conversation by Mr. Fitzgerald, one of the defendant's solicitors, is, that they spoke of a sale of the north half of the lot which the plaintiff occupied, and that the plaintiff offered $1500 for it, or $1600 for the south half, or $3000 for the 200 acres, which Mr. Fitzgerald refused; that Mr. Fitzgerald said to him, he the plaintiff must give up possession, and that the plaintiff said he did not care whether he gave up possession or not, but by the lease there would be $40 due to him by Cameron and he should get that before he gave up possession. I said he should think what Miss Miles's position was, that I could in forty-eight hours put the sheriff in. He said he should have $40. I said to put his offer in writing that he would give up possession on getting $40. The plaintiff after that wrote on October 13th, saying "I will give you possession of the place at any time you ask by your paying me forty dollars for improvements. Now I want to know the lowest you will take for the lot I am on, I am a poor man, and am willing to do the right thing."

On getting the letter Mr. Fitzgerald said he took no steps to enforce the getting possession, nor did he answer it.

On December 11th, the defendant's solicitors wrote to the plaintiff's solicitors.

"You of course understand that Miss Miles does not seek to deprive the plaintiff of whatever interest he took under any lease he may hold from Mr. Cameron, *i. e.* if he has any such lease, so that Martin will stand in the same position as if Cameron had not been foreclosed."

On February 8th, 1883, the defendant's solicitors repeat the like terms "that the plaintiff is to be considered in all respects as far as the defendant is concerned in the same position as if Cameron had not been foreclosed, *i. e.* to be allowed to retain possession according to the terms of his lease."

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On February 20th, the defendant's solicitors propose to give the village lot to the plaintiff, and to continue the plaintiff in possession under his lease, on condition of the actions pending being dismissed, and the registration of them removed, and on payment of the defendant's costs. The plaintiff's solicitors declined the proposal.

Whether the plaintiff's account of the personal conversation between him and Mr. Fitzgerald, or that of Mr. Fitzgerald, be the most accurate one I need not say, because it all ended by the plaintiff offering to give up possession on receiving $40, and by the non-acceptance of that offer by the defendant's solicitors.

I say their non-acceptance of it,

1. Because it was not answered, and the defendant was never bound by it; and,

2. Because the defendant by the letter of December 11th, elected not to deprive the plaintiff of the possession under the lease he had from Cameron, and that declaration is repeated in the letters of the 8th and 20th of February.

The statement that the plaintiff shall stand in the same position with respect to his lease as if Cameron had not been foreclosed, does not mean that the defendant waives or opens the foreclosure in her favour, but that the plaintiff's rights "to retain possession under his lease," are to remain as if no foreclosure had taken place.

I construe the letters in that respect as they were intended, and as I think they may fairly be understood. To attribute the meaning put upon them by the plaintiff's counsel would be to defeat the whole purpose of the defence,—a valid and conclusive foreclosure against Cameron, which the defendant would not abandon—but a willingness to give effect to the lease as a subsisting lease, and to be continued against herself for the full term which had been created, which she could not be compelled to accept.

She had no idea of referring to the plaintiff's right or power of redemption, as such lessee of the mortgagor; and it was not necessary she should refer to such a right,

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for the plaintiff had the right in himself which she could not take away or prejudice. I am of opinion that as the plaintiff's proposal to leave the place on being paid the $40, assuming it to have been voluntarily and with a full knowledge of his rights made, was not accepted or acted upon at any time, but was varied from by the defendant, that the plaintiff has done nothing to waive or to prejudice his rights as such lessee by anything which took place respecting his willingness to give up possession of the land; and besides the defendant could not properly have waived or re-opened the foreclosure to the prejudice of Peter Kelly while representing him. He had agreed to suspend his rights and to be governed by the rights which the defendant had independently of him as purchaser.

3. Is the plaintiff entitled to redeem when the defendant offers to confirm and adopt the lease he holds from Cameron?

The plaintiff has the general right to redeem, but not the absolute right. The right must be exercised subject to the discretion of the Court.

It may be said as a rule that every one having an interest from the mortgagor in the land, can redeem the mortgagee.

The mortgagee cannot say to such a person any more than he can say to the mortgagor he will buy him out and keep the land. Nor can he insist on redeeming the second or later incumbrancers. He must submit to be redeemed, because all he is entitled to is his money and interest. He has no absolute right to the equity of redemption, he has only a right which he can enforce against it.

In that view why should not the plaintiff, the holder of a beneficial lease, enforce his general right of redemption?

He may, I should say, without any question so long as the mortgagee who has foreclosed the lessor of a lease made after the mortgage, keeps the lessee at arms length, and refuses to recognize him. But if such prior mortgagee adopt and confirm the lease so as to form the relation of landlord and tenant between himself and the mortgagor's

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tenant, or is willing to do it—can such tenant, who can in no way be prejudiced by accepting such an offer, claim of right to redeem?

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The defendant refused by parol to recognize the plaintiff as her tenant, although he was willing to accept her as his landlord.

And that was the state of things when the action was commenced on November 17th.

I do not think that was such an act of election to treat the plaintiff as a wrong-doer, as to conclude her from afterwards electing to treat him as her tenant.

Neither an act or words will be considered to be a disclaimer, unless the tenant set up title in himself or in another: *Jones* v. *Mills*. 10 C. B. N. S. 788.

So after bringing ejectment for a forfeiture, the landlord has made an election to treat the lease at a end, and he cannot afterwards waive that act.: *Jones* v. *Carter*, 15 M. & W. 718.

Here the plaintiff neither set up title in himself nor in another. He claimed throughout his lease should be recognized. The defendant refused to do that till after action brought, and before such action she sold the land to Peter Kelly, not subject to the lease. If she had recognized the plaintiff as her tenant, which she might have done: *Doe dem. Whitaker* v. *Hales*, 7 Bing. 322; *Doe dem. Rogers* v. *Cadwallader*, 2 B. & A. 473; *Evans* v. *Elliot*, 9 A. & E. 342,—he could no longer have redeemed, because he would have been her tenant.

After the refusal of the defendant to recognize the plaintiff as her tenant, she might, I think, have waived that refusal, as it was by mere words. There was no act done before her sale to Kelly of that binding nature, such as by bringing ejectment, from which she could not recede.

A disclaimer by the tenant may be waived: *Doe dem David* v. *Williams*, 7 C. & P. 322. If so, a mere parol refusal to accept of the plaintiff as her tenant may be waived. But her sale to Kelly,—and as Mr. Fitzgerald said, "it was no part of defendant's agreement with Kelly that

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he should take the plaintiff as his tenant,"—I think was a refusal to take him. I am, however, of opinion, from the particular nature of mortgage proceedings, that the assent to affirm the lease, the plaintiff still claiming the benefit of it and in effect endeavouring to force it upon the defendant by this action, may still be given by the defendant on behalf of herself, and as representing Kelly the purchaser, the lateness of the assent affecting only the costs.

And so far as the plaintiff is concerned, I am influenced also by the fact that this action is brought by and on behalf of Cameron, the mortgagor, who has been foreclosed; and who is by the agreement between them to receive the possession at once from the plaintiff if he is successful in this action; the only difference between the offer of Cameron and the offer formerly made by the defendant, being that the plaintiff was to receive $40 from the defendant, while he is to receive $80 from Cameron. In the one case the plaintiff was, and in the other case he is willing to give up possession of the premises.

He does not prosecute this action for his own benefit, or in anyway to protect his rights or interests; he has parted with his rights to Cameron.

I am not, however, prepared to say he may not do that if he please. There is no reason why he may not if Cameron could become the direct and open assignee, or purchaser of the lease from the plaintiff: *Bromitt* v. *Moor*, 9 Hare 375; *Goldsmid* v. *Stonehewer*, 9 Hare, App. xxxviii.

But if Cameron is to be considered as the assignee in fact of the plaintiff's interest in the lease, the beneficiary in this action, he can be in no better position than the plaintiff himself, and he should not be allowed in effect to re-open the foreclosure, especially after a sale made under it: see *Campbell* v. *Holyland*, L. R. 7 Ch. D. 173; *Trinity College* v. *Hill*, 2 O. R. 348; *Johnston* v. *Johnston*, 9 P. R. 259; and when the lease is ready to be confirmed, and the real purpose is not to maintain the lease, but to make use of it for a merely collateral purpose.

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I have every disposition to make the defendant take her mortgage money and give up the estate; and I should not regret if it fell again into the hands of Cameron, who is the one to make whatever profit there is to be made out of it; and not to regard the agreement with Kelly, who bought from the defendant with full notice, and whose purchase abides the result of this action.

But I think I cannot aid the plaintiff or Cameron, the real party, under the circumstances and evidence of the case.

I must dismiss the action, with costs, if the plaintiff will not accept a confirmation of his lease.

If he accept the confirmation, there will be no costs to either party.

Afterwards, on September 11th, 1883, the plaintiff moved by way of appeal to the Divisional Court.

O. Howland, for the appellant. The learned Chief Justice found all the facts necessary to establish the right to redeem. He found that the lease was a valuable one, and that nothing had displaced the plaintiffs' right to redeem, nevertheless he would not allow redemption.

Beck, contra.

The following cases were referred to: *Canada Permanent Loan and Savings Society* v. *Macdonell*, 22 Gr. 461; *Faulds* v. *Harper*, 2 O. R. 405; *Smyth* v. *Simpson*, 7 Mo. P. C. 205; *Skae* v. *Chapman*, 21 Gr. 534; *Long* v. *Long*, 16 Gr. 239, *S. C.* in App. 17 Gr. 251; *Orr* v. *Orr*, 21 Gr. 397; *McDonald* v. *McKinnon*, 26 Gr. 12; *Hart v. McQuesten*, 22 Gr. 133; *Johnson* v. *Johnson*, 9 P. R. 259.

September 29th, 1883. BOYD, C.—In *Jones* on Mortgages, vol. ii. sec. 1066, it is said, "a tenant for years may redeem although his lease being made after the mortgage, and good against the mortgagor, is not good against the mortgagee; and although the lessor, being also the mortgagor, has released his equity of redemption to the holder of the mort-

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gage." The cases cited bear out the statement in the text; and this is indeed the conclusion arrived at in the present case by the Chief Justice, that the plaintiff had a right to redeem.

Now an equity of redemption is an estate in the land, and in all cases when the right to redeem has not been barred by the Statute of Limitations, it exists as a right and an estate over which the Court has no discretionary power. The law of England is that which by legislation has been adopted in this province, touching the limitation of the right to redeem. One will search the English books in vain to find anything upholding the view that the Court exercises discretionary power in granting redemption to a person interested in the equity of redemption. On the contrary, as put by the Lord Chancellor in *Pearce* v. *Morris*, L. R. 5 Ch. App., at p. 230: "All that either the Court or the mortgagee has to attend to is, that in fact the person tendering the money has an interest, whatever it may be, in the equity of redemption." And as further put by Proudfoot, J., in a case before the Divisional Court, and not cited to Wilson, C. J., *Faulds* v. *Harper*, 2 O. R. 411, "Any one person entitled to a share in the equity of redemption may insist upon paying off the whole mortgage debt, and the mortgagee is bound to convey to him the mortgaged premises." If the tenant for years in this case redeem, it may be that the original mortgagor will have the right again to redeem him though as between the original mortgagor and the mortgagee there has been foreclosure.

But with that we have no concern. What the ultimate result of redemption by the plaintiff may be is not a matter which interferes with his present vested right to redeem, and the mortgagee, who gets the payment of his mortgage debt, which was all he contracted for, is in no position to complain. I think the judgment appealed from errs in withholding redemption, and it should be reversed, with costs. The judgment should be for redemption by the plaintiff, and with costs of action if the tender before action was sufficient. If not sufficient the costs should be added

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to the mortgagee's debt, except the extra costs occasioned by disputing the right to redeem, which should be deducted, from what the plaintiff is to pay. As to the sufficiency of the tender, if the parties cannot agree there may be a reference.

FERGUSON, J., concurred.

Afterwards, on February 21st, 1884, the plaintiff moved to vary the minutes of the judgment as settled by the Registrar, in the matter of costs It appeared before the Registrar that there had been no tender of the amount due before the writ issued in the action, though tender was made before appearance entered, and the Registrar thereupon held that under the judgment of the Divisional Court the defendant was entitled to add his costs of the action to his debt, except so far as such costs had been increased by his resisting redemption.

F. Arnoldi, for the motion. The Registrar should have held the defendant entitled to no costs of action at all, while he should have held the plaintiff entitled to all his costs of action. The costs were really occasioned by disputing the right to redeem: *Roberts* v. *Williams*, 4 Ha. 129.

Beck, contra.

BOYD, C.—Tender, if made after action for redemption brought, must be enough to cover costs of the plaintiff incurred up to that time. If it is so, the plaintiff is bound to accept it, and any litigation afterwards must be at his expense. Here, however, the main costs were incurred in resisting the right to redeem. The judgment should be varied in accordance with this: *Sextance* v. *Porter*, 7 Ha. 426.

PROUDFOOT, J., and FERGUSON, J., concurred.

A. H. F. L.

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www.libtool[CHANCERY DIVISION.]

CARNEGIE v. THE FEDERAL BANK OF CANADA.

Pledge of stock—Margin speculation—Unauthorized sale by the pledgee.

The plaintiff pledged with the defendants, certain shares of bank stock, as security for a loan under an agreement in writing, providing, that he was to keep up a cash margin of not less than 10 per cent. above the market price of the stock, and authorizing the bank, in the event of default, "to sell or dispose of the said security without notice, and to apply the proceeds in liquidation of the said advance."

The plaintiff claimed that before default was made, the bank wrongfully loaned or sold his stock without his knowledge or consent; and that he was entitled to credit for the amount realized, and to a return of interest paid, and damages for being compelled to give additional security.

The defendants alleged that although the stock was transfered backwards and forwards by way of loan, it was never sold until default was made.

Held, that if the stock was sold before default made, such sale was *tortious*, and following *ex. p.* Dennison, 3 Ves. 552, that a *loan* of the stock was a *sale*; and that the plaintiff might elect, either to claim damages, or affirm the sale and claim the proceeds and profits made by the bank; one element of the measure of damages being, the highest point of the stock market between the conversion and the next default.

But that if default was made, the bank was entitled to sell the stock without notice; but only for the purpose of liquidating the advance, and that credit must be given for the proceeds, at the current rates of the days on which the transfers were made, until all the shares had been transferred.

THIS was an action brought by Charles Carnegie against the Federal Bank of Canada.

The plaintiff's statement of claim alleged that in the year 1878 the defendants lent the plaintiff large sums of money on the security of certain Ontario Bank stock, which was assigned to H. S. Strathy, their cashier, in trust: that the defendants agreed to hold the said stock until the said loans were paid off with interest, but that if the said stock depreciated in value the plaintiff would, upon demand, pay the defendants such sum of money as would pay off the loan or maintain a margin of security thereon, and if the plaintiff made default in so doing the defendants should be at liberty to sell the stock and apply the proceeds on the loan: that the plaintiff at different times paid the defendants large sums upon their representations that the stock had depreciated: that the defendants at various times rendered the plaintiff accounts shewing large sums of money due by him to them, and he relying on the said accounts, and believing that they still

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held the stock, paid the said sums so demanded as interest on the loan: that in the year 1880 the defendants pretended to sell the said stock, and the plaintiff, believing that they did then sell it, accepted from them the amount they said was coming to him after paying what was due them on the loan.

The plaintiff charged that the defendants did not hold the stock during the currency of the loan, but soon after making the said loan, without notice to, and without the consent of the plaintiff, disposed of it: that the defendants received for the said stock more than sufficient to repay the plaintiff's loan, and should not have demanded from him such sums for margin and interest: that after they had sold the stock they falsely represented that they still held it, and that it had depreciated, and demanded further security, and he, believing that they still held it, deposited a large quantity of valuable jewelry as such security: that he only became aware of the facts shortly before this action was commenced, and as soon as he became aware of them he demanded an account, which was refused: that such disposal of the stock had the effect of depreciating the market value thereof, and the plaintiff by that means suffered loss and damage. And the plaintiff asked for an account and for repayment of all interest paid by him after the disposal of the stock, and a repayment of all sums received by the bank over the amount of the loan and all margins paid after it was disposed of; and for damages for being forced to give the jewelry for security, and for depreciation of the stock caused by its disposal.

In the statement of defence the bank denied all charges of concealment, mistatement, and misrepresentation; and alleged that the transaction was a call loan, which authorized the bank to sell the securities in default of payment of the loan on demand, and that the bank was not bound to carry on the loan, but that they did so for about two years to save the plaintiff from loss and ruin; and they denied that soon after the making of the loan they sold the stock without notice to the plaintiff; as, on the contrary,

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the stock was not sold until the year 1880, when it was sold by the plaintiff, who gave the broker instructions and superintended the sale himself; and the bank exercised great forbearance with the plaintiff, and allowed him to act as if he were independent of the bank, except that the proceeds were received by the bank; and alleged that after the last sale in 1880, an account shewing a small balance in favour of the plaintiff was settled and closed to his satisfaction, and should not now be opened up: that the plaintiff bought the stock for speculative purposes, and the bank was not satisfied with the security, and the plaintiff was anxious to hold it until he could sell at a profit, and the bank solely for his accommodation accepted the said jewelry as further security to enable him to accomplish his desire.

By a statement of defence to the plaintiff's amended statement of claim, the defendants denied that they disposed of the stock or received any money for the same, and alleged that the purchase was a gambling transaction on the part of the plaintiff, in that he never owned the stock but only put up a margin thereon, and as such it was an illegal transaction; and they contended that the plaintiff was not entitled to any damages.

The action was tried at Toronto on November 29th, 1883, before Boyd, C. The evidence seemed to show that the plaintiff had borrowed money from the bank, to pay for and hold certain Ontario Bank stock, which he had bought for speculative purposes, and he pledged the stock with the bank, under written contracts or deposit notes, which provided that he should keep up a cash margin of 10 per cent. above the market price of the stock, and that if the advances were not duly paid, or "the margin of security" was not kept up, the bank should be at liberty "to sell or dispose of said security without notice," and should "apply the proceeds in liquidation of said advance," and that the bank had loaned the stock on several occasions backwards and forwards to other parties during the currency of the loan to the plaintiff taking as security therefor a deposit in cash

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equal to the market value thereof, on the days of such loans, and allowing interest thereon at the rate of 4 per cent. until such stock was returned, thus presumably making a profit in the higher rate of interest, at which that money could be loaned out again.

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Moss, Q.C., with him *J. R. Roaf*, for plaintiff. A pledgor of stock is entitled to have the stock held for him intact, in the same manner as he would be entitled to have any goods deposited by him as a security held; and, upon repayment of the loan, he is entitled to a return of the specific stock pledged by him; and the pledgee cannot claim or have any right to return an equivalent amount of stock of the same nature or class. *Langton* v. *Waite*, L. R. 6 Eq. 165. In App., 4 Chy. 402. The defendants claim that they did not sell the stock pledged with them, but only "loaned" it, that is, they transferred it, took a deposit in cash at the market value of the stock, with a right to call upon their transferee to deliver over to them, whenever called upon, a like quantity of stock of the same nature and at the same price. This, as between the parties to this action, is a sale of the stock pledged. *Ex p. Dennison*, 3 Ves. 552. The defendants also claim they had a right to deal with the stock as they saw fit, that the plaintiff gave them liberty to do so. The plaintiff denies this, and as the defendants allege the fact they should prove it, while such a permission would militate against the plaintiff, whose object was to keep the stock locked up, and off the market; but, even if it should appear that they had such a right, they did not use it, as their own evidence distinctly shews that they did not deal with it in any different manner than they would have done if they had not had such permission. They also claim a right to sub-pledge; this they might do, as all lenders have a right to re-borrow, but they admit they did not do it. The defendants put all the stock held by them in one common fund, and it is their duty to shew that the stock transferred by them was stock they had a right to transfer, but the evidence shews that they transferred all

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the stock they had, so there is no doubt the stock of the plaintiff was transferred. Plaintiff is entitled to a full account of how the defendants dealt with his stock. The evidence also shews that the defendants rendered certain accounts or statements to the plaintiff, as if they held the whole of his securities, and any settlement obtained from the plaintiff by means of such statements was one obtained by misrepresentation, and would not be such a settlement as would be binding upon him. The plaintiff having only learned the true state of facts lately, at once claimed an account from the defendants, which, being refused by them, necessitated this action. The Court should aid him by compelling the defendants to give a correct account of their dealings with the securities he had pledged with them.

Cattanach, for defendants. The bank had a common law right independent of contract to sub-pledge the stock for its own advantage: *Donald* v. *Suckling*, L. R. 1 Q. B. 585; approved in appeal, in *Holliday* v. *Holgate*, L. R. 3 Ex. 299. No actual transfer of stock was made by the bank until after plaintiff was in default, and after default the bank had express power to sell or dispose of the stock, and therefore until sale and even before default was made, had the right to use it. The only obligation on the part of the pledgee, is to be prepared to re-deliver the pledge when required: *Lecroy* v. *Eastman*, 10 Mod. 499. A pledgee has the right to subpledge: *Lewis*, on Stocks, p. 133. When the bank loaned the stock it was in fact a mere subpledge, as they received the market price for it in money, and held the money until the stock was returned to them, paying four per cent. for it, while they charged the plaintiff seven per cent. uniformly. The bank had a right to re-pledge his securities, unless specially restricted, and thus to make a profit by borrowing at a lower rate than they charged: *Collins*, on Banking, pp. 248, 250. If it is held to be a tort to re-pledge collateral securities, business could not be carried on. A speculator in stocks knows his broker must sub-pledge the stock, if money is to be borrowed, and, if a broker can, why should his sub-pledgee

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not be at liberty to sub-pledge, and so on. The ordinary contract between a broker and his customer is one of agency, but it is otherwise with regard to a bank and when a broker acts as a banker too: *Duncan* v. *Hill*, L. R 8 Ex. 242; *Thacker* v. *Hardy*, 4 Q. B. D. 685; cases digested. 21 *Am. Law Register*, 452; *Foley* v. *Hill*, 2 H. L. C. 28. The contention that the loaning of the stock must necessarily affect the pledgor prejudicially, cannot prevail in the face of the evidence, which shews that the market was firmer after each transfer. The onus is on the plaintiff, and having failed to prove substantial damage, his suit should be dismissed: *Hiort* v. *London and North Western R. W. Co.* 4 Ex. D. 188; *Benjamin*, on Sales (Corbin's 4th Am. ed., 1018). The pledgee is not bound to return the identical shares. *Cud* v. *Rutter*, 1 P. Wms. 570; *Lewis* on Stocks, p. 147. If the plaintiff may elect to treat the transfers as sales, he must take the transfers in the order in which they are made: *Hart* v. *Bown*, 7 Gr. 97; *Ex p. Dennison*, 3 Ves. 552. It is shewn that the plaintiff would not sell when the stock was at its highest, and therefore he should not be allowed to make an arbitrary selection now. The settled account should not now be opened after such a lapse of time, and after the parties have destroyed their papers.

Moss, Q. C., in reply,

January 19th, 1884. BOYD, C.—Having regard to the contradictory evidence, I am unable to find that any oral agreement was arrived at between the parties, touching the stock and transactions in question.

The only contract which can be regarded as proved, is that contained in the memorandum signed by the plaintiff, when the stock was handed over to the bank.

That provides for repayment of the amount loaned on demand, and that the plaintiff will keep up a cash margin of not less than ten per cent. above the value of the stock, as quoted in the newspapers, and, in the event of default, it thus proceeds, "The bank is hereby authorized to sell or

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dispose of the said security without notice, and to apply proceeds in liquidation of said advance."

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It is affirmed, and not denied, that default had occurred in not keeping up a sufficient margin before the 22nd of June, 1878.

The action proceeds upon the ground that, soon after the loan, the bank disposed of the shares held by them in pledge, and it asks a repayment of all sums paid for interest thereafter, and of all sums received by the bank from the disposal of the stock over and above the amount of the loan, and it also claims damages for being asked to give and giving additional security, and for the depreciation in value caused by the disposal of the shares without plaintiff's leave or consent.

This last item of damages refers, as I understand, to the market price being lowered by so much Ontario Bank stock being put on the market by the defendants, but it is not made out in the evidence.

There is no complaint made that the sales were wrongful, but the scope of the bill is to affirm what was done, and to seek an account based on those sales being substantiated.

The pleader has assumed what is probably correct, that if default occurred in keeping up the margins then a right of sale arose without notice.

By the terms of the memorandum, it was as open for the plaintiff to inform himself as to the state of the margin by reference to the newspaper stock reports, as for the defendants, and in this view notice of default was not contemplated by the parties.

Then, if there was default prior to the 22nd June a right of sale thereupon accrued, and on that day the bank did dispose of so much stock as reduced the total in their hands to 225 shares. The plaintiff had pledged with them, 369 shares, and at this date there was a shortage of 144 shares.

The terms of the bargain must govern the dealings of the bank. There is express power given to sell or dispose of the shares after default, but only that the proceeds may be

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applied in liquidation of the advance. There is, by the strongest implication, no power given to deal with or use the shares in the absence of any default, as was argued by the bank, and there is none to deal with or use the shares, even after default, except for the specific purpose of reducing the debt by means of the proceeds. See *Allen* v. *Dykers*, 3 Hill 593; affirmed, 7 Hill 497.

Ordinarily, if property is pledged, the same property is to be returned after satisfaction of the pledge, and that rule applies to stock, if it can be identified.

There is no evidence in the case upon the subject of identification, and, if the strict rule is applied, it lay upon the bank to shew that the stock they dealt with intermediately was the same stock which was afterwards got back and held under the plaintiff's pledge. This has not been done. But, besides this difficulty, the bank admits that the stock was transferred, by way of loan, backwards and forwards, though it was never sold.

I think the case of *ex p. Dennison*, 3 Ves. 552, interprets such a transaction to be a sale. That decision has not been reversed or adversely commented upon, and it is recognized in the latest text books and cases. The effect of that decision is succinctly given in *Seton* on Decrees, 4th ed., p. 1097, thus: "If a mortgagee [pledgee] of stock transfer it by way of loan to another, the transfer will be considered a sale, and in the account between the mortgagee and mortgagor the former will be charged with the value of the stock on the day of such transfer." It is cited, and to the same effect, by Cotton, Q. C., in *Langton* v. *Waite*, L. R. 6 Eq. 167, and authenticated as existing law by Malins, V. C., at p. 173.

So that I conceive the bank is shut up to the conclusion that on the 22nd June there was a disposal of the stock in pursuance of the memorandum of deposit, the proceeds of which at the current market rate were to be applied in liquidation of the advance. At that date the bank retained 225 shares, and these are to be regarded as against the bank as the plaintiff's shares, because the bank went on

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charging interest and dealing with the plaintiff as if the shares were still his property.

The same process was repeated, and with the same result as to the manner of accounting, and for the same reasons, on the 25th June, when the shares held by the defendants were reduced to 208; again, on the 8th July, when the reduction was to 206; again, on the 9th July, when they held 181; again, on the 15th July, when the balance came down to 63; and again, and finally, on the 16th July, 1878, when the whole of the Ontario bank shares held by the Federal Bank were disposed of, and passed out of the defendants' hands.

If, upon the taking of the accounts on this footing, the plaintiff appears to be in default at the time of each sale or disposition of shares, credit will be given on the account for the current rates on that day.

If, however, the plaintiff was not in default, the transfer would be tortious, and the plaintiff will be entitled to elect whether he will claim damages, or affirm the sale and claim the proceeds and the profits made therefrom by the bank.

One element of damage will be the highest point of the stock market between the conversion and the next default, and there may be other items of loss which will be open before the Master.

It is referred to the Master, (or Registrar, if the parties wish,) to take an account of the dealings between the parties on this footing. Further directions and costs reserved.

If the plaintiff does not seek such a manner of accounting, then the action is dismissed, with costs.

He may elect within the fourteen days as to the course he will take.

G. A. B.

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[QUEEN'S BENCH DIVISION.]

WALMSLEY V. MITCHELL.

Verdict of jury—Costs withheld—"Good cause shewn"—Rule 423.

In an action of seduction, it appeared that the wrong complained of was partly attributable to the culpable conduct of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get costs, whereupon judgment was directed to be entered for him without costs.

Held, that good cause was shewn why costs should not be given to the defendant within Rule 423, which declares that where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge or Court shall otherwise order.

THIS was an action for seduction, tried at Walkerton before Wilson, C. J.

The verdict was for the defendant, upon which judgment was given for him without costs.

There was evidence from which it might be inferred the defendant had the intercourse with the girl which was complained of, and upon that evidence the jury expressed themselves adversely to the defendant. It appeared, however, that the plaintiff, the father of the girl, permitted not only his grown up sons and daughters to sleep in the same bedrcom, but the young men also who visited the house slept in the same room in which his sons and daughters were; and upon the night on which the girl said the defendant forced her and had intercourse with her, and from which she said she became pregnant, it appeared the girl and the defendant were left alone in the kitchen until a very late hour, and long after the rest had gone to bed; and it was during that time the intercourse referred to took place; and it also appeared that when they went to bed they went to the same room, and that there were in that room the girl, her sister, and another young woman in one bed, a younger sister in a separate bed, two brothers of the girl in one bed, and two young men, one of these being the defendant, in another bed.

The Chief Justice, in his direction to the jury, observed upon the very culpable conduct of the parents in allowing

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their daughters to sleep in the same room with young men; that it was a disregard of their duty as parents, showing an indifference to the purity and chastity of their daughters, and affording them an opportunity to go astray, against which the parents were bound most carefully to guard them; and in such a case it was a matter for the jury to say how far the plaintiff had by his own conduct brought about the injury of which he complained.

The jury were of opinion that the plaintiff had contributed to his own wrong, and upon that ground they gave a verdict for defendant; but they said they wished the defendant should get no costs.

May 28, 1884. *Osler, Q. C.*, moved to set aside the judgment so far as the costs were concerned. There is no case in which a defendant has been deprived of costs when he is the successful party; and costs are not in the absolute control of the jury—they are to follow the event, unless "for good cause," and no such cause exists here. He referred to Rule 428; *Harnett* v. *Vise*, 5 Ex. D. 307; *Collins* v. *Welch*, 5 C. P. D. 27; *Marsden* v. *Lancashire, &c., R. W. Co.*, 7 Q. B. D. 641; *Jones* v. *Curling*, Weekly Notes for 1884, p. 109; *Campbell* v. *Linton*, 27 U. C. R. 563.

May 29, 1884. WILSON, C. J.—It is very much to be doubted if the jury would have found as they did, if I had not stated to them that I thought I could give effect to their desire in that respect, because my own opinion was, that the defendant was not entitled to much consideration in this case.

We are of opinion, upon the facts in this case, that as the plaintiff failed by reason of the neglect of his parental duty, and as the defendant succeeded by no merit on his part, but has abused the confidence of the family, and done them a very serious wrong, and has brought the whole of the litigation upon himself, he is within the terms of the rule and the decisions upon it.

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The rule provides that "Subject to the provisions of the Act the costs, * * shall be in the discretion of the Court. * * Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the Judge, before whom such action or issue is tried, or the Court, shall otherwise order."

The cases show an application was sufficiently made, and that upon such facts as this judgment was given there was good cause shown. That no case is shown in which the defendant has been deprived of costs is not an answer so long as defendants are within the rule, and they certainly are within it.

The motion will therefore be refused.

ROSE, J., concurred.

OSLER, J. A.—Rule 428 clearly applies to both parties to the action, and although the defendant succeeds the plaintiff may shew good cause why the Judge should deprive him of his costs. *Harnett* v. *Vise*, 5 C. P. D. 307, decides that in exercising that jurisdiction the Judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the action. Assuming the truth of the facts found by the jury, as that case also says the Judge is bound to do, the circumstances of the present case shew that it is one in which the rule above laid down was very properly applied.

Motion refused.

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[QUEEN'S BENCH DIVISION.]

HYMAN v. BOURNE.

Chattel mortgage unregistered—Assignment by mortgagor—Right of assignee to dispute mortgage—Adding creditor as party.

The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor, and before any creditor had been informed of the assignment the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the Master in Chambers ordered M. to be added as a party defendant, in order to test the validity of the plaintiff's mortgage.

Held, affirming the order of Galt, J., who rescinded the Master's order, that the defendant was not entitled to the order, for when the plaintiff demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment.

THIS was an appeal from an order of Galt, J., setting aside an order of the Master in Chambers.

The facts were as follow :—

Robert Whittaker made a chattel mortgage to the plaintiffs upon the 6th of March, 1884, and on the day following he made an assignment to the defendant of his estate for the benefit of his general creditors. The plaintiffs did not file their mortgage, nor did they get possession of the goods mortgaged to them. The defendant was a mere trustee and not a creditor of Whittaker.

The defendant got possession of the estate assigned to him.

The plaintiffs on the 11th of March demanded possession of the goods covered by the mortgage from the defendant, who refused to give them up, upon which this action was brought against the defendant.

The defendant applied with the consent and at the instance of Wm. Meehan, who was a creditor of Whittaker at the time of the giving of the mortgage, and who recovered a judgment for his debt on the 18th of March, to have Meehan made a party defendant, so that some creditor of Whittaker should be a party to the action, to test the validity of the mortgage by reason of its non-registration in due time.

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The defendant made an application for that purpose to the Master in Chambers, who made an order allowing Meehan to be joined as a defendant.

May 22, 1884, *Scott*, Q. C., in supporting the motion, referred to *Parkes* v. *St. George*, 2 O. R. 342; *Lumsden* v. *Scott*, 4 O. R. 323; *Kitching* v. *Hicks*, 9 P. R. 518, *S. C.*, in 19 Can. L. J. 158, 277.

Gibbons and *Aylesworth* shewed cause. The defendant was a wrong-doer in not giving up the goods to the plaintiffs on demand. The defendant not being a creditor of Whittaker is in just the like position as Whittaker, and as Whittaker cannot dispute the validity of the plaintiffs' mortgage, registered or not registered, so neither can the defendant. He desires now to add Meehan, a creditor of Whittaker, to enable him, the defendant, to oppose or defeat the plaintiffs' just claim against him. The plaintiffs made their demand on the defendant within five days after giving of the mortgage to them. The plaintiffs have no objection to the addition of Meehan as a defendant to contest any matter which can be raised against the mortgage, excepting the merely technical defect of want of registration in due time. The defendant and Meehan, however, rely upon that omission, and upon it only for their defence.

They referred to *Clarkson* v. *White*, 4 O. R. 663; *Maughan* v. *Sharpe*, 17 C. B. N. S. 443; *Richards* v. *James*, L. R. 2 Q. B. 285; *Ex parte Blaiberg*, 23 Ch. D. 254.

May 26, 1884. WILSON, C. J.—The Chattel Mortgage Act, R. S. O. c. 119, declares that every mortgage "which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall within five days from the execution thereof be registered."

The plaintiffs' mortgage was not "accompanied by an immediate delivery of the things mortgaged" upon the giving of the mortgage on the 6th of March; and upon the

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7th of March an assignment for the benefit of creditors was made by the debtor to the defendant, and he got an actual delivery and the possession of the goods, and kept and had it to and upon the 11th of March, when the plaintiff demanded from him the possession of the goods, which he refused to give.

The 11th of March was the last of the five days *from* the execution of the plaintiffs' mortgage *within* which they were required to register, and they did not register and have not registered.

The Act then declares that "in case such mortgage * * * is not registered it shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration."

The defendant is not a creditor, nor a purchaser, nor a mortgagee, and unless his position as trustee for creditors confer upon the creditors he represents by the assignment to him for their benefit a right to intervene and set up the assignment, or unless it confer upon him a right to intervene on their behalf, this motion must fail. The creditors by the Act can impeach the plaintiffs' mortgage, or creditors who bring an action expressly to set aside the mortgage, as in *Parkes* v. *St. George*, 2 O. R. 342, or who are enforcing their rights in some way against the property: *Barker* v. *Leeson*, 1 O. R. 114.

The point between the parties is this. The defendant says a creditor has the right to intervene now, and to dispute the validity of the plaintiffs' mortgage upon any ground on which an execution creditor, or a creditor who is a party to an assignment for the benefit of creditors, can dispute it, and so take advantage of the want of registration of the plaintiffs' mortgage.

The plaintiffs say the assignment made for the benefit of creditors was a voluntary act and continued to be so upon the 11th of March, when they, the plaintiffs, made a demand upon the defendant for the delivery over to them of the property covered by this mortgage, because the defendant,

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the assignee of the deed for the benefit of creditors, was not a creditor himself, and none of the creditors of the assignor are parties to it, nor had they, or any one of them, assented to or accepted it before the demand so made by the plaintiffs for the goods; nor is it shewn the assignment had been communicated by the assignor or assignee to any of the creditors by or before that demand was made.

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When the demand was made the assignment was still a voluntary conveyance against which—and the parties to it and the goods mentioned in it—the plaintiffs had the like rights as if the assignment had never been made, because the defendant represented the rights of the assignor only and not the rights of his creditors. The refusal therefore of the defendant to give up the goods was a wrong and prejudice to the plaintiffs at that moment.

If the creditors at that very time were not in a position to maintain their rights as creditors under the assignment, they cannot be allowed to make good their claim under it by setting up their subsequent assent to the assignment, and claiming that such assent shall have relation back to the date of the assignment, a date prior to the time of the plaintiffs' demand, when the claim of the plaintiff is founded upon the wrongful act and refusal of the defendant to give up the goods to the plaintiffs, the only persons then entitled to them as against the assignor, and as against the defendant as representing the assignor, and him only.

If the defendant had made a case by which the creditors had been parties, privies, or assentients to the assignment before the demand made by the plaintiffs, the result might have been different.

I need refer only to *Johns* v. *James*, 8 Ch. D., on Appeal, 744, which reviews the law upon this subject.

The motion must therefore be discharged, with costs.

OSLER, J., concurred.

Appeal dismissed, with costs.

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[COMMON PLEAS DIVISION.]

MORRISON ET AL. v. EARLS.

Promissory note—Syndicate—Partnership—Sale of land—Price of land—Misrepresentation—Rescission.

Action on a promissory note for $1000 made by the defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate formed under an agreement which stated that "We the undersigned hereby covenant, promise, and agree with each other to form ourselves into a syndicate," to purchase a lot of 300 acres of land in Manitoba from M., for $50,000. divided into 15 shares of $3,333.33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, &c., to be borne proportionately by each member according to his share, appointing M., trustee to form the syndicate, and on completion the members were to appoint M., or any other person trustee to carry out the objects of the syndicate. The syndicate was completed, and the defendant appointed trustee, and a conveyance of the land made to him. It appeared that M. by fraudulently representing to defendant that the price he M. paid for the land was $50,000, whereas it was only 31,000, that it was well worth $50,000, was suitable for being laid out for town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resided in Toronto, and had no knowledge, or means of acquiring knowledge, but relied upon the truth of these statements, to enter into the agreement. The defendant in consequence asked to have the agreement rescinded and the note delivered up to be cancelled.

Held, that by reason of the misrepresentation the defendant would have been entitled to be released from the contract had he been solely concerned, but that the defendant was not in a position alone to put an end to the agreement, for that the so-called syndicate was in fact a partnership, and all the members thereof were not asking for its rescission; and the defendant's remedy must be by cross-action or counter-claim for deceit.

ACTION on a promissory note made by the defendant, dated the 26th of May, 1882, payable to W. J. Morrison or order for $1,000, payable three months after date, and endorsed by the payee to the plaintiffs.

Before the note was due the plaintiffs endorsed the note t he Imperial Bank. When the note fell due the bank sued the plaintiffs and the defendant, and the plaintiffs had to pay the same, with costs, and interest amounting in all to $1,116.68, and the plaintiffs claim that sum with interest from 17th October, 1882.

The defendant denied the plaintiffs' statement of claim.

The plaintiffs' firm is composed of Llewellyn A. Morrison and W. J. Morrison, and was so composed before and at the time of the occurrence of the facts in the statement of defence mentioned.

In or about April, 1882, W. J. Morrison returned from

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Manitoba, having, as the defendant believed and was informed by W. J. Morrison, acquired a thorough knowledge of land as to locality and otherwise in that Province. And W. J. Morrison, with the intent of defrauding the defendant, falsely and fraudulently represented to the defendant that he, W. J. Morrison, had bought from one Robert Balkwell 300 acres of land, being the south half of section 25, township 13, range 20, west of the first principal meridian in Manitoba, less the west 20 acres thereof, at the price of $50,000, and that it was well worth that sum, and was suitable for being laid out in town lots, and could be readily and immediately sold for town or building lots, and that he was desirous of obtaining a number of persons to form a syndicate for the purchase from him of the said 300 acres for that sum, and he proposed that such sum should be divided into fifteen equal shares of $3,333.33 each, and he proposed that the defendant should become one of the syndicate, and he recommended the defendant to become the purchaser and holder of a half-share in such syndicate.

The said W. J. Morrison represented to the defendant that the said land was within the limits of Rapid City, a town or village in the said Province, and that the land could be at once surveyed into town lots, and immediately sold as such at largely remunerative prices upon said purchase, and whereby the defendant would realize large profits on his investment; and he further falsely represented that the lands in the immediate neighborhood were selling at large prices equal to the prices which he desired to obtain for the said 300 acres; and also falsely represented that one George Balkwell and one C. J. Whellams, who were residents of Rapid City, had each purchased one of said fifteen shares at the sum of $3.333.33 each, whereas the fact is the last named persons had not purchased any such shares.

The defendant having at that time confidence in W. J. Morrison, and relying upon his representations at his earnest solicitation, became a subscriber for one-half of one of such shares at the sum of $1,666.66, according to the terms of two agreements dated the 24th of March, 1882,

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and the 17th April, 1882, under which the syndicate was formed, one of the conditions of which was that $1,000 should be paid on the said half-share before the completion of the syndicate, and the balance be secured on the said land by mortgage, but the defendant, with the consent of the said W. J. Morrison, gave him the defendant's promissory note, which is now sued upon in this action in satisfaction of the said payment of $1000 on account of the said half-share, and before the note became due the defendant discovered the fraud and repudiated the syndicate agreements, and refused to be bound by the same. The said W. J. Morrison, before and after the defendant gave the promissory note, represented to the defendant that several other persons had become parties to the syndicate and had paid their purchase moneys, and the defendan, believed the same to be true, and gave his note on the faith thereof.

The defendant says that many persons whose names were appended to the said agreements as subscribers for shares or half-shares, were not *bonâ fide* holders thereof, and did not pay, nor was it intended they should pay for the same, but the said W. J. Morrison procured the use of their names to induce the defendant and others to become members of the syndicate: that W. J. Morrison did not, in fact, pay $50,000 for the land, but a much smaller price, and the defendant would not, if he had known the same, have entered into the syndicate or given his note.

The land was not worth then more than $6,000, which W. J. Morrison well knew, and it would not now sell for that sum, and it was wholly unsuited for the purposes represented by W. J. Morrison, or for which the syndicate was formed, and is suited only for farming purposes.

The defendant never was in Rapid City or its vicinity, and had no knowledge of the value of land there, &c.

The plaintiff, W. J. Morrison, is the same person as W. J. Morrison mentioned in the statement of claim.

The plaintiff Llewellyn A. Morrison was, prior to and at the time the syndicate was formed, aware of the said facts and

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circumstances, and was, at the time W. J. Morrison endorsed the note to the plaintiffs, a partner with W. J. Morrison, &c.

There never was any valuable or good consideration for the giving of the note by the defendant.

The syndicate was never completed or formed, and by the terms of the agreement the defendant was not to be bound to pay any part of the price of the half-share, and the defendant is entitled to have the note delivered up.

Issue.

The action was tried at the last Spring Assizes held at Toronto before Patterson, J. A., without a jury.

The defendant said that W. J. Morrison stated the lots would sell at from $40 to $75 each, and lots were selling in the neighborhood at that price, and the property would cut up into about 3,600 lots with twenty-five feet frontage deducting streets and lanes, and costing the member about $14 a lot. W. J. Morrison was to be a partner. He was the trustee in the syndicate agreement. He said he would not bother syndicating the property if he had money but as he had not, he wanted his friends to assist him in buying it. The names of L. A. Morrison, G. Balkwill, C. H. Whellams, and, the defendant thought, George F. Bostwick. He had great confidence in L. A. Morrison. The plaintiff W. J. Morrison named others in Toronto whom he expected to go in with him, personal friends of the defendant, and many more of considerable influence and money. All the papers attached to the agreement were then attached to it, and shewn to the defendant. The plaintiff W. J. Morrison called in about a week again and shewed he had obtained other signatures since he last saw him, Mr. Abrey, J. A. Carlow, the cashier of the Grand Trunk Railway Company, and Mr. S. S. Mutton. The plaintiff W. J. Morrison pressed me again to sign, saying there was a large fortune in it, and all that sort of thing. A day or two after that I wrote the plaintiff W. J. Morrison I would take half a share. He said he was so anxious to get me into the syndicate he would not insist on the deposit, he would let that go. I said I had no available cash at that time. I signed the

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agreement. He said my note would be taken, when the matter was closed. L. A. Morrison said he was in partnership with his brother, who was dealing for the firm considerably in real estate in the Northwest, from which they hoped to realize a large profit. He wanted me to join the syndicate. W. J. Morrison said, when I spoke to him of his name not being on the paper, his brother's name was there, the firm could not sign it. I had no knowledge that less than $50,000 was paid for the property. I believed $50,000 was paid for it. I have no knowledge that Morrison, Balkwell, or Pridham were not bound to pay $3,333 cash. Directors were appointed for the syndicate on the 3rd of May, 1882, and on the 19th of May I was elected a trustee to hold the property until some one was got to sell it. W. J. Morrison would not continue to act as trustee. The deed was made from W. J. Morrison to me on the 26th of May. I communicated with lawyers in the Northwest, and with other parties with regard to the land. In July after, Mr. Carlow and I met Morrison in my office. I told him nearly all the members of the syndicate were dissatisfied with the arrangement: that we had been imposed upon: that we were all very angry, and threatened to institute proceedings to upset the whole arrangement, and I said to him the representations he had made as to the value of the land were false, altogether false. He said we could do what we liked about law, he did not care what we did in instituting legal proceedings, &c.

In cross-examination he said, we complained of Morrison's representation, that he paid $50,000 for the land, also the representation as to the location of the property and its suitableness for a town site, as being within the limits of the town as then defined and understood. I complained also, that the prices which he said the property there was selling at were misrepresentations, and so were the prices which he said our own lots would sell for, and the profits to be made upon them. I saw the deed from Balkwell to Morrison. It is dated the 2nd of May, 1882. I did

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not examine minutely to ascertain the consideration, it is stated there at $31,466.67. I put the amount of the mortgage and the other amount you mention together and consider that shewed the price of the land. I thought the amount in the mortgage made up the difference. I wrote to Mr. Clay on the 29th May to boom the property for us. I did not expect Morrison was booming when he sold to us. I relied on his statement that the property was already boomed up to the value paid for it, that it was worth the price he paid for it. The letter to Mr. Clay was written after we found nothing could be done with the property here. I told Morrison on his shewing me the extracts from the papers attached to the agreement I did not believe all the newspapers said. He said he guaranteed those statements to be true.

Re-examination.—The amount of the mortgage from W. J. Morrison to Balkwill on this property was about $18,000, and I put that sum and the $31,667 in the deed together. My attention was not drawn to the latter sum being the price of the land.

W. H. Abrey said—"I got a receipt for $500 from Mr. Morrison as one of the members of the syndicate, but never paid any money for it. Mr. Morrison said it would be worth that much to him to have my signature to the agreement. I was to get that $500, but to pay the rest of my share, $2,800. Morrison said at the time, he paid $50,000 for the property."

Henry Moffatt—"I signed the agreement. Morrison said he had paid $50,000 for the property."

W. Dineen said—"I signed the agreement. I understood from reading the papers attached to the agreement that $50,000 had been paid for the property. L. A. Morrison had the papers."

Mr. Ogden, one of the syndicate, and solicitor for it, said—"My impression was the two sums, that in the deed and that in the mortgage, made $50,000. That was the sum mentioned in the deed to us."

Llewellyn A. Morrison said—"I was not jointly interested

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in the purchase with my brother. I had a share in the syndicate. It was my own share. My brother said to me if he succeeded in syndicating the land at $50,000 he probably could finance it so as to save me in paying up the money, and that my share would be paid out of the proceeds of the sale. I cut out some of those extracts from the papers. I gave them to my brother. I presume they were fastened to the agreement to induce persons to go into the syndicate.

The learned Judge, after taking time to consider, delivered the following judgment:

PATTERSON, J. A.—The action is brought by Morrison Bros., a firm which consisted of W. Morrison, and his brother L. A. Morrison, to recover from the defendant the amount of a promissory note made by the defendant on the 26th May, 1882, payable three months after date to the order of W. J. Morrison.

The note was not made by the defendant on account of any dealing of his with the firm of Morrison Bros., but was on account of a transaction with W. J. Morrison alone, on which the defence now to be investigated is founded. W. J. Morrison indorsed the note as payee, and also indorsed it in the name of his firm to a bank where he procured it to be discounted for his own benefit. After the note matured the plaintiffs had to pay the amount to the bank, and so acquired title to the note, but subject to whatever infirmity would have attached to it in the hands of the original payee.

The consideration for the note was certain money assumed to be payable upon an agreement respecting some land in Manitoba. The defendant alleges that he was induced to enter into the agreement by fraudulent representations made by W. J. Morrison; and further, that under the terms of the agreement he was, for reasons which he did not discover until after the giving of the note, under no liability to Morrison.

There are other questions concerning parties to the

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action, and some other matters which I may have to notice as I proceed.

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W. J. Morrison was engaged in the early part of 1882 in forming an association of persons to purchase three hundred acres of land at a place called Rapid City, in Manitoba, the ultimate object being to divide the land into building lots, and sell them for the profit of the shareholders. The association was to be what has come to be called a syndicate, and the enterprise undertaken by Morrison is described, in the vocabulary employed in these matters, as syndicating the land. In the same vocabulary the steps taken to create a demand for the purchase of building lots in such localities seem to be called "booming" the property, or creating a "boom."

Morrison appears to have agreed with one Balkwill for the purchase of three hundred and seventy acres, part of section 25, township 13, range 20, west of the first principal meridian in Manitoba for $40,000, though such an agreement is not actually proved. He proposed to "syndicate" three hundred acres of this, and accordingly had a document prepared which is in evidence. It bears date 24th March, 1882, and is executed, under seal, by twenty subscribers, each of whom takes a share or half a share, including the defendant, but not including W. J. Morrison himself. In the sense of not having executed the document, and not being a shareholder or member of the syndicate, W. J. Morrison is not a party to the agreement, but he is not a stranger to it, as will appear from one of its provisions to which I shall refer, and he did formally become a party to it by the execution of another subsidiary or supplementary document, dated 17th April, 1882, which is also in evidence, and which is executed by all the parties except two, who executed the earlier paper.

There is no evidence of the time at which these documents were executed by the several persons, but it is clear that they were not executed by all the parties until some time after the dates they bear, and it would seem that they were executed by all earlier than 26th May, 1882.

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By the first instrument the parties described as "the undersigned" covenant with each other to form themselves into a syndicate for the purpose of purchasing from W. J. Morrison, of Winnipeg, the three hundred acres upon the terms and conditions stated, viz: Price $50,000, payable $30,000 in cash and the balance of $20,000 in two equal payments of $10,000 each in six and twelve months from the date of the cash payment, with interest at eight per cent. per annum. The purchase money is to be divided into fifteen shares of $3,333.33 each. The cash payment on each share to be $2,000, and to be paid over to W. J. Morrison, (who is appointed trustee for the purpose of forming the syndicate until the requisite number of shares has been taken up and the syndicate fully completed) so soon as all necessary papers are prepared and the title to the land passed by solicitors who are named; but a deposit of $500 a share is to be made with the trustee upon the execution of the agreement, and is to form part of the $2,000 cash payment: Expenses are to be borne equally by each share, and there is a clause which I extract at length: "It is also further expressly agreed and understood by and between the parties hereto that in the event of said trustee failing to form said syndicate for the purposes aforesaid, and upon the above mentioned terms, then this agreement shall cease to be of any force or effect, and shall be absolutely null and void, and no liability shall attach to any person who may have become a party thereto." This summary states the whole agreement with the exception of a provision that, when the syndicate is complete, the members of it shall have the privilege of re-appointing Morrison as trustee, or of appointing such trustee or trustees as they may see fit, to carry out the objects of the syndicate.

The second agreement is between W. J. Morrison, of the first part, and the several persons who have joined or may join the syndicate, of the second part, and is expressed as to be read as part of the former agreement, and in connection therewith.

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It recites that Morrison has purchased "*the property*" from Balkwill, and is to give his own mortgage thereon for $20,000, and then goes on to state that Morrison agrees with the several persons who are or hereafter may be in said syndicate to convey to any trustee or trustees the majority in said syndicate may select "*the land in said agreement referred to*," subject however to the mortgage; but the trustees are not to be liable personally on the mortgage, nor are any members of the syndicate to be personally liable in respect of it, but the land is to be primarily liable, and Morrison secondarily. And it is further agreed that any one joining the syndicate may pay up his share in full to Morrison, who shall thereupon pay it in reduction of the said mortgage; and that any one so paying in full shall be entitled out of the proceeds of the land, and after the payment of the mortgage and all expenses, to a repayment of $1,3 33.33,⅓ and interest at eight per centum per annum before any of the profits shall be distributed, and shall have a lien on the land for the same; and that no one shall be responsible for more than his proportionate part of any expenses; and any one paying more than his proper share shall have a lien for repayment of same on the land and the proceeds of the sales.

This latter agreement was prepared at Toronto; the first one had been prepared at Winnipeg, and is expressed as "dated at Winnipeg." I notice that the two signatures to the first document, which do not re-appear in the second, are those of two persons whose address is given as Rapid City, the others all being of Toronto or its neighbourhood.

Both of the agreements had been executed by eight or ten persons when Morrison first approached the defendant. This was about the middle of April, 1882. He called upon the defendant, and shewed him the two agreements which were attached together as they now appear, and had also fastened to them some other papers which are still so attached. One of these was a sketch or plan of forty-eight sections, sixteen of which were enclosed by double lines in red ink to indicate the limits which Morrison and others

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were endeavouring to have included in the proposed incorporation of Rapid City. One of these sixteen sections was divided in two by a red ink line, a portion of the southern half thus shewn being also cut off from that half by a red line, and the words "Balkwill 300 acres," written across the remainder of that half section. This was to indicate the land now in question. The attempt to have it included in the corporate limits did not succeed, but nothing now turns upon that circumstanee. It may have caused disappointment, but there was no misrepresentation about it. Three of the other papers were telegraphic despatches from Winnipeg to W.J.Morrison, dated respectively 31st March, 7th April and 14th April. They all referred to the property. The first was concerning maps, adding "two shares in Balkwill sold."

The second read: "Rapid City property boomed twenty-five per cent. on passage of S. and R. M. bill." This related to a bill respecting the Souris and Rocky Mountains Railway, which also ended in disappointment but without any imputation of misrepresentation. The third was: "Boom started strong. Hurry back. Garrett secured." The other paper attached to the agreement contained a series of clippings, apparently from newspapers, containing items shewing the active demand for property, and other matters indicative of the promising future of Rapid City. The items with which we have to concern ourselves are two out of ten or eleven which purport to state transactions in real estate.

One of these read thus: "James Robertson of Montreal purchased the west-half of section 4, township 14, range 19 west, Rapid City, from W. J. Morrison for $75,000"; and the same information, clipped apparently from another newspaper, was worded thus: "W. J. Morrison has sold to James Robertson of Montreal, the west-half of section 4, township 14, range 19 west, Rapid City, for $75,000."

The error, which by a singular coincidence, had crept into both of these announcements was in the figures, which should have been $7,500, instead of $75,000. The

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error was corrected by Morrison in pencil, but not until after the transactions now in question, and after litigation had arisen between him and a member of the syndicate named Carlow.

The other item is the one with which we are more directly concerned. It stated that "Mr. W. J. Morrison, of Morrison Bros., Toronto, bought the balance of Mr. Geo. Balkwill's property in Rapid City, for $50,000."

This referred to the purchase of the 370 acres, the price of which was $40,000 and not $50,000, and 300 acres of which was the land mentioned in the syndicate agreement. This item mentioning the purchase of the land for $50,000 appears to have been cut from a Winnipeg paper called the *Free Press*, of 24th March, 1882, which is the very day the syndicate agreement is dated. The land had been bought by Morrison from Balkwill, either the same day or the day before, as is stated by Morrison in his examination.

The evidence leaves no doubt upon my mind that Morrison represented to the defendant, as well as to others, not only by putting these printed slips into their hands, but also by direct statements or direct answers to questions that $50,000 was the price at which he had bought from Balkwill the 300 acres of land which he proposed to syndicate, and that his design in so doing was to lead them to believe that he was selling it to the syndicate for the same price he was himself giving for it. I gather this last fact from the evidence generally, for I do not remember that any one told us that Morrison had said in so many words that he was selling for no more than he bought for; yet the defendant in part of his evidence really says it in effect, or perhaps puts it in the more striking light that the syndicate was formed to buy from Balkwill at the $50,000. I allude to that part of his evidence in which he spoke of Morrison's explanation of how fortunes were to be made by selling the 3600 building lots into which, after setting off streets and lanes, the land was to be divided, and said that his object in selling was to come in himself: that if he had the money he would not have troubled

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himself to syndicate the property, but that not having the money he wanted his friends to assist him in buying it.

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I say this is the evidence given by the defendant, not that I find the fact precisely as he states it. I have no reason to doubt the defendant's veracity, and I do not doubt the substantial correctness of what he says. The fact that Morrison did not put down his own name as holder of any share in the syndicate is calculated to raise a doubt as to whether he can have represented his own intention of "coming in." If he had no such intention, and so informed those whom he solicited to subscribe, and they supposed he was selling at cost price, they might well have wondered what was his motive in taking so much trouble, and incurring whatever risk there was. In that case his friends would not be in any sense assisting him, but he would be sacrificing himself for the benefit of his friends. We can, of course, now see that even if he sold for only what he gave for the "Balkwill property,' which was 370 acres, yet, as he was selling only 300 acres and was retaining seventy, there would have been motive enough, and that there might have been an endeavour to keep that motive out of sight by putting forward, as the real motive, the desire to join in the syndicate speculation. But the retention of the seventy acres does not seem to have been avowed at the interviews at which the defendant was solicited to subscribe; and whether or not it occurred to the defendant to reason as to the motives actuating the promoter of the scheme, he tells us that he did remark the absence of Morrison's name as a member of the syndicate, and that Morrison explained away that circumstance by saying that his brother had signed, which as they were in partnership was the same thing, and that they could not sign as a firm.

Subscribers must have occupied one of three positions; either they were told nothing about the cost of the property, but were left to form their ideas of its value from other facts or other information; or they were told truly what it cost; or they were told what was not true. The

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first alternative is out of the question, because it cannot be denied that the newspaper extract was put before them. In weighing probabilities between the second and third we can hardly be expected to believe that they knowingly agreed to pay twenty-five per cent. more than the land was bought for earlier on the same day, no change in its condition having in the meantime occurred.

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If anything is said, under such circumstances, as to the price paid, a candid statement can scarcely be looked for.

But it is argued that a misstatement of the price paid is not a representation on which a purchaser has a right to rely, but is merely analogous to a statement of one's opinion of the value, or such a commendation as a vendor may legitimately make, and by which a purchaser ought not to be deceived.

Upon this point several decisions have been cited to me, those chiefly relied on being in some of the American Courts. I have referred to those cases, and shall presently notice them.

In the meantime I may say that the general doctrine that representations respecting value are to be treated only as statements of opinion, or legitimate commendation, cannot be applied without discrimination to all cases, because they may be, like any other representations, both calculated and intended to deceive, and may involve actual and fraudulent misstatements of facts. Thus in *Ingram* v. *Thorp*, 7 Hare 67, Sir James Wigram, V. C., is reported to have said, p. 73: "The misrepresentation with respect to the property the subject of the mortgage, as alleged by the bill, is that there was no incumbrance upon it except an annuity, and that the property was more than sufficient in value to pay the debt. The sufficiency may or may not be a matter of opinion; but I do not concur in the observation that, because value is a matter of opinion, therefore a man who says his property is sufficient to pay a debt may not be shewn to have made a fraudulent representation. It may

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be so plainly deficient as to make it impossible for the party to have believed what he stated."

In *Dimmock* v. *Hallett*, L. R. 2 Ch. 21, an estate had been sold under the decree in a suit, and the purchaser petitioned to be relieved on the ground, amongst others, of misrepresentations contained in the conditions of sale or announcement of the auctioneer. One farm had been described as "lately in the occupation of Mr. R. Hickson, at an annual rent of £290 15s. Now in hand." The facts were, as stated by Sir G. J. Turner, that the farm had been let at a higher rent than £290 15s, before Hickson became tenant. Hickson took the farm at midsummer, 1863, at the rent of £290 15s. At Michaelmas, 1864, he left it, and there appeared never to have been any actual tenancy between his leaving and the time of the sale, which was in January, 1866. There had been an agreement to let it to another person for £225, but that tenant had given up the bargain. "Was it then fair and honest," the learned Judge asked, "to describe the farm in the particulars as late in the occupation of Hickson at a rent of £290 15s., when Hickson had been out of possession nearly a year and a half, within which period there had been an agreement to let the farm at a rent less by £65 than that paid by him?" There was a misrepresentation of a similar character respecting another farm, which formed part of the estate sold. The sale was set aside. Sir H. M. Cairns, L. J., concluded his judgment by saying: "The statement as to the rent was calculated to mislead, and was not prepared with the good faith which is requisite in conditions of sale. I think that a misrepresentation of this nature affects the validity of the contract, and is not a matter for compensation, but entitles the petitioner to be discharged."

In *Wall* v. *Stubbs*, 1 Madd. 80, the bill was for specific performance of an agreement to purchase an estate. The Vice-Chancellor (Sir T. Plumer) thought there was proof by persons best able to form a judgment, of great misrepresentation as to the value of the estate, which appeared to be worth £5,000 less than it was represented to be; and

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considered that as a sufficient ground to refuse specific performance; relying for authority upon *Buxton* v. *Lister*, Prec. in Chan. 383; *Howard* v. *Hopkins*, 2 Atk. 371; *Higginson* v. *Clowes*, 15 Ves. 516; *Ellard* v. *Lord Landaffe*, 1 Ball & Bea. 241; *Legge* v. *Croker*, 1 Ball & Bea. 506.

Further I think we may easily err in applying to such cases as this, where the value of the property is for the most part speculative, not in any sense representing that intrinsic value which may be tested by its productive capacity either in the way of crops or rental, the doctrines which in other circumstances may be appropriate.

There are cases known to every one, in localities like our North West, and not unknown in the older Provinces, and the present case is one of them, in which the only fact by which the selling value of property can be estimated, is the price at which it, or property similar to it in situation and quality, may have been recently sold. Such prices may be purely on speculation, still they are facts touching the question of marketable value. Outside of such facts it is all speculation. To class a misrepresentation of such facts with fair expressions of opinion, or permissible exaggerations, would be, in my judgment, a misapplication of a principle which in its proper place is sound and useful.

In *Sandford* v. *Handy*, 23 Wend. 260, decided in the Supreme Court of the State of New York, in 1840, Nilson C. J., made use of the following language,: (p. 269) "I am also inclined to think that any misrepresentation as to the *actual cost of the property*, is a material fact, and naturally calculated to mislead the purchaser. In *Lysney* v. *Selby*, 2 Lord Raym. 1119, an action was held to lie, for falsely affirming the rents to be much higher than they actually were. See *Pasley* v. *Freeman*, 3 T. R. 51, at p. 58; *Dobell* v. *Stevens* 3 B & C. 623; *Bowring* v. *Stevens*, 2 C. & P. 337. The price which an article is bringing in the market, is often a material fact, and a fraudulent representation, by a person who has peculiar means of knowledge, has been held to invalidate the contract. Misrepresentation of the cost of an article, stands somewhat on the same footing; it is a

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material fact, which tends not only to enhance the value, but gives to it a firmness and effect beyond the force of mere opinion. The vendor is not bound to speak on the subject, but if he does, I think he should speak the truth."

In *Van Epps* v. *Harrison*, 5 Hill N. Y. 63, 67, decided in the same Court three years later, evidence was offered as a defence to an action upon a bond given for the price of land, that the plaintiff falsely and fraudulently represented to the defendant that he had paid a much higher price for the land than what he really had paid. That evidence was rejected at the trial. On a motion for a new trial, before the Court which consisted of the same three Judges who formed the Court before which *Sandford* v. *Handy* was heard, Bronson, J., who delivered the judgment of the Court, gave his opinion differing from that expressed by the Chief Justice in the former case, which he treated as an intimation of the opinion of the Chief Justice on a point which was not decided: but he stated that his brethren were of opinion that the false affirmation concerning the price paid for the land furnished a good ground of action, and a new trial was therefore granted upon that point as well as upon another relating to the condition of the land.

Medbury v. *Watson*, 6 Met. 246, was argued before the Supreme Judicial Court of Massachusetts in 1843. It was an action for deceit, charging the defendant with having induced the plaintiff to buy a tannery from a third person, by falsely and fraudulently stating that it had cost the vendor a larger sum than it really cost him. It was held that the action lay against the defendant, although it was said it would not have lain againt the vendor himself if he had made the representation; because as I understand the opinion, the purchaser should have been on his guard against the representations of his vendor. "When, therefore," it is said at p. 259, "a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused so much for it; such assertions, though known by him to

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be false, and though uttered with a view to deceive, are not actionable. They are the mere affirmations of the vendor, on which the vendee cannot safely place confidence, and will not excuse his neglect in not examining for himself, and ascertaining what the facts are, and what credit is to be given to the assertions. But even this is qualified by one of the more ancient decisions: As where a vendor had falsely affirmed as to an amount for which the estate rented, and had induced a person to give a higher price for the estate in consequence of such false affirmation respecting the rent, there an action was held to lie, on the ground that it was a matter within his own knowledge, and that the tenant might not disclose the amount of rent paid by him: *Ekins* v. *Tresham*, 1 Lev. 102, 1 Sid. 146. And so fraudulent misrepresentations of particulars in relation to the estate, which the buyer has not equal means of knowing, and where he is induced to forbear inquiries that he otherwise would have made, are not to be viewed in the light of assertions *gratis dicta*; and therefore, where damage ensues, the party guilty of the fraud will be liable for the injury sustained."

The same point came before the same Court again, in 1864 in *Hemmer* v. *Cooper*, 8 Allen 334, when *Medbury* v. *Watson*, 6 Met. 246, was treated as having settled that the representations of a vendor of real estate to the vendee, as to the price which he paid for it, are to be regarded in the same light as representations respecting its value; and that a purchaser ought not to rely upon them, and that even when they are false, and uttered with a view to deceive they furnish no grounds of action.

These cases in Massachusetts are relied on for the plaintiffs. I do not think they are safe guides to follow; certainly it would be unsafe to follow them without carefu regard to the circumstances. In one of them the question was not strictly before the Court, and in the other there is only the short statement that the plaintiff relied solely upon misrepresentations by the defendant, as to the price paid by her for the land which she conveyed by way of

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exchange to the plaintiff. If the doctrine is relied on as a general rule applicable to all cases, it is opposed to the highest authority to which in this Court we can appeal, viz., the Judicial Committee of the Privy Council, by whom the case of *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, was decided, affirming on the question of the effect of misrepresentation of price paid, the judgment of the present Chief Justice of Ontario when Vice-Chancellor, and that of the Court of Error and Appeal.

But conceding, for argument's sake, that the facts and the law are as I have so far stated, it is urged on behalf of the plaintiffs that the defendant knew or had the means of knowing, when he gave his note, that the price paid for the land was much less than $50,000.

After the syndicate agreement had received subscriptions for the full fifteen shares, the subscribers met, and W. J. Morrison desiring not to continue trustee, they nominated the defendant in his place, as by the agreement they had power to do, and a conveyance of the three hundred acres was made by Morrison to the defendant as trustee. But Morrison had first to obtain a deed from Balkwill. Morrison, Balkwill, and the defendant therefore met on 26th May, at the office of Messrs. McMichael, Hoskin, and Ogden, solicitors, in Toronto, the junior member of which firm was one of the syndicate, and acted as solicitor for the syndicate. A conveyance was there produced, from Balkwill to Morrison, which had been prepared in Winnipeg by the solicitors named in the agreement, and was ready for execution. It was for 300 acres, not the 370, and it mentioned the consideration money as $31,466.67. This deed bears the date, 12th May, 1882, which had been inserted in Winnipeg, but it was not executed until the occasion I am speaking of on 26th May. At the same time Morrison executed a mortgage to Balkwill on the same land for $18,666.67, and the conveyance to the defendant as trustee for the expressed consideration of $50,000. The sum of $18,666.67, secured by the mortgage, was in fact part of the sum of $31,466.67, mentioned as the con-

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sideration for the conveyance of the land to Morrison, but nothing appears on the face of either of these deeds, to shew the relation between the two sums.

It is not important for us to know how the broken amounts mentioned in the deeds were arrived at, but it but it may be said that the consideration money mentioned in the deed does not bear the same proportion to $40,000, which 300 bears to 370.

The defendant saw and handled the deeds on the occasion now in question. He saw that the consideration mentioned was not $50,000, but only $31,466.67; but he says that did not strike him as inconsistent with what Morrison had told him, because he assumed, so far as the matter passed through his mind, that the $50,000 was represented by the two sums of $31,466.67 and $18,666.67.

It is not likely that any man who had much acquaintance with our ordinary conveyancing would have drawn that inference from an examination of the deeds, if he examined them at all attentively. But the defendant's account is, that he did not examine them attentively with regard to the consideration money mentioned, there being nothing which called his attention particularly to it; and his casual notice of the amounts did not excite his suspicion that what he had been told was untrue, but as they so nearly made up $50,000, the effect was rather to confirm his belief.

Mr. Ogden, the solicitor who was present on the occasion, was called as a witness for the plaintiff, but the mention of the consideration moneys in the deed and mortgage did not appear to have suggested to him, any more than to the defendant, that the whole price was less than $50,000.

The promissory note was given by the defendant on this 26th May, and if I am not mistaken, at or after the time of the execution of the deeds. It is for half the amount of the cash payment, in respect of one share provided for in the syndicate agreement, the defendant having subscribed for only half a share.

The question is whether the means of knowledge enjoyed

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by the defendant were such as to neutralize the misrepresentation which, by use of those means, he might have corrected.

Upon this point I have been referred to several authorities by counsel for the plaintiffs, including remarks of Lord Brougham in *Attwood* v. *Small*, 6 Cl. & F. 232, 447; and of Lord Langdale in *Clapham* v. *Shillito*, 7 Beav. 146, and the sections of *Fry* on Specific Performance, 2nd ed., secs. 648-650, p. 291-2, where those cases are quoted, in illustration of the doctrine that the party seeking relief on the ground of misrepresentation must appear to have been led into the contract by his reliance on the representations. The statement of the doctrine by Lord Langdale is very comprehensive.

Lord Justice Fry quotes it at length in the 648th section of his treatise, and then adds in section 649: "It must not from this be inferred that the mere presence of the means of detecting the misstatement prevents the deceived person from relying on it. If a statement be made by A. to B. and the means of verification be offered, B. may rely on the statement and refuse the investigation: but if he accept the investigation and find or might have found the statement false, he cannot afterwards allege that he relied on the statement: for in fact he did not."

The question whether the contract was or was not made in reliance upon the representation, is always, as I understand the law, a question of fact, and all the cases in which the doctrine is discussed or applied, I take to be merely illustrations of that position. If the representation is not believed, whether from original incredulity or from the possession of counter information, it is not relied on. If the party undertakes to examine the subject for himself, he furnishes evidence that he does not act upon the representation. But access to the means of independent information is not the same thing as possession of the information, and a party may, as in this case, even handle and read a document which, if his attention were called to the matter, would in all probability have caused him to make further

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inquiries, without being necessarily fixed with the knowledge such enquiries might have produced.

The principle is put so clearly and forcibly by Lord Chelmsford in his judgment in *Central Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L., 99, at p. 120, as to justify a rather long quotation from it. "But the appellants say that even admitting the prospectus to be open to the objections which are made to it, the respondent has no ground of complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail himself; that he was told by the prospectus that 'the engineer's report, together with the maps, plans, and surveys of the line, might be inspected, and any farther information obtained, on application at the temporary offices of the company;' and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus. But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he ought have known the truth by proper inquiry. He has a right to retort upon his objector, 'you, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly on your fairness and honesty.' I quite agree with the opinion of Lord Lyndhurst in the case of *Small* v. *Attwood*, 6 Cl. & F. 395, that 'where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to re-

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cover damages for the deceit so practised; and in a Court of equity a foundation is laid for setting aside the contract which is founded upon that basis.' And in the case of *Dobell* v. *Stevens*, 3 B. & C. 623, to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was entitled to recover damages, although the books were in the house, and he might have had access to them if he thought proper."

In the face of the evidence of the defendant, confirmed as it is by that of Mr. Ogden, I cannot hold that the defendant contracted with any other knowledge of the price paid for the land than that given by the false representation made by the plaintiff W. J. Morrison; and I must also hold that by reason of that misrepresentation, the defendant is entitled to be relieved from the contract.

Apart from this, and as another ground for relief, it is contended that under that clause in the agreement of 24th March, 1882, which makes the obligation of each subscriber depend upon Morrison's success in completing the syndicate for the purposes and upon the terms set out in the agreement, the defendant is free from liability because it is said that in some instances special terms were made with subscribers by which they were not to pay as purported by the document. The case of the plaintiff, L. A. Morrison, was relied on as the strongest. He had subscribed upon the understanding, distinctly stated between him and his brother, that he was not to pay any money, the brother expressing the hope that he would be able to make good that money out of the profits of the enterprise.

Another instance was that of Mr. Abrey to whom W. J. Morrison gave a receipt for $500 on account of the $2,000 cash deposit, the effect of which was to relieve Abrey from the payment of that sum, and at the same time to charge W. J. Morrison himself with it as against the cash payment of the purchase money.

I need not detail the facts touching the other instances Taking these two as examples of the whole, and placing

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no stress on the circumstance, that the defendant himself was one of those who availed himself of a special agreement when he gave his note instead of paying cash, I think the condition was substantially fulfilled.

While it is not strictly true, as at one time urged by Mr Rose, that W. J. Morrison is no party to the syndicate contract, it is true, as he pointed out, that each subscriber became bound to the others who could compel performance of the agreement according to its letter, unless the terms were substantially fulfilled by arrangements made with Morrison, equivalent, as regarded the other members of the syndicate, to the payment of money to Morrison as trustee, by making Morrison who was to have received the money as trustee, and to have ultimately retained it as vendors accountable for the sums as paid in cash.

For another reason, this defendant has no right to complain of the character of L. A. Morrison's subscription, and that is that he became a party to the agreement understanding that the syndicate was not to consist of holders of fifteen shares, exclusively of W. J. Morrison, and being told, as he has informed us in his evidence, that L. A. Morrison subscribed on behalf or in the interest of his brother as his partner.

The result of my opinion is, that by reason of the misrepresentation, the defendant is entitled to have this action dismissed, unless there is anything in the matter of parties which interferes or requires adjustment.

One objection, on the subject of parties plaintiff, becomes unnecessary to consider if the action is to be dismissed. It is raised upon the facts that W. J. Morrison retired from the firm of Morrison Bros. after this action was commenced, releasing all debts, &c., to his brother, and that since that the brother has assigned all his estate and effects to a trustee for the benefit of his creditors. The question of abatement of the action, or the addition of the assignee as plaintiff, need not now be entertained.

The objection on the other side is, that the lands having been conveyed to the defendant in trust for all the members

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of the syndicate, the *status quo ante fraudem* cannot be restored, or any decree in that direction made in the absence of the other *cestuis que trustent*.

This objection seemed to me at first sight to have more in it than, after some consideration, it now strikes me as having.

It is not in any way raised upon the pleadings.

I have found in favour of the defendant all the issues there presented. It is true that that result will not entitle him to judgment if the facts proved are not sufficient to entitle him to succeed; but the pleadings serve to shew at least how the matter was at one time treated by the parties in litigation, namely as a matter between themselves touching only the right to enforce this particular note. I think that is the proper way to look at it. The agreement of March and April, 1882, does not, as was pointed out for another purpose by Mr. Rose, contain any direct promise from the subscribers individually to pay money to Morrison as vendor of the land. The syndicate is formed to purchase the land from Morrison; the subscribers agree each with the other to pay certain cash to a trustee, and Morrison is to act as trustee up to the time of his completing the formation of the association. Up to that time nothing was payable by any one, except the $500 per share which was to be deposited at the time of signing, but which was of course liable to be returned if the project fell through. Morrison was to receive it at that time simply as trustee and not at all as vendor. Then when the necessary papers were *prepared*—not *executed*—and the title passed, the rest of the $2,000 a share was payable, but still to the trustee as such. The associates were then at liberty to appoint a new trustee to receive the conveyance; and they appointed a new trustee and the conveyance was made. Then for the first time Morrison *as vendor*, became entitled to be paid any money.

It may be questionable whether he ever had a right of action against any individual subscriber, separately from the others, for his subscription. He assumed however to

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deal separately with the defendant, and the defendant dealt directly with him, both of them treating the money as due directly from the defendant to Morrison, in respect to the one-thirtieth interest in the land which the defendant was to take as subscriber for half a share under the syndicate agreement. The deed made to the defendant does not declare any trusts, nor does it indicate the character in which the defendant took it, except by the addition word word "trustee," after the word "esquire," in the designation of the party of the second part. The trusts are to be found in the agreements of March and April, and are for the members of the syndicate. There is nothing to prevent the transfer of any share.

Now when the plaintiffs assert that the defendant as a member of the syndicate agreed to pay them, or one of them, one thousand dollars as the cash payment upon one half share, I do not see anything to prevent the defendant retorting, "I was induced by your fraud to subscribe for that half-share, and whether any other subscriber was deceived, or whether all the others entered with full knowledge of all the facts into the agreement, and so may have bound themselves irrevocably, you cannot insist on treating me as a member." There has been no dealing with the property, or change of position, to interfere with the defendant's present contention. Whether the plaintiffs or a stranger should take his position as shareholder, or whether he simply drops out of the number, the trusts equally apply to the shareholders who remain.

We have nothing to do with any questions, if any are possible, between the defendant and the other subscribers. He is now simply asserting against the plaintiffs that the claim, which they advance as a personal claim against him, is one which for reasons personal to them and to him they cannot enforce. If they desire a formal transfer of his half share so as to constitute them members of the syndicate in his place, and his *cestuis que trustent*, he must give it to them. His notice repudiating his liability to pay, which he gave shortly before the note came due, involved a dis-

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claimer of any beneficial interest in the land, of which he held the legal estate as trustee for the members of the syndicate

And we have not to inquire whether the defection of the defendant from the ranks of the subscribers will, under the terms of the contract respecting the completion of syndicate, give occasion for questions between W. J. Morrison and the others, because Morrison must of course be prepared to encounter whatever consequences may follow from his misrepresentations.

The action is dismissed, with costs, subject to the right of the plaintiffs if they desire it, to an order for the transfer of the defendant's half share.

In Easter Sittings *Rose*, Q. C., for the plaintiffs, moved on notice to set aside the judgment for the defendant on the following grounds: (1) The onus of proving that misrepresentation had been made by the plaintiffs was upon the defendant, and he had failed to prove it. (2) If any misrepresentation was shewn, it was not shewn to be material nor sufficient in law to set aside the contract, and was no more than representation as to value. (3) The defendant did not rely upon any misrepresentation by the plaintiffs. (4) The plaintiffs had supplied the defendant with the means of information as required by law to apprise him of the facts. (5) The defendant was well aware of the facts concerning which he complains, that misrepresentations were made to him. (6) The property was conveyed to the defendant in trust to collect the moneys to be paid by himself and others, and to pay them to W. J. Morrison, and he cannot, nor has he offered to, place Morrison in the same position he was before the contract. (7) Judgment should have been given for the plaintiffs.

During the same Sittings, June 8, 1883, *Rose*, Q. C., supported the motion. The plaintiff, W. J. Morrison bought 370 acres of land for $40,000, being 300 acres of the land now in question, and seventy acres of the same lot. For the

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300 acres he paid $31,333, and for the seventy acres the difference between the last sum and $40,000, and he did not represent he had paid $50,000 either for the 300 or for the 370 acres. The only charge of misrepresentation is as to the value of the property. It was not shewn the property was not worth the sum it is said W. J. Morrison represented it to he worth. Here the defendant had knowledge that in the deed from Balkwill to Morrison the price was $31,466, and if he had not, he had the means of knowledge for he saw the deed on which that price was stated, and he cannot therefore be allowed to say he was deceived: *Clapham* v. *Shillito*, 7 Beav. 146; *Fry* on Specific Performance, 2nd ed., sec. 648, and that deed was executed in the office of the solicitor of the syndicate. On the 12th of May, 1882, Balkwill conveyed the 300 acres to W. J. Morrison for the consideration expressed in the deed of $31,466,67, and on the 26th of the same month Mosrison gave a mortgage to Balkwill on the same land for $18,666.77, and the solicitor for the syndicate and the defendant thought these two sums made the total price $50,000, and they made no enquiry whether that was the case or not, and such an enquiry they should have made: *Attwood* v. *Small*, 6 Cl. & F. 232; *Fry* on Specific Performance, 2nd ed., 293. The defendant, after the execution of the deed to himself, wrote to Mr. Clay, an agent at Winnipeg, to boom the property, that is he did just what he complains of Morrison having done: *Jennings* v. *Broughton*, 5 DeG. McN. & G. 126. A representation as to price is not a ground for relief. The rule *caveat emptor* applies: *Kerr* on Fraud, (1868) 45, 57; *Hilliard* on Vendors, 2nd ed., 346. The cases on specific performance are not to be applied in this case: *Dimmock* v. *Hallett*, L. R. 2 Ch. 21; *Medbury* v. *Watson*, 6 Met. 246, 250; *Lysney* v. *Selby*, 2 Ld. Raym. 1119, 1121; *Urquhart* v. *Macpherson*, 3 App. Cas. 831; *Fry* on Specific Performance, 2nd ed., sec. 706, p. 317. Fraud without damage gives no cause of action: *Kerr* on Fraud, 51.

Bethune, Q.C., shewed cause. Morrison exhibited his

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papers attached to the agreement of the 24th of March, 1882, and stated that they were all true, and it is there stated that W. J. Morrison, had bought the balance of Balkwill's property for $50,000, and he also said if they had not been true they would not have been attached to the agreement. He referred to *Lincoln* v. *Claflin*, 7 Wallace 132. W. J. Morrison made himself a trustee for those with whom he was dealing, and he was bound to disclose the whole facts: and he cannot be allowed to make any profit out of the transaction. He cannot in any case, if the agreement be allowed to stand, a charge more for the property to the syndicate than he gave for it, namely, the $31,466, expressed in the deed from Balkwill to him; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, 239. W. J. Morrison dealt with each one of the syndicate separately, and not as a body: *Clarke* v. *Dickson*, E. B. & E. 148; *Fraser* v. *McLean*, 46 U. C. R. 302. The defendant saw the deed from Balkwill to Morrison, which stated the consideration to be $31,664, but he and Mr. Ogden saw at the same time a mortgage from Morrison to Balkwill for $18,666, and they believed those two sums represented the $50,000, which the plaintiff had represented he had paid for the property, and that the mortgage represented the unpaid part of the purchase money due to Balkwill. As to difference in representation between *price* and *value*, he referred to *Ingram* v. *Thorp*, 7 Hare 67; *Schultz* v. *Wood*, 6 Sup. Ct. R. 585, 621; *Van Epps* v. *Harrison*, 5 Hill. N. Y. 63, 70. As to the delivering up of an executed agreement, he referred to *Rawlings* v. *Wickham*, 3 DeG. & J. 304, 5, Jur. N. S. 278, *Fry* on Specific Performance, secs. 710 to 717, p. 318-320. The sale was in this case to each member of the syndicate, and not of his entire land to the whole body and so each one may restore his own part. A person imposed upon is refused relief if his inability to restore what he has got is prevented, by any act of his own. There was fraud in dealing with some members of the syndicate differently from the way others were dealt with. Abrey was allowed $500

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by Morrison off his purchase money to induce him to join, so that others might by Abrey being a party be induced to subscribe: *Bigelow* on Fraud, p. 235; *Mullens* v. *Miller*, 22 Ch. D, 194.

Rose, Q. C., in reply. The agreement is joint. It is *we* the undersigned covenant with each other to form ourselves into a syndicate. The defence is based upon the language used by Strong J., in *Schultz* v. *Wood*, 6 Sup. Ct. R. 621, and in the case of *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221 239, but the latter case is very distinguishable from this; for in that case Farewell concealed he was a vendor. Morrison was no longer a trustee when the defendant was appointed in his place. The whole case relied upon is that the plaintiff told an untruth in saying he had paid $50,000 for the land, when it was only about $31,000, no one being prejudiced. But *Smith* v. *Chadwick*, 20 Ch. D. 27, 75, 76, shews their must be damage sustained to give a ground for relief. See also *Redgrave* v. *Hurd*, 20 Ch. D. 1. The rights of third parties have now intervened, and the contract cannot be rescinded; and if the contract cannot be rescinded the defendant must be left to his action for damages. The case now set up is not the case the defendant has made in his pleadings.

The Court directed the case to be reargued upon the point whether the defendant could or could not get relief from the payment of the note without procuring in some form or other the restitution of the whole of the land which had been made over to the syndicate.

In Hilary Sittings, February 15, 1884, the case was accordingly reargued.

J. H. Macdonald supported the motion. There is plainly no right to rescind. The defendant cannot put the plaintiffs in *statu quo*. The contract is not one made between the plaintiffs and defendant for any particular piece of the property, but a contract by and between the members con-

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stituting the syndicate with each other to purchase the property. It is the same as a partnership, and one partner could not rescind without the consent of his co-partners: *Fraser* v. *McLean*, 46 U. C. R. 302; *Merchants' Bank* v. *Thompson*, 3 O. R. 541. The defendant's remedy, if he has any, must be by action or counterclaim for deceit, and damage must be shewn which has not been done here.

McMichael, Q.C., contra. The question as to recission and putting the parties in *statu quo* is disposed of by the case of *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P.C. 221; and the learned judge who tried the cause based his judgment on that case. The defendant Earl can reconvey his share and place the defendant in exactly the same position in which the plaintiffs placed him, and defendant is perfectly willing to do so. The evidence clearly shewed that the defendant was damnified by the misrepresentation.

J. H. Macdonald, in reply. The case of *Lindsay Petroleum Co.* v. *Hurd*, L. R, 5 P. C. 221, is clearly distinguishable. There the company was before the Court, and they could deal with the matter and see that the parties were placed in *statu quo*. The action here is against one member of the syndicate. The sale was of the whole property to the syndicate, and the conveyance by the defendant of his share certainly would not place the parties in the same position.

March 7, 1884, WILSON, C. J.—The defendant pleads that W. J. Morrison with intent to defraud falsely, and fraudulently represented to the defendant, he had bought the land in question for $50,000, and that it was well worth that sum; and was suitable for being laid out in town lots and could be readily sold in town or building lots at largely remunerative prices, and that it was within the limits of Rapid City.

The evidence supports the first four allegations just stated; and there is evidence which may sustain the fifth charge also. The defendant and Mr. Ogden, the solicitor for the syndicate both state, that although they saw the

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sum of $31,466 stated as the consideration for the sale of the land mentioned in the deed from Balkwell to Morrison, dated on the 12th of May, 1882, on the day Morrison executed the deed to the defendant for the syndicate on the 26th of the same month, they believed that the $18,666 mentioned in the mortgage given upon the last named day by Morrison to Balkwell, was the balance of the $50,000 still owing by Morrison to Balkwell upon the land as the two sums just about made up the $50,000, the consideration which the syndicate was giving to Morrison, and which was expressed in the deed he made to the defendant for the syndicate on the same day.

I think that explanation states the fact, and that it is a reasonable explanation.

The parties had been told time and again by Morrison, he had paid $50,000 for the land. The like statement was contained in the newspaper extract attached to the first syndicate agreement, and the fact was not at the time doubted by any one. There was nothing more natural that the defendant and Mr. Ogden finding the consideration stated in the deed from Mr. Balkwell to Morrison to be only $31,466, and the mortgage to be for a sum of $18,666 should have treated the one sum as additional to the other as they so nearly made the $50,000 and which confirmed in their belief the truth of the principal statement that he had given that sum for the property.

The principles applicable to such a case are contained in the decisions and works which were referred to on the argument.

The contract can be avoided only when the party claiming to avoid it is able to put the opposite party into his original state before the contract: *Urquhart* v. *Macpherson*, 3 App. Cas. 831; *Clarke* v. *Dickson*, E. B. & E. 148. If he cannot put the opposite party into his original position he must resort to the remedy by action for deceit: *Ib.* There may be a misrepresentation as to value, and the fact that the plaintiff, W. J. Morrison, represented he had paid $50,000 for the property was, in my opinion.

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with respect to this land lying hundreds of miles away from inspection, and of which the defendant knew nothing, and could know nothing but what the plaintiff represented to him, a material representation made which influenced the opinion of the defendant as to the value of the property; but besides that the plaintiff represented the land to be well worth that sum, and that it would sell for much more than the price he said he had paid for it: *Ingram* v. *Thorp*, 7 Hare 67; *Dimmock* v. *Hallett*, L. R. 2 Ch. 21.

If the purchaser do not rely upon the statement of the vendor as to value, but examines the property himself, he will not be relieved from the contract: *Jennings* v. *Broughton*, 5 DeG. McN. & G. 126. Nor will relief be given if the representations, although untrue, do not add to the value of the property: *Ib.* I am of opinion there is good sense in the observations of Strong, J., in *Schultz* v. *Wood*, 6 Sup. Ct. 585, at p. 621: "Further, I am of opinion that misrepresentation by a vendor as to the price which he himself paid for the property which is the subject of the contract of sale invalidates the contract. There are, I am aware, American authorities to the contrary, but the case of *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, is, I think, conclusive the other way."

I do not say that in every case the mere statement that a particular price has been paid by the vendor for the property will invalidate the sale. I think it would not. The purchaser must, as a rule, look out for himself. But in cases in which the purchaser does not and cannot see or examine the property which is the subject of bargain, and in which the price said to have been paid, does and must necessarily raise the value of the article in the estimation of the buyer, and was so intended, and particularly where the price stated to be paid is greatly in excess of anything like the true value, such language may constitute a fraud or deceit as gross as if the vendor were to produce a false receipt purporting to be the receipt given by the vendor for the money said to have been paid. All that is very distinguishable from mere opinion of value or commendation

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by the vendor of his property, or even the exaggeration of it in some respects, which is, to some extent suffered, and which I may say is to some extent expected to be done by the vendor, for a seller is not likely to depreciate his own wares, but it may be nevertheless carried to a dangerous and unwarrantable limit.

A person who joins thus in a partnership on the faith of representations made by them, is not bound as against them to satisfy himself by any further enquiry of the truth of such representations, and when a contract is founded on misrepresentation, the Court does not rectify it. but sets it aside: *Rawlins* v. *Wickham*, 5 Jur. N. S. 279,

In the case of alleged misrepresentation it must be shewn, (1) that there was misrepresentation, (2) that it was false, (3) that it was false to the knowledge of the defendant, (4) or that he did not believe it to be true, (5) that the complainant was deceived by it, (6) and that it was material: *Smith* v. *Chadwick*, 20 Ch. D 21, at p. 75.

Stating to a purchaser that another person was ready to buy the property for a given sum, and if defendant would give £50 more he would make a clear profit of 7 per cent., are grounds for refusing specific performance: *Mullens* v *Miller*, 22 Ch. D. 194.

When misrepresentation is proved, it is not sufficient for the defendant to shew the plaintiff enquired to a certain extent whether the representation made to him was true but did it so carelessly as not to discover his fraud: *Redgrave* v. *Hurd*, 20 Ch. D. 1.

It is also for the defendant in a case of material misrepresentation, to shew the plaintiff did not rely on such representation, in the absence of such evidence the inference remains that the plaintiff did rely upon it: *Ib.*

The part of the case which requires special consideration is that part of it which Mr. Rose argued as excluding the defendant from the relief he claimed, the rescission of the contract, even although fraud be proved, because there are other persons concerned in the contract with the defendant who are not taking means to avoid the contract, and the

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defendant's engagement is with these others as trustee for them, and he cannot it is said replace Morrison in the position he was before the making of the contract.

The standing of the parties was and is as follows.

W. J. Morrison bought the land from Balkwell. He got up a syndicate as it is called.

The instrument is to this effect: "We, the undersigned, hereby covenant, promise, and agree with each other to form ourselves into a syndicate for the purpose of purchasing from W. J. Morrison, of Winnipeg, the following lands and premises, to-wit, * * for the price or sum of $50,000, payable. * * It is hereby agreed by and between the parties hereto, that said purchase money shall be divided into fifteen shares of $3,333,33 each, the cash payment to be $2,000 on each share, and said cash payment to be paid over to the trustee hereinafter mentioned, so soon as all necessary papers are prepared, and the title to said lands and premises passed by our solicitors. It is further agreed that a deposit of $500 for each share taken shall be made with our said trustee at or upon the execution of this agreement, said deposit to form part of said cash deposit of $2,000. It is further agreed that all expenses of and incidental to the purchase, advertising, surveying, mapping and selling of said lands and premises shall be proportionately borne by each of the parties hereto, according to the number of shares held. It is also further expressly agreed between the parties hereto, that in the event of said trustee failing to form such syndidate for the purposes aforesaid, and upon the above mentioned terms, then this agreement shall cease to be of any force or effect, and no liability shall attach to any person who may have become a party thereto. And we the parties hereto hereby name, constitute and appoint W. J. Morrison to be our trustee, for the purpose of forming said syndicate until the requisite numbers of shares has been taken up, and said syndicate fully completed. The members of said syndicate when so completed to have the privilege of reappointing said trustee, or such other trustee or trustees as they may see

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fit to carry out the objects of said syndicate. Dated at Winnipeg, the 24th of March, 1882."

Then followed the names of subscribers taking up the whole fifteen shares; ten taking each a full share, and ten each a half share.

The contract is not with Morrison, nor is it by each one for a particular part of the property. It is an engagement by, and between the twenty subscribers with each other, It is in fact a partnership, or in the nature of a partnership between them, for the purchase and sale of the property. of which association W. J. Morrison was the trustee, he was not, however, a subscriber; his brother and partner in business, L. A. Morrison, subscribed for one share. When W. J. Morrison had secured all the cash instalments or notes for them, he declined to be a trustee any longer; he got the defendant into that position in his stead; he was out of it, and L. A. Morrison the subscriber became insolvent soon after and assigned what estate he had for his creditors; so that the owner of the property having sold it, and got these others into a syndicate which can do nothing with the property, has retired from the concern and left the syndicate to shift for itself.

It seems a very fraudulent transaction, and the recovery of this note from the defendant by these plaintiffs should be prevented as far as possible, as the plaintiffs are identified as one in the business. The fraud, for it can bear no other name, was committed by W. J. Morrison. There is nothing of his to rescind excepting the promissory notes he may hold. The syndicate agreement is not with him but by and between the members of the syndicate. The defendant cannot, although the title to the land is in his name from Morrison, convey it back to him because the defendant has taken the deed as a trustee for his co-partners as well as himself. If they all combined, the land could he restored to Morrison. Without their permission I do not see how Morrison can be put in the position he was before the contract unless this syndicate arrangement is held not to be a partnership but a mere union of co-owners. There is no

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fraud between the members of the syndicate, although some of them have not been dealt with by Morrison on equal terms as others of them. There is no object in dissolving the syndicate, if it could be done unless for the purpose of reaching Morrison, and the dissolution would perhaps rather embarrass them, than help the defendant in getting relief.

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When the case was first argued we suggested some modes of relief which might be open to the defendant as a bar to the recovery of the amount of the note from him, or as a means of compensation for the damage he alleges he has sustained by reason of his having been drawn into the bargain which he made with the plaintiff, W. J. Morrison, and for which he gave the note now sued upon.

The parties desired a further argument upon the point whether the defendant could or could not get relief from the payment of the note without procuring in some form or other the restitution to W. J. Morrison of the whole of the land which he had made over to the syndicate? That argument has been had, but the case still remains just as it stood upon the first argument.

The question really is, whether the arrangement by the instrument before mentioned constituted an ordinary partnership between the parties to it, or a company as distinguished from an ordinary partnership. If the former, the defendant, it is very likely, will not be able to procure a complete restitution of the whole of the land to W. J. Morrison, and he will not be able to sell or assign his own individual share of the land to Morrison so as to constitute Morrison a partner with the others in respect of that share, nor will he be able to relieve himself from that liability to his co-partners which attaches to his personal membership. But if the latter, the defendant, will be able to restore to W. J. Morrison all that he, the defendant, ever received from him, and will be able to place Morrison in his, the defendant's, place with respect to the other members just as the defendant himself stands in the company towards them.

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The agreement, it will be remembered, is not one which the members made altogether by and between themselves. It is one which Morrison made with persons whom he procured to agree to form the syndicate, and if that agreement does not, in its terms and with the aid of the surrounding circumstances, constitute an ordinary partnership, but a co-ownership of the land only by and between the respective members, then each co-owner can restore to Morrison his own particular share in complete restitution in case of fraud, because it was the share of a co-owner which Morrison made over to each person, and not a sale to a partnership.

There is a very great difficulty in determining such a question, not from the want of decisions, but from the number of them, and the different opinions which are expressed as to the principles which must be applied in solving it.

It seems to be settled that land may as well as goods be held in ordinary partnership, so that on the death of the partner his share will go to his personal representatives, and not to his heir or devisee. *Darby* v. *Darby*, 3 Drew. 495; *Story* on Partnership, 6th ed., secs. 82, 83; *Ex parte McKenna, Bank of England Case*, 3 DeG. F. & J., at p. 658; *Noakes* v. *Barlow*, 20 W. R. 383; *Dale* v. *Hamilton*, 5 Hare 369.

Then as to what will constitute a partnership? In *Lindley* on Partnership, 3rd ed., p. 62, it is said that "co-owners may be partners not only in the profits but in the mine, and in that case that is a partnership to all intents and purposes; but a co-ownership only is formed where the members share in the profits only, but not in the mine."

At p. 59 it is said: "When, however, co-owners of property employ it with a view to profit, and divide the profit, * * the difference if any between them and partners, becomes very obscure. The point to be determined is, whether from all the circumstances of the case, an agreement for a partnership ought to be inferred; but this is frequently an extremely difficult question."

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In *Collyer* on Partnership, Am. ed., 1878, pp. 7, 8,, 71, in the notes it is said: The intent of the parties to form a partnership will be inquired into, but if persons have a joint interest in the property, and share in the losses and profits of it, buying it jointly to sell again, it seems there will be a partnership.

In *Story* on Partnership, secs. 49, 50, and notes, it is said the intention of the parties must govern, although the parties share in the profits. "In short, the true rule *æquo et bono*, would seem to be, that the agreement and intention of the parties should govern in all cases. * * Wherever the profits and losses are to be shared by the parties in fixed proportion and shares, and each is intended to be clothed with the powers and rights, and duties and responsibilities of a principal, either as to the capital stock, or the profits, or both, there may be a just ground to assert, in the absence of all controlling stipulations and circumstances, that they intend a partnership."

In *Cox* v. *Hickman*, 8 H. L., Cas. 268, it was said by Lord Cranworth, at p. 306, "The real ground of the liability" of a partner "is *that the trade has been carried on by persons acting on his behalf.*" And by Lord Wensleydale, at p. 313, "can we then collect from the trust deed, that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed *constitutes them his agents for carrying on the business on the account* of himself and the rest of the creditors."

In *Noakes* v. *Barlow*, 20 W. R, 303, the defendant and a builder agreed by which the latter was to erect certain houses, providing the plant &c., for which the defendant was to find the funds, which were to be paid into a bank on their joint account, the builder being entitled to draw £2 per week for personal expenses during the erection. Both parties were to be jointly interested in the houses, which on completion were to be sold, and an account of profit and loss was to be taken between the two. And it was held in the Exchequer Chamber, the builder had power to pledge the credit of the defendant for materials bought for the building.

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In *Holme* v. *Hammond*, L. R. 7 Ex. 218, the question was, whether the executors of a deceased partner, were partners with the surviving partners of the firm, the articles between the original partners having provided that in the case of death of any of the firm before the term expired, the survivors were to continue the business, and pay the representatives of the deceased, the share of the deceased just as if he were living and such payments were made to his executors. There was no capital of the firm when the partner died. Held, the executors were not partners.

Kelly, C. B., said, at p. 227: "Whenever a contract of partnership among commercial men exists, each partner is in point of law the agent for the others, and for the firm collectively; and they are bound by any contract he may enter into within the scope of the partnership with reference to the nature of the undertaking, this agency being an incident to the contract of partnership."

Martin, B., said, at p. 230: "The existence of such partnership implies also the existence of such a relation between those persons, as that each of them is a principal and each an agent for the others."

Bramwell, B., said, at p. 232: "The executors could not have refused this business, could not personally have sold the property, could not have insisted on receiving the sum due from the purchaser, and could have maintained no action jointly with the surviving partners * * No doubt a patrnership is more than a mere constitution of principal and agent. But one partner binds another by force of an authority given him * *

Cleasby, B., was of opinion agency proceeded from partnership, and not partnership from agency.

Martin, and Cleasby, B. B., would have held the executors had become partners, if the firm had possessed any capital when the testator died.

In *Ex parte Tennant*, 6 Ch. D. 303, Cotton, L. J., at p. 315, said the question is, "whether the parties were carrying on the business as principals and agents for each other

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—whether it is a joint business, or the business of one only."

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In *Pooley* v. *Driver*, 5 Ch. D. 458, the Master of the Rolls says, at p. 474: "If we find an association of two or more persons formed for the purpose of carrying on * * business, and we find those persons share between them generally the profits of that business, as I understand the law of the case as laid down by the highest authority, (*Cox* v. *Hickman*, 8 H. L. Cas. 268) those persons are to be treated as partners in that business, unless there are surrounding circumstances to shew that they are not partners. * * Whether, looking at the contract as a whole, it is intended to secure the benefit of a partnership with or without its liabilities; or whether it is not intended that the benefits of a partnership shall be secured."

In *Pawsey* v. *Armstrong*, 18 Ch. D. 698, Kay, J., said, at p. 704: "I confess in my opinion the agreement to share profit and loss is quite conclusive of the relation between two persons, who do so agree, and it is not possible for one of them afterwards to say, "I was not a partner."

The difference between a company and a partnership was as James, L. J., said in *Smith* v. *Anderson*, 15 Ch. D. 247, at p. 273: "A company * * is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in. * * An ordinary partnership is a partnership composed of definite individuals bound together by contract to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract."

The agreement in question provides as follows:

1. We, the undersigned, hereby covenant, promise, and agree with each other to form ourselves into a syndicate.

2. For the purpose of purchasing the land for W. J. Morrison for $50,000.

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3. Which sum is divided into fifteen shares of $3,333.33 each to be paid to the trustee of the syndicate.

4. The expense of purchasing, advertising, surveying, mapping, and selling the lands are to be proportionally borne by each member according to the number of his shares.

5. The subscribers appointed Morrison as their trustee "for the purpose of forming such syndicate until the requisite number of shares has been taken and the syndicate fully completed."

6. And if he failed to form such syndicate the agreement was to be void.

7. When the syndicate was completed, the members could re-appoint Morrison or such other trustee or trustees as they might see fit "to carry out the objects of the syndicate."

So far as *intention* is concerned, apart from the legal effect of the agreement, the parties did not know what kind of an association they were forming, and perhaps they did not care. They did not know the difference between a co-ownership and a partnership, nor the effect of such difference. It is almost certain they did not intend to give to each one of the members power to sell the land and to enter into contracts for the sale of it, and at such price or upon such terms as the individual vendor in his judgment might think were fair and reasonable, and to bind the whole body by such contracts, and so far as the agreement among themselves applies they have not done so, for by the agreement the members have the power to appoint a trustee or trustees "to carry out the objects of the syndicate," and a trustee, the present defendant, has been so appointed.

But suppose a member made a contract for the sale of a part of the land to a purchaser who bought from him in good faith, not knowing a trustee had been appointed, but knowing only the vendor was one of the syndicate, and assuming the agreement constituted a partnership in law, would not the syndicate be bound to carry out the agree-

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ment? The internal arrangements of the partners curtailing their general power have no effect upon strangers to the partnership who deal in good faith and in ignorance of internal arrangements with a member of the firm who is transacting the ordinary business of the firm.

The purpose of this syndicate, whatever that term may mean, the dictionary meaning being "a council,"* was unquestionably to buy this land on speculation, for the purpose of selling it again, at a profit if possible, and after bearing the expenses of carrying on the business, ratably among the members according to the amount of their respective shares, to divide the profits in like manner, which profits, however, the agreement makes no mention of.

The terms: then are a community of interest in the capital or fund of the association, and a right to participate in the profits and a liability to bear the losses, which are held to constitute a partnership, and they all apply here.

In some cases it is said there must also be the power or agency of each member to act for and in the name of the general body, while in other cases it is said that power is not one which is superadded to the other general power of partners, but is one inherent in and resultant from the

*In Chambers's Journal, 10th May, 1884, p. 289, it is said *syndicate* is a term that "was not unknown in old world commerce. There it meant the combination of a number of merchants for the consummation of a venture beyond the means or the inclination of any one of them. The Dutch merchants were fond of forming syndicates for large trading purposes; and the East India Company, Hudson's Bay Company, and many other concerns of our own time, which have now attained the dimensions and the dignity of public corporations had a similar origin.

The syndicate had in it the germ of the joint stock company system but although each member subscribed a certain amount which he would advance, or for which he would be liable, his liability could not alway be restricted thereto. The uncertainty in this respect evolved the limited liability principle now so common. But the syndicates of to day are of somewhat different character. They are usually combinations of capitalists to bring about changes in the markets for commodities or stocks for a specific purpose. In this manner they are the parents of corners."

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constitution of the partnership, and the latter view of the right of agency seems to place the doctrine of agency in such a case on the most satisfactory and accurate footing.

If that right or power of agency do not exist from the nature or terms of the agreement, or from the kind of business to be carried on under it, there may be ground for contending that no partnership has been formed.

There is another point also to be considered. Did the parties intend to convert the shares in the land into personalty, or to have their shares represent a part of their real estate? It may be said that is the result of a partnership, and cannot be used to affect the partnership itself. That is true, but it may be looked at as indicating the intention of the parties.

The fact of there being a trustee perhaps does not shew one way or the other in what light this agreement should be considered. I rather think if a dissolution took place the land would be ordered to be sold, and the parties could not of right claim to have a partition made between them of the land itself.

The general aspect of this agreement is, that it constitutes a partnership, there being community of interest in land, in profits, and in losses, although the parties may not have intended it should so operate.

The defendants' remedy therefore is not by a rescission of the note which is now sued upon, but to bring a cross action, or to counterclaim for the loss he has sustained by having to pay the price he agreed to pay for the land, and the value that it was at the time of his purchase really worth. In that case he will be fully recompensed for his loss: *Clarke* v. *Dixon*, E. B. & E. 148; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. H. L., 1218, at p. 1278.

The fraud is not that of this syndicate, but of Morrison, to whom the defendant gave the note, and Morrison's fraud will not avoid the syndicate agreement, so long as all of the parties to it do not assent to put an end to it.

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The only rule we can make is that the nonsuit and judgment thereon be set aside, and that the defendant be allowed to amend his pleadings as he may be advised, without costs to either party.

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GALT, J., concurred. *(a)*

[COMMON PLEAS DIVISION.]

HALL v. GRIFFITH ET AL.

Action, settlement of—Rights of third persons—Solicitors' costs—Collusion.

A Montreal firm of solicitors brought an action for one C. against H., the now plaintiff, which was settled for $3,700, of which H. paid $3,000, and gave the solicitors a note for $5,500 made and endorsed respectively by the defendants Griffith and Gimson, and held by H. as endorsee, out of which they were to take the $700 and their costs. They sent a clerk to Toronto, where defendants lived, to effect a settlement, but being unable to do so, he left the notes for collection with M. & Co., a Toronto firm of solicitors. After legal proceedings had been instituted, plaintiff paid C. the $700. A settlement was discussed between the solicitors, which M & Co. agreed to, provided their costs and the charges for the clerk's expenses to Toronto were paid. Negotiation for a settlement had been going on between the parties themselves, and on the 2nd December an agreement was entered into, that defendants should pay $5,000 clear of everything, to the plaintiff. On 4th December defendants' solicitors were informed by M & Co. of other parties, besides the plaintiff, being interested in the note. On 6th December the parties met and effected a settlement, by plaintiff accepting $5,000 in full of all claims under the action. The note which was held by M. & Co., was never delivered up to the defendants.

Held, that the action was not the plaintiff's, but that of C., or for his benefit, and that M. & Co. could proceed therewith, as C 's solicitors to enforce payment of their costs, and the Montreal solicitors charges: that the settlement of a claim under a negotiable security without the security being delivered up, subjected the defendants to such charges as were a specific lien thereon, of which they had notice; or *Semble* even without notice: that the effect of the agreement of the 2nd December was that the defendants should pay M. & Co.'s costs, and defendants afterwards on the settlement made not providing then for, and leaving the note outstanding, was some evidence of collusion to deprive M. & Co. of their costs, and that the notice given not to settle without providing for M. & Co.'s costs, etc., gave M.&. Co. an equitable claim to the interposition of the Court.

THIS was a motion by way of appeal from the Master in Chambers, who made an order dated the 14th of May, 1883, that the defendants do pay to the solicitors of the plaintiff in this action, and also to Messrs. McMaster, Hutchinson and Weir, the costs due to the said parties

(a) This case was argued before WILSON, C.J., and GALT, J., ROSE, J., having been engaged in the case while at the bar.

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respectively incurred by them of and incidental to this action.

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The facts appearing by affidavit were: the firm of McMaster & Co., advocates and barristers in the City of Montreal, brought an action in the Province of Quebec for one Carman against the now plaintiff, Hall, in which a settlement was made between these parties, by which Hall was to pay Carman the sum of $3,700 in satisfaction of the action. Hall paid to McMaster & Co. $3,000, and being unable to pay the remaining sum of $700, he left with McMaster & Co. the note upon which this present action was brought, for $5,500 made by Griffith, and endorsed by Gimson, and held by Hall as indorsee. Hall directed McMaster & Co., to collect that note from the now defendants, and to deduct from the proceeds the amount still payable to Carman, and that he, Hall, would pay McMaster & Co.'s expenses, which might be deducted from the amount collected.

In October, 1882, a clerk of McMaster & Co. was sent by them to Toronto to try to arrange the claim on the note with the now defendants, but not being able to do so, he left, according to instructions from McMaster & Co., the note with McCarthy & Co. to collect the same, of all which facts the now plaintiff had, at the time, full knowledge.

On the 5th of October, 1882, this present action was commenced by McCarthy & Co. upon the promissory note in question, and the two defendants were served with a copy of the writ upon the following day.

On the 17th of October the defendant's solicitors served an order for security for costs.

On the 18th of October, at the request of Mr. Sampson, one of the firm of solicitors of Wells, Gordon & Sampson, the solicitors for the defendant Griffith, Mr. Creelman, one of the firm of McCarthy & Co., went to Mr. Sampson's office to discuss a proposition made for settlement, made by Wells & Co. The proposition was, the defendants should pay to the plaintiff $3,000 in cash, and give the plaintiff a promissory note for $2,000 at one year, with interest at

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six per cent., in full. That offer was communicated to McMaster & Co., who required the defendants should in addition pay the costs of McCarthy & Co., and the further sum of $55 for the expenses of the clerk of McMaster & Co. going from Montreal to Toronto and back when he attempted to make a settlement with the defendants in Toronto.

On the 21st of October Mr. Creelman communicated to Mr. Sampson the substance of McMaster & Co.'s proposition, and after some discussion, during which McMaster & Co.'s claim was stated to be $55, and McCarthy & Co.'s claim for costs of this action to be $65, Mr. Sampson said he would recommend his client to accede to those terms, and it was agreed the $3,000 cash and the note for $2,000 should be delivered over to McCarthy & Co. The proposal made for settlement contained the words "without prejudice," and soon after Mr. Sampson desired these words to be struck out, and his clients would accept it. Mr. Creelman declined to do so.

Some correspondence passed between the solicitors, and the result was, that on the 26th of October, 1882, the negotiation for a settlement failed and was determined.

On the 23rd of November the firm of McCarthy & Co. paid into Court $400 of their own money as security for costs.

On the 27th of November the statement of claim was filed and served.

On the day before the statement of defence was required to be filed, Mr. Sampson asked for time to put it in, and Mr. Creelman gave time till and including the 5th of December.

On the 4th of December McCarthy & Co. received a letter from Wells & Co. marked B. (which was not among the papers) "which was the first intimation I or my firm (that is Mr. Creelman or McCarthy & Co.) had received that a settlement was being effected between the parties." Mr. Creelman then said that on the same day he informed Mr. Sampson that other parties were interested

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in the note besides the plaintiff, and that a settlement should not be concluded with Hall except through McCarthy & Co., and that provision should be made for the payment of the costs of the said firm, and also the costs of McMaster & Co. The costs of McCarthy & Co. were about $100.

The matter came before the Master in Chambers, and he directed proceedings to stand until some arrangement was made with respect to Carman's claim on the note in question for $700, and that sum had since been settled.

Mr. Creelman wrote to Wells & Co. several times after the last date. The last letter was on the 21st of February, 1883. He had asked their consent to the withdrawal of the $400 paid into Court as security for the defendant's costs, and he had asked them to say whether they would pay the costs of McCarthy & Co. and of McMaster & Co. Upon the last named day Wells & Co. wrote they would consent to the withdrawal of the $400 provided proceedings were stayed in the action, but as to paying " your costs and those of McMaster & Co., we still maintain that the settlement with Hall was final."

Mr. Sampson in his affidavit of December, 1882, said: that on the 4th of that month, in the conversation between him and Mr. Creelman, he, Mr. Creelman, informed Mr. Sampson that other parties than Hall were interested in the note, which was the first intimation he, Mr. Sampson, had of that fact, and that Mr. Sampson then told Mr. Creelman that an agreement between the parties in this cause had been come to for a settlement.

Mr. Sampson, in his affidavit of April, 1883, said he had no knowledge of any other claim on the note than that of the plaintiff until after a binding agreement had been made between the parties for a settlement, and he did not believe Griffith was aware of it either until after the agreement was made.

The defendant Griffith, by his affidavit of December 5th, 1882, stated that on the 30th of November he received the letter from Hall the plaintiff, of the 26th of November,

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proposing terms of settlement, and on the 2nd of December Griffith accepted it, and he said the suit was now settled. He accepted by telegram to the plaintiff, acting on behalf of myself and my co-defendant. He said by a telegram he had received he intended to go to Kingston on the 6th inst., or such other day as might thereafter be agreed upon, to carry out the settlement.

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In his affidavit of the 15th of December he said he was not aware until after his return from Kingston, that is, until after he had settled with Hall, that any one but Hall was interested in the note.

In the letter of Hall, the plaintiff, of the 26th November, referred to by Griffith in his affidavit, Hall wrote, "Your telegram and letter of the 24th just received. * * * I telegraphed you I would take $5,000 *clear of everything*, at long dates, and but little cash, viz.: $5,000; cash, $1,000; $500 three months, balance evenly divided in 6, 9, 12, and 15 months; interest six; same endorser; or you can adhere to your first offer, if you wish, say $5,000, *clear to me* $2,000 cash, balance 6 and 12 months, interest six, same endorser; $240 off first payment for government claim. * * You must decide and carry it out at once. This matter has hung fire too long already. The lawyers are pushing me, and costs accumulating daily. They tell me you don't mean to settle, and are only fighting for time. I am doing all this against Mr. McCarthy's advice. * * In the hope of helping you to a settlement I have temporised and fought off the lawyers so far, but cannot do it any longer. * * If conditions I mention are not fully carried out within specified time we must only continue the suit. I have done *all* I can to help you."

The answer of the defendant Griffith was: "I accept your offer contained in your letter of 26th November, to take $5,000 clear of everything, at even dates, &c."

Mr. Rae, a member of the firm of Smith, Smith & Rae, solicitors for Gimson the defendant, in his affidavit of the 7th of December, 1882, said that on the evening of the 5th

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of December, he in company with Griffith, the defendant left Toronto and met the plaintiff Hall, by appointment, at Kingston: that he, on the morning of the 6th of December, paid to Hall $1,000 in cash, and handed him over the notes in terms of the agreement: that he then drew a receipt which Hall signed "Received" or "in full of all claims under the action of Hall and Griffith, which is thus settled."

The affidavit then proceeded, that in the course of conversation "Hall said that he himself would arrange with his solicitors. In all our conversation the plaintiff spoke of this as being a debt due to himself alone."

Mr. Rae in his affidavit of the 17th of December, 1882, said, that after Mr. Creelman informed him his firm were in fact agents in the suit of McMaster & Co., he saw Griffith, who shewed him a series of letters, telegrams and copies of documents relating to negotiations between him and the plaintiff, in order to arrive at a settlement; in consequence of that he personally advanced $1,000 for Gimson, and had the notes prepared and endorsed, and carried out the settlement in good faith; he had no knowledge that any person had any right to interfere as plaintiff instead of Hall, or jointly with him.

Gimson made affidavit that he had no personal knowledge of any of these matters.

At the Michaelmas sittings, November 27, 1883, the motion was argued.

G. M. Rae, for the defendant Gimson. The settlement so far as the defendant Gimson was concerned was made *bonâ fide*, and without any attempt to defraud the solicitors of their costs. The Courts will not interfere with a *bonâ fide* compromise of a suit, made between the parties although the solicitors lien is prejudiced thereby, and although he has given notice of his claim. It must be shewn that the arrangement was made collusively to deprive the solicitor of his costs: *Crump & Evans*, Jud. Prac. p. 822; *Fisher* on Mortgage, 4th ed., p. 157; *Ex*

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parte Harte, 1 B. & Ad. 660; *Ex parte Morrison*, L. R. 4 Q. B. 153; *Clark* v. *Smith*, 6 M. & G. 1051.

G. T. Blackstock, for the defendant Griffith. The principle at first laid down was, that the settlement must be made *bonâ fide*, and without notice. Thus in *Welsh* v. *Hole*, 1 Doug. 237, it is said that if the attorney give notice to the defendant not to pay until his, the attorney's, bill be paid, a payment made after such notice would be in the defendant's own wrong; and in *Langle* v. *Fetterley*, 5 U. C. R. 628, it is said that the Court will interfere to protect the attorney where the settlement is made *bonâ fide*, and after notice, and if without notice then it is collusive. The later cases, however, clearly shew that notice is immaterial, and that the sole question is, whether there is collusion to deprive the solicitor of his costs: that there must be an intention to defraud. This is clearly laid down in *Brunsdon* v. *Allard*, 5 Jur. N. S. 596, 2 E. & E. 19, 28 L. J. N. S. Q. B. 306. In that case notice was given, but it was held that the parties were entitled to make a *bonâ fide* compromise, and the result of such compromise was that the lien was lost; but that the lien may prevail against a collusive compromise made with the express object of defeating it.

Clement, contra. The solicitor has clearly a lien for his costs; and the Court, in its equitable jurisdiction, will interfere to protect its officers. A settlement made after notice cannot be relied on to defeat the solicitor of his costs: *The Hope*, 8 P. D., 144; *Ex parte Harte*, 1 B. & Ad. 660; *Plant* v. *Stone*, 9 U. C. R. 458; *Nelson* v. *Wilson*, 6 Bing. 568; *Cole* v. *Bennett*, 6 Price 15; *Gould* v. *Davis*, 1 Dowl. 288; *Jordan* v. *Hunt*, 3 Dowl. 666. The case of *Brunsdon* v. *Allard*, is questioned as being a correct interpretation of the law; and moreover it was a case of unliquidated damages. There was no binding settlement here until the time when the money was paid, and prior to this the defendants were notified not to settle without providing for the solicitors' costs. The solicitors also had a specific lien through the Montreal solicitors. The settle-

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ment was also made without the note being given up, it remaining in the hands of the solicitors,

Blackstock, in reply. The case of *Brunsdon* v. *Allard* is the governing case, and the cases before referred to of *Welsh* v. *Hole* and *Langle* v. *Fetterley*, were decided prior to it. It is clearly laid down that it is immaterial whether the action is one of liquidated or unliquidated damages. It is not alleged here that the plaintiff Hall is not good for the costs. In any event the notice must be personal, and not to the solicitors, and the defendants swear that they had no notice. The retainer of the defendant's solicitors was at an end on the binding agreement for the settlement being made, and they were therefore under no obligation to inform the defendants of the notice: *Quested Callis*, 10 M. & W. 18; *Gould* v. *Davis*, 1 Tyr. 380; *Garber* v. *St Quintin*, 12 M. & W. 441; *Hough* v. *Edwards*, 1 H. & N. 171.

March 7, 1884. WILSON, C. J.—The statements referred to in the affidavits material to be considered are:

1. That Carman, to whom Hall was indebted, delivered the note to McMaster & Co., of Montreal, advocates for Carman, in security for the payment of $700 by Hall to Carman, and for the costs of McMaster & Co. in collecting the note.

2. That McMaster & Co., as advocates of Carman and under the rights they had from Hall, put that note in suit into the hands of McCarthy & Co., solicitors here, for collection against the now defendants.

3. While Carman had the claim upon the note for $700, the suit in Hall's name against the defendants proceeded until Carman agreed that he would look to his remedy for the satisfaction of his claim against Hall in the Province of Quebec, of which decision Wells & Co., acting for the defendants, were notified by McCarthy & Co. on January 4th, 1883.

4. Until that time the proceedings were carried on here chiefly, if not altogether, for the benefit of Carman, and of

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his advocates McMaster, & Co., who had a specific lieu upon the note, the one for a debt, the other for his costs of collection, by agreement made for that purpose with Hall.

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5. The plaintiff and Griffith for some time before they finally settled upon the 6th of December, 1882, were corresponding with respect to a settlement of the claim upon this note.

6. Hall's proposition of the 26th of November was $5,000 to be paid to him *clear of everything*, and again, *clear to me.* He also said *the lawyers are pushing me and costs accumulating daily. I am doing all this against McCarthy's advice. In the hope of helping you to a settlement I have temporised and fought off the lawyers so far, but cannot do it any longer.* And by that proposition Hall was in effect providing that Griffith should pay the costs, because Hall was to get the $5,000 clear of everything, and there was nothing else but the $5,000 *excepting the costs of this action*, of which they had both knowledge, and excepting McMaster & Co.'s claim for their charges, of which Hall, I presume, had alone knowledge.

7. Griffith's acceptance of the offer of the 2nd of December was to pay to Hall $5,000 *clear of everything*; that is, in effect, that Hall should not pay the costs of the action, but he, Griffith, should.

8. Upon that 4th of December Mr. Sampson, one of the solicitors for Griffith, admits that Mr. Creelman informed him when he, Sampson, told Creelman about the proposed settlement between the parties to this action—that is, two days before the settlement was actually made—that other parties were interested in the note than Hall, and Mr. Creelman says he then told Mr. Sampson that provision must be made in any settlement that was come to for payment of the costs of this action, and the costs also of McMaster & Co.

9. The parties after that met at Kingston on the 6th of December and settled the action for the $5,000 "in full of all claims under the action of Hall and Griffith, which is thus settled," making no provision for the costs now claimed.

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10. If that settlement were one intended to be according to the previous agreement the defendants were to pay the costs.

11. If it were not so intended, then the parties have departed from the terms of the agreement, and have settled with the full knowledge and with notice that the costs in question must be provided for in the settlement, and that no settlement must be made but through McCarthy & Co.

I am of opinion the defendants choosing to settle the amount of the note with Hall, without requiring the delivery up of the note, must be held liable for whatever lien or charge Carman or others had upon the note, because they were not bound to pay it unlsss it was given up to them: *Hansard* v. *Robinson*, 7 B. & C. 90; *Alexander* v. *Strong*, 9 M. & W. 733.

In this case the parties had, by the express admission of their own solicitor and Griffith acting for Gimson as well as himself, notice and knowledge of others being interested in the note than Hall, yet in disregard of it Griffith says he intended to go to Kingston to complete the settlement, and he did so. And he claims to be exempt from all liability for the claim now made upon him, because he did not obtain knowledge of these facts by himself or by his solicitors until after he had made an agreement with Hall, binding upon him, to settle upon the terms of their negotiation. Until about a month after that settlement the action was the action of Carman in Hall's name, and the costs claimed in the action are costs which were also incurred while Carman's claim was unsettled. McCarthy & Co. would not have acted, and were not acting in the interest or under the direction of Hall, but of McMaster & Co., the agents and advocates of Carman.

The parties have made a settlement in defiance of the warning given to Mr. Sampson of these other claims upon the note.

It has fortunately for the these defendants since happened that Carman has received his debt from Hall, but the costs of the action, and McMaster's costs, have not yet been paid.

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I am of opinion this action may be treated, for the recovery of the costs, as the action of Carman, as it was his action for the recovery of his claim against Hall. McMaster & Co. held the note for Carman, and they transmitted it to McCarthy & Co. as their agents to collect for Carman.

The defendants are liable for the payment of the costs in question, upon the very ground they rely upon being discharged from their payment. They say they are not bound to pay them, because the knowledge they acquired of notice not to settle with the plaintiff without paying the costs of the plaintiff's solicitors, was after they had made a binding agreement with the plaintiff to make a settlement on the terms of their negotiation. But the terms of that binding agreement expressly provided for payment in effect by the defendants of the costs of the action.

If the case be put upon the other ground on which it has been presented to us, that the solicitors who brought this action are entitled as such solicitors to be paid their costs by the defendants, because they settled the action with Hall after notice to them that there was a claim for costs due to the solicitors, we have to see how the authorities apply.

Welsh v. *Hole*, 1 Doug. 238, decided that the defendants were liable for the costs of the plaintiff's attorney, as they had settled with the plaintiff after notice from the plaintiffs attorney not to settle unless his costs were paid.

The case of *Brunsdon* v. *Allard*, 2 E. & E. 19, decided that mere notice was not sufficient to prevent a settlement between the parties being final without regard to the costs of the plaintiff's attorney, that there must be collusive fraud between the parties to cheat the attorney of his costs, to entitle him to the aid of the court.

Clark v. *Smith*, 6 M. & G. 1051, and the cases there cited. are to the like effect, including *Nelson* v. *Wilson*, 6 Bing 568.

The last case on the subject, of *The Hope*, in 8 P. D. 144, on appeal, is to the same effect, that "there is no rule, the parties may not compromise an action without the inter-

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vention of their solicitors; they must do so, however, honestly, and not to cheat the solicitors of their proper charges."

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It does not appear however, that the rule of *Welsh* v. *Hole*, has been over-ruled yet in express terms, for it is referred to in *The Hope Case*, just quoted as laid down in Arch. Pr., 13 ed., 143; that "the Court will exercise this equitable interference" in favour of the solicitor "where the solicitor has given the opposite party or his solicitor, notice of his lien, and that he claims the amount payable to his client to be paid to him."

The conclusion I come to is, that the action was not and is not the action of Hall, but of Carman, or of McMaster & Co., his advocates; he or they controlled the action for Carman's benefit; and that McCarthy & Co. are entitled to proceed with the action as Carman's solicitor to enforce the payment of their costs and McMaster & Co.'s charges. That the settlement the defendants made of a negotiable instrument without obtaining its delivery up to them subjects them to such charges which were a specific lien upon it at the time they so settled, and as I think, even although they had no notice of such lien. With notice before the settlement, which I find they had, they are certainly bound by such lien. That settling as they did, having beforehand agreed to pay, as I construe the proposals, the costs of the action, and afterwards not providing for them but leaving the note outstanding, is some evidence of collusion to deprive the solicitors of their costs. That the express notice which the parties had not to settle without providing for the costs of the plaintiff's solicitors; nor without settling through them, gives the solicitors an equitable claim to the interposition at the Court, if Hall is to be considered as the client of the plaintiff's solicitors, and that the motion of the defendants be and the same is hereby discharged with costs.

GALT, J., concurred. (*a*)

(*a*) This case was argued before WILSON, C. J., and GALT, J., OSLER, J., having been appointed a Judge of the Court of Appeal, and the vacancy not having been then filled.

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[COMMON PLEAS DIVISION.]

WILTON v. THE NORTHERN RAILWAY COMPANY.

Railway—Accident—Negligence—Contributory negligence—Automatic bell.

The plaintiff, early in the morning, it not being quite day-break and snowing a little, was driving a yoke of oxen and a pair of bob sleighs along the highway towards a railway crossing, sitting on the front bob, low down behind the oxen. The track crossed the highway at an acute angle, and was some seven feet above the highway which was graded up to it. At the crossing there were some bushes which obstructed the view, but before reaching them there was a view of the track for some sixty or seventy rods, but not while in the hollow at the bottom of the grade and sitting as the plaintiff was. The plaintiff without looking out for the train, drove on to the track, and as he did so he saw a train approaching a few rods off, when he jumped to the off side and hit the off ox causing it to spring aside and clear the track, but before he could get clear himself he was struck by the train and injured. It was urged that the plaintiff by so doing voluntarily exposed himself to danger; but there was evidence to the contrary. The defendants engine had an automatic bell. A witness stated that these bells do not always ring when the train is in motion. The engineer stated that the bell was in good order when the engine left the last station, but he could not say whether or not it was ringing when the accident happened; while a number of witnesses stated that the bell was not then ringing. The jury found that the bell was not ringing; that it was not in good order; and that the plaintiff exercised reasonable care. On motion to enter a nonsuit,

Held, WILSON, C. J., doubting that there was evidence for the jury; that it could not be said that the findings were not justified, and the court therefore refused to interfere.

THIS was an action for negligence tried at Owen Sound Fall Assizes, on the 5th of November last, before Osler, J., and a jury.

In answer to certain questions left by the learned Judge, the jury found that the whistle was not sounded, nor was the automatic bell ringing, nor was it in good order, and that plaintiff exercised reasonable care, and found the damages, $350, whereupon judgment was directed to be entered for the plaintiff for that sum.

At the Michaelmas Sittings of the Divisional Court, *Boulton*, Q.C., obtained an order *nisi* to set aside the verdict and enter a nonsuit, or for a new trial, on the grounds that the verdict was contrary to law and evidence, and asking that in the event of a new trial being granted the jury notice should be struck out.

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During Hilary Sittings, February 7, 1884, *Osler*, Q. C., supported the order *nisi*. The evidence shews that the engine was supplied with an automatic bell, and that it was in good order before and after the accident, and therefore it must have been ringing when the accident happened. As opposed to this is merely the negative evidence of persons who state that they did not hear the bell ring. It is quite consistent with their evidence that the bell did ring. The finding of the jury that the bell was not ringing was clearly against the evidence. The plaintiff was guilty of contributory negligence in the manner in which he approached the crossing. If he had been looking out he could have seen the train coming, and thus avoided the accident. The case of *Davey* v. *London and Southwestern R. W. Co.*, 11 11 Q. B. D. 213 is expressly in point. There the plaintiff stated that before crossing he looked to the right along the down line, but did not look to the left along the up line, and he admitted that if he had done so, he must have seen the train. No whistle was sounded or any warning given. The Court held that a nonsuit must be entered, because, on the undisputed facts, no negligence was proved, but that the plaintiff's own want of caution was the sole cause of the accident. In *Johnston* v. *Northern R. W. Co.*, 34 U. C. R. 432 it is expressly laid down that it is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and the omission to do so is contributory negligence. The plaintiff was also guilty of contributory negligence in voluntarily exposing himself to danger. This is clearly laid down in *Hay* v. *Great Western R. W. Co.*, 37 U. C. R. 456. The contributory negligence appeared on the plaintiff's own evidence. There was therefore no disputed question of fact to be submitted to the jury, and a nonsuit should have been entered. If the plaintiff is held entitled to recover in cases of this kind, it is needless for a railway company to ever offer any defence. If the Court should grant a new trial, the jury notice should be struck out.

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Creasor, Q. C., contra. There was evidence to shew that the bell, though an automatic bell, could get out of order and not ring. And, also, as it was shewn at the time, the bell might have been clogged up so as to prevent its ring ing. A number of witnesses, who would have heard the bell if it had rung, swore that it did not ring, and the jury, on this evidence, found that it did not ring. Taking the strongest view of the case in favour of the defendants, namely, that the Court, on the evidence, would have found for the defendants, still where there is evidence to submit to the jury that the bell did not ring, the Court cannot say that their finding is wrong. There was no contributory negligence proved. The plaintiff did use reasonable care in approaching the crossing. The case of *Davey* v. *London and South Western R.W.Co.*, 11 Q. B. D. 213, is quite distinguishable. In that case there was no statutory obligation to sound the whistle or ring the bell and the judgment is based on this. Lord Coleridge, in giving judgment, expressly states that he was not disposed to lay it down as a general proposition that a train must always whistle on approaching a level crossing: that, under the circumstances of that case, he could not say there was any obligation to whistle, and therefore he could not say there was any duty incumbent on the company which they had not discharged. Here, however, there is a clear statutory duty to sound the whistle on approaching a crossing, and therefore, by the omission to do so, and thus to give persons warning, the company did not perform their duty; and they are therefore liable for the accident caused by their negligence. They cannot get rid of their liability by saying that the plaintiff should have been looking out for the train, when by their omission to give him the required warning he might reasonably presume that no train was then approaching. The plaintiff however did use reasonable precautions in approaching the crossing. Then as to the plaintiff throwing himself in the way of danger. The evidence shews that the plaintiff did what was the best to be done, and what any prudent man would have done under the circumstances.

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March 7, 1884. ROSE, J.—The grounds on which the defendants moved were: 1. That the defendants having an automatic bell of sufficient weight, *i. e.* more than thirty pounds, ringing at the time of the accident were guilty of no negligence. 2. That the plaintiff did not use reasonable care in looking for the train as he approached the crossing. 3. That he brought the injury upon himself by jumping in front of his sleigh to save his oxen, instead of jumping in the other direction to avoid danger.

The facts were, that the plaintiff, accompanied by one John Craig, on the 5th of January, 1883, was proceeding in a sleigh drawn by a yoke of oxen westward from Thornbury to Meaford, the sleigh being a pair of bobs without a box, when coming to the third crossing above or west of Thornbury, where the defendants' railway crosses the main road on which he was travelling at an acute angle, the train came upon him unawares, and the accident happened in which he had his leg broken, and suffered the damage sought to be recovered in this action.

It is said that there is a slight ascent in the main road approaching the crossing.

As to the first point, the evidence may be summarized thus:

The plaintiff, John Craig, John W. Conkling, Henry Collins, and William Madill swore positively that the whistle did not blow, nor did the bell ring. With the exception of the plaintiff, all are apparently disinterested witnesses, and each man had a good reason to give for observing the fact. Craig was in the sleigh, and says he must have heard either. Conkling timed himself for going to work by the whistle. He heard the whistle after the accident, but is positive it did not sound before. He was not far from the crossing, and swears positively the bell did not ring. Collins was waiting for the train to go by so as to take his horses out of his stable, as the noise of the train frightened them. He is positive that neither bell rang nor whistle blew. His place is on the track opposite Madill's. Madill was going from his house to his

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stable as the train came along, and stood watching it until it passed. He is also positive that the whistle was not sounded, nor did the bell ring. For the defence, the employees on the train were called.

Their evidence is always open to comment, often, no doubt, unjust, of being influenced by their position. The engineer's duty was to have both sound. By statute he is liable for one-half of the damages if he neglect his duty, and more or less blame would also fall upon the conductor and the man whose duty it was to oil and keep in order the bell.

John Conkling swore positively that the bells do not always sound when the train is going, and the fireman said, "I know it was ringing leaving Meaford, but I could not say whether it was ringing all the time. Can we say in face of this evidence that the jury were perverse?

Mr. Osler said, if on this evidence the company could not succeed, no defence need be attempted. The plaintiff might possibly reply, if on this evidence a party injured cannot succeed where an automatic bell is found, no action need be brought. I cannot say which set of witnesses is mistaken. It is not my duty. It was the duty of the jury. They have discharged it. Whether or not I would have arrived at the same conclusion, is not the question. I cannot undertake their duty, and am of the opinion that this ground of the rule is not supported. The damages are small. The plaintiff, no doubt, poor. A new trial before a jury would result in the same way, no doubt. I do not think the jury should be dispensed with, and I see no advantage to the defendants, and possibly an injury and injustice to the plaintiff, if a new trial were granted on this ground.

In *Dublin Wicklow, &c., R. W. Co.* v. *Slattery*, 3 App. Cas. 1155, the jury believed two witnesses who had not heard the whistle, as against ten who swore they did, and the case was not disturbed by the full Court.

As to the second ground, I extract the following evidence: The first witness stated as follows: "The railway

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embankment is seven feet high there—seven feet above the road. * * * The road is graded up to the railway. * * It crosses at a very acute angle, an angle, I think, of about fifteen degrees. * * The view is obstructed, there is a quantity of bush along the road, perhaps 100 to 120 feet from the crossing. The view would be obstructed east of the crossing. * The rise of the road would make an apparent obstruction. * * The grade of the railway there is down grade going east." "Q. How far could a person see up the track from that 100 feet? A. Scarcely see up the track at all, not in riding on a sleigh, because the oxen would be higher than the sleigh, this arises from the grade of the road." * * On cross-examination. "Q. If you were driving on that road and were on a proper look-out, could you not see the train coming? A. If it was daylight I could see it, if there was a headlight I should see it, as I should be looking out at the crossing." He further said the clump of cedar bushes would from one point completely obstruct the view—but "a person coming along the road in an ordinary way should see the train" or the headlight. The grade of the railroad he styled "a gradual grade, a slight grade."

The plaintiff stated that the time was seven o'clock a.m., not quite daylight, snowing a little: That just as he came on the track, looking up the track over the back of the oxen he saw the locomotive a few rods from him; He saw the smoke-stack: that he heard neither bell nor whistle: that he knew a train was due about that time, but that it was not always on time: that his hat was not pulled down over his face: that he could not from the position he was in have seen the train, being prevented by the oxen: that when near the crossing he could have seen the train for about sixty rods in daylight: that he was on the track before he saw the train.

John Craig stated that it was scarcely daylight: that both he and the plaintiff were seated on the front bob; heard no noise of the train until they got on the track: that the plaintiff was sitting on the right hand side nearest the

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track behind the off ox: that he, witness, was not on the look out for the train: that he knew trains did pass frequently at that time: that he was not prepared to say how far one could see the train approaching if on the look out, but that he could not see it far sitting on a sleigh and the cattle in front of him: that if one were close by the track the approaching train could be seen for sixty rods: that it was not a blustering morning.

John W. Conkling stated that it was a calm morning, but heavy air: that the train did not make as much noise as usual on account of the snow on the rails: that when you get pretty near the crossing you can see the train, possibly for sixty rods, but not before you come to the crossing: that one would have to be pretty close to the crossing there to see the train.

Henry Collins stated as follows: "Q. Supposing you were coming up to this crossing, how far could you see the train before you came to the crossing? A. You cannot see it but a very little piece until you come to the crossing. Where Wilton got hurt you cannot see the train far." "Q. Coming up the crossing, could he not look along the track if he were on the look out? A. Not at that crossing you cannot see much distance, there is a rise of ground there. Without you are just looking up the track you cannot see it. You cannot see a great distance if you are looking up there." "Q. Suppose a man is standing twenty feet from the crossing where the accident happened. A. If you were coming from Thornbury you would have to be on the railway track to see." "Q. Am I to understand you cannot see up the railway track at all, until you get on the crossing. A. No, you cannot see at all." This man is apparently a farmer, whose farm is near the place where the accident occurred, as he stated that the railroad ran along his farm for about 200 rods.

William Madill, who lives about sixty rods from the crossing where the accident occurred, in answer to a question as to the view from the hollow, as it is called, in the road just before reaching the track, said: "I often

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passed the remark about the cattle-guard fence and the telegraph poles taking the view of a man's eye in the hollow there:" that one would have to be ten or twelve rods east of the hollow place to see up the track a distance of sixty or seventy rods.

For the defence, were called the engineer, fireman, conductor, baggageman, and brakeman. The engineer stated that he did not see the plaintiff until he came right on the crossing, and the conductor stated that the train was going at a rate of speed that would traverse a quarter of a mile in half a minute. A quarter of a mile would be eighty rods.

This is the evidence on the first point, as to the want of care on the part of the plaintiff in not looking out for the train.

Taking the view most adverse to the plaintiff, it would appear that before he reached the bushes a train might be seen if then approaching for sixty or seventy rods: that while the view was intercepted by the bushes the train could not be seen at all, while in the hollow sitting on the sleigh not at all, and when on or near the track it might be seen for about sixty or seventy rods, *i.e.*, for less than half a minute before it would reach the crossing.

Some of the evidence is more favourable to the plaintiff. The engineer on the train did not see the plaintiff until he was on the crossing. If, as one might suppose, his duty was to keep a look out for persons crossing the track, and the view was unimpeded for a long distance, as suggested by the defendants, one would conclude that he would have seen the plaintiff for some distance before he reached the crossing.

I am not prepared to say the finding of the jury can be impeached on that ground. Certainly there was evidence to be submitted to the jury.

Lord Cairns, in the *Slattery Case*, L. R. 3 App. Cas., at p. 1167, says: "I think they," (these considerations) "should have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of

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the train, or the want of reasonable care on the part of the deceased, was the *causa causans* of the accident."

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Assuming that the defendants in this case neither rang the bell nor sounded the whistle, it must have been submitted to the jury to determine the question as to want of reasonable care on the part of the plaintiff.

Johnston v. *Northern R. W. Co.*, 34 U. C. R. 432, was cited on behalf of the defendants. That case was decided before the *Slattery Case*, and so far as inconsistent with the decision in that case, is not to be followed. The case of *Davey* v. *London and South-Western R. W. Co.*, 11 Q. B. D. 213, was also cited.

This case has been affirmed in appeal, but the full report has not yet reached us (*a*). It will be observed that Lord Coleridge, C. J., who leads the Court in the decision, was a dissentient in the *Slattery Case* and relies upon an *illustration* of Lord Cairns in that case upon which to found his judgment. The language used by Lord Cairns will at once shew that the case we are now considering is not one he would have thought of withdrawing from the jury. He says, p. 1166: "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad day light, and without anything either in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death."

Now, in the case before us it was not "broad daylight," and there was something in the structure of the line and otherwise to obstruct his view, and so these facts must have been left to the jury.

See also the dissentient opinion of Lord Hatherley: "Again, the case may be different if a special statutory duty were imposed on the company of whistling at a

(*a*) Now reported, 12 Q. B. D. 70.

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station, for then it might be said this mode of warning strangers and no other is what the stranger is entitled to rely on."

As to the third point. The plaintiff says: "I saw the locomotive a few rods from me, and I saw the smoke stack, and I jumped off on the off side, and I hit the off ox, and he sprang to the side, and the nigh ox came around to the end of the train, and as the train went by it struck the off ox and the train struck me on the shoulder." Again: "I jumped off the side and struck the oxen when I saw the train coming. I thought I lit on the track. The train was two rods ahead of me. I was on the track before I saw it. * * The off runner of the front bob was on the track. * * I jumped off on the track. When I jumped off the sleigh I was on the track. * * I had no other way to jump. It was the quickest way of getting rid of it. If it had struck the oxen it would have killed the both of us. I stepped off on the side I was in order to get away, and if it had struck the oxen it would have struck me; it could not have been avoided. * * I struck the ox in the act of jumping. After the ox got off I followed it. Q. But you could not get off the track before the train came up? A. No. Q. What did you do after you struck the ox? A. I stepped off. Q. And the train struck you before you had time to do anything else? A. Yes."

John Craig says: "The oxen were on the track and the sleigh close on the track behind. * * He shouted whoa, and struck one of the cattle with the whip, and jumped off nearly at the one time. * * I am not prepared to say what I would have done. Owing to the circumstances I do not see how he could have bettered himself. Q. If he had not jumped off the sleigh, according to your evidence he would not have been hurt at all. A. I firmly believe that he and the cattle would have been killed. He was close. * * If the cattle had been carried off he would have been carried off." He adds that he did not know what the plaintiff's ideas were—very likely his object in

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jumping off was to save the cattle. "Had the cattle stayed on the track, and he and the sleigh been carried off, he would have been hurt." Again: "Q. The oxen were fastened to the sleigh, of course. A. Yes. Q. And you say that if the train had struck the oxen it is just as likely as not Wilton would have been killed? A. Yes. Q. Why? A. Owing to the position, the angle of the road; and when the cattle were on the road the sleigh was close to the track, and if it had struck the cattle it would have carried them partly in the direction the train was going."

The engineer, in his evidence, says that the plaintiff was not on the track. He was standing in front of the oxen, as if he was trying to put the oxen back.

On this evidence we are asked to say that it was clear beyond doubt that the plaintiff ran into danger which he could easily have avoided in order to save his cattle, and that the plaintiff ought to have been nonsuited. Looking back now with plans and evidence before us, it seems that possibly the wisest course would have been to jump on the track, as he did, then turn eastward and run away from the train along the highway, and possibly he might have so done; but if he had not executed this movement quickly enough and the oxen had been caught by the train, the oxen and sleigh might have been carried eastward and thrown off the track, and he entangled in the debris and injured. This is what is suggested and argued, and was not this a question for the jury?

The case is very different from *Hay* v. *Great Western R. W. Co.*, 37 U. C. R., p. 456.

I think the language of Morrison, J., in putting a suggested argument in that case, p. 466, may well be used here. "It may be said that it cannot be expected that a person placed in such circumstances as the plaintiff was, will or can act with ordinary prudence or caution, and that if he rashly does an act which causes an injury he ought to be excused, or rather the defendants held liable, upon the ground that the injured person could not foresee

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or have time to reflect upon the risk and danger he was about to incur."

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And again, it may well be said that it was the duty of the plaintiff, if possible, to draw off the oxen and save the train from the danger which would threaten it if it had knocked the oxen down in front of the engine. However, that might be, I do not see how the question could properly have been withdrawn from the jury, and I am not of the opinion that their finding is so contrary to evidence as to warrant our interference.

In my opinion the rule must be discharged, with costs.

WILSON, C. J.—I think there was evidence of a good deal of carelessness on the part of the plaintiff in approaching a place where, according to the general statement of the witnesses, it is difficult to see an approaching train until the person moving towards the crossing is almost upon the track, and in approaching it in the manner he did, sitting low down at the bottom of an ox sleigh, in which position he could with difficulty, if at all, see over his team, and that team too a slow moving yoke of oxen, which could not readily be got out of the way in time, in a case of pressing danger; and yet he never stirred from his seat, nor took the trouble or common precaution, although his own life was at risk, to take a step or two in advance of his team to see whether he could safely cross or not.

It is true he had the right to trust much to the train giving the proper warning, but that is no better argument for him than if he had closed his eyes, as he approached the track, and attempted to cross it in that blinded state.

It was his duty to be as careful against a possible danger to himself from the negligence of another, although there is no statute to that effect, and especially through the means of so irresistible a power as a railway train, as it was the duty of the driver of the train, independently of the statute in that behalf, to guard against doing any injury to the plaintiff.

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I do not wholly agree with the judgment of my learned brothers, and yet it is with reluctance I say I do not differ from them, that is, I submit grudgingly.

GALT, J., concurred with ROSE, J.

Order nisi discharged.

[COMMON PLEAS DIVISION.]

FIELD v. GALLOWAY.

Company—Action by judgment creditor of company for defendant's unpaid stock– Set off—Payment.

After plaintiff had commenced an action against the defendant to recover from him in respect of his unpaid stock in a joint stock company the sum of $442.29, being the amount of an unsatisfied judgment recovered by the plaintiff against the company, one B. recovered a judgment against the company for $4,333.08, and assigned it to one G., who assigned part of the money recovered to the extent of $500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim.

Held, that the procuring of such assignment by defendant being for such purpose, and being a voluntary act on defendant's part, and with notice of plaintiff's claim did not constitute a defence to it; but *Semble* if the set off had occurred to the defendant in his own right, although after action brought, it would have been otherwise.

G. assigned the remainder of his judgment to M., who after the commencement of the plaintiff's action, and with knowledge thereof, recovered a judgment against defendant for $526.21 without defence, and to give M. a preference in respect of his unpaid stock, which defendant paid to M. who released the company from their liability in the judgment so recovered against them to the extent of $500.

Held, that the judgment so recovered, and the payment thereunder constituted a good defence to the plaintiff's claim; and that the prior commencement of the plaintiff's action was immaterial.

ACTION by the plaintiff to recover from the defendant in respect of the amount of his unpaid shares in the stock of the Masson Manufacturing Company sufficient to satisfy the sums of $417.94 and $24.35, for damages and costs, which the plaintiff, by judgment, had recovered against the said company, and which remained due and unsatisfied to the plaintiff, the defendant being a holder of ten shares in the stock of the company, upon each of which shares the sum of $500 remained unpaid by the defendant

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The statement of defence set out that one Wm. Bowman, then a creditor of the said company, on or about the 9th of November, 1880, recovered a judgment against the company for the sum of about $4,333.08 damages and costs; and by indenture, dated the 20th of August, 1883, assigned the same to one Francis W. Glen, who, by indenture, dated the 1st of September, 1883, assigned the same to the defendant to the extent of $500 of the said judgment debt, and which said judgment is in full force and unsatisfied, and the defendant, by such judgment and assignment, is a creditor of the company to the sum of $500, and he claims the benefit of the same under the statutes in that behalf against the amount claimed by the plaintiff on the latter's said alleged judgment.

2. That the plaintiff's said judgment is wholly or partly paid, but the defendant is unable from lack of knowledge to state the amount (if any) which is still unpaid thereof.

In the further statement of defence it is alleged that on or about the 18th of October, 1883, one George A. Masson, the assignee of the remainder of the judgment in the statement of defence already delivered, mentioned, recovered a judgment in the Queen's Bench Division in the name of the said Bowman as plaintiff, but for his, the said Masson's, own benefit, against the defendant in respect of his alleged unpaid stock in the company for the sum of $500 damages, and $26.21 for costs. And on or about the 7th of November, 1883, the defendant paid the said judgment so recovered against him, and thereupon the said Masson released and discharged the said company from their liability to him on the said judgment against the company to the amount of the said $500, and the defendant submits that by such payment and satisfaction his stock in the said company is now fully paid and satisfied.

Reply.

That the company in or about the month of January, 1881, being in insolvent circumstances, made a general assignment of all its assets and effects to trustees in trust for creditors; and that he, the plaintiff, never was a share-

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holder of the company; and that the assets of the company, including the amount unpaid upon the stock of the defendant and the other shareholders of the company, are wholly insufficient to meet the liabilities of the company to its outside creditors.

2. The said Bowman was and is a shareholder of the said company, and has never paid up the full amount of his stock therein, and that the assignment of part of the said judgment was made without any value or consideration; and that the defendant procured the same after the commencement of this suit, and collusively, and for the express purpose of defeating the plaintiff's claim.

3. The plaintiff further says that if the defendant did give any value or consideration for the said assignment, it was very much less than the said sum of $500, and the plaintiff submits the said assignment having been procured after the said general assignment made by the company for the benefit of creditors, and after the commencement of this suit the defendant is not under any circumstances entitled to set-off against the plaintiff's claim anything more than the amount actually advanced and paid by him for the said assignment of judgment.

4. The plaintiff joins issue on the second paragraph of the statement of defence.

5. To the further statement of defence, the plaintiff says: the defendant did not pay to George A. Masson the said sum of $500 on the said judgment.

6. If the defendant did pay anything on the said judgment recovered against him by Masson, it was much less than $500, and the defendant is not entitled to any credit on the amount unpaid upon the stock beyond the amount actually paid by him.

7. The defendant after the commencement of this suit with the intention of defeating the plaintiff's claim, procured the said Masson to commence proceedings against him, and recover judgment thereon upon the judgment recovered against the company, and that the payment by the defendant of the judgment recovered against him was

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made by the defendant in his own wrong, and he is not entitled under the circumstances to set up such payment as an answer to the plaintiff's claim herein.

8. The payment and satisfaction by the defendant of the said judgment was made by him voluntarily and in collusion with the said Masson for the express purpose of defeating the plaintiff's prior claim. Issue.

The action was tried before Rose, J., without a jury, at Toronto, at the last Winter Assizes of 1883.

The learned Judge disposed of the case as follows:

ROSE, J.—The plaintiff's claim is admitted, and that he is entitled to recover against the defendant the sum of $148.30 if the defendant do not sustain the defence: that Bowman recovered a judgment against the company which he assigned to Masson: that after the commencement of this action Masson brought his action against the defendant in respect of the amount due by the defendant on his stock; and that the defendant satisfied that judgment by crediting the amount of it on a note which he held against Masson for money which the defendant had lent to Masson, and which was unpaid at that time; that Masson brought his action against the defendant with the knowledge of the plaintiff's prior pending action against the defendant, the defendant being content that Masson should get judgment in priority to the plaintiff.

The plaintiff's counsel contended that the effect of the consent proceedings on the part of the defendant to the recovery by Masson constituted in effect a voluntary payment by Galloway to Masson. That would hardly be consistent with the decision in *Macdonald* v. *Crombie*, 2 O. R. 243, now pending in the Court of Appeal, and *Turner* v. *Lucas* in the Queen's Bench Division, 1 O. R. 623, and other cases.

The plaintiff contends upon the authority of *McGregor* v. *Currie*, 26 C. P. 55, that a judgment creditor who is not a shareholder of the company, is entitled to priority over a shareholder of the company who may also be a judgment creditor.

The remarks of the present Chief Justice of the Queen's Bench Division would seem to go that length.

The defendant's counsel urged that that case was not binding as the Act passed since that decision

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allowed shareholders to recover equally with outside creditors against the company, and the decision might be confined to winding-up proceedings, and referred to *Grissell's Case*, L. R. 1 Ch. 528. The learned Judge had that case before him in *Macbeth* v. *Smart*, 14 Gr. 298. Sitting here as a Judge of the first instance, I shall follow that opinion, leaving the defendant to appeal, if so advised.

I therefore give formal judgment for the plaintiff, leaving the defendant to raise the question before the full Court where we may have opportunity for mature consideration.

He therefore entered the verdict for the plaintiff, with costs, staying the proceedings until term. The amount of the verdict to be settled between the counsel.

At the Hilary Sittings the plaintiff moved on notice against the finding of the learned Judge by varying the verdict according to the evidence or for a new trial, on the grounds: (1) That the Judge should have found the whole of the transaction between Masson and the defendant was collusive and colourable for the express purpose of enabling the defendant to defeat the plaintiff's claim, and that the defendant was not entitled to set up the same in this action as a payment or discharge of the defendant's liability under the statute in respect of the amount unpaid on his, the defendant's stock. (2) The finding should have been that no assignment of the Bowman judgment, or any part thereof, was in fact made to Masson, and that he was not therefore entitled to any set-off under the statute. (3) And that the alleged payment by the defendant of the Masson judgment was a voluntary payment.

The defendant also moved on notice to set aside the verdict and judgment for the plaintiff, and to enter the same in favour of the defendant, or for a new trial, upon the grounds: (1) That before the recovery in this action against the defendant he had paid the full amount unpaid upon his stock in the action brought by Masson against the defendant. (2) That the defendant was entitled by way of set-off to the judgment assigned to him. (3) That the findings and evidence shewed the plaintiff was not entitled to recover.

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During the same sittings, February 15, 1884, *Cassels*, Q.C., supported the defendant's motion, and shewed cause to the plaintiff's. The contention of the other side is, that because this action was brought before Masson brought his action against the defendant, the plaintiff was entitled to be paid before Masson, and that the payment made by the defendant is inoperative against the plaintiff, the plaintiff having by his prior action acquired a lien against the unpaid stock of the defendant in preference to the claim of any subsequent plaintiff. There is no such lien. The pleadings, evidence, and findings of the learned Judge shew the defendant has a good defence against the plaintiff. Why should the plaintiff in an action of this kind have a priority over every other creditor? There is no such lien in any other kind of action, and there is nothing to prevent the defendant from paying any other creditor before the plaintiff, and if he do not, the first execution delivered to the sheriff will take the precedence. The defence set up was therefore a good one. He referred to *McGregor* v. *Currie*, 26 C. P. 55; *Grissell's Case*, L. R. 1 Ch. 528; *Smart* v. *Macbeth* 14 Gr. 298; *Benner* v. *Currie*, 36 U. C. R. 411, 414; R. S. O. ch. 150, secs. 53 & 61; *Thompson* on Liability of Shareholders, sec 424: *Ingalls* v. *Cole*, 47 Maine 580; *McCracken* v. *McIntyre*, 1 Sup. Ct. R. 479, 516; *State Association* v. *Kellogg*, 63 Miss. 540.

Ritchie shewed cause to the defendant's motion, and supported the plaintiff's. The plaintiff acquired a lien or precedence, by reason of the earlier action, and the whole of the proceedings to defeat the plaintiff's recovery are fraudulent and collusive. At all events, the payment of the Masson judgment was a voluntary payment, and cannot affect the plaintiff. He referred to *McGregor* v. *Currie*, 26 C. P. 55; *Cole* v. *Butler*, 43 Maine 401; *Ingalls* v. *Cole*, 47 Maine 541; *Jones* v. *Wiltberger* 42 Georgia, 575; *Benner* v. *Currie*, 36 U. C. R. 411, 416, 417; *McCracken*, v. *McIntyre*, 1 Sup. Ct. R. 479, 525. [ROSE, J., referred to *Macdonald* v. *Crombie*, 2 O. R. 243, 255.]

Cassels, in reply.

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March 7, 1884. WILSON, C. J.—The R. S. O. ch. 140, The Ontario Joint Stock Companies General Clauses Act, sec. 35, enacts "that each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon," &c. Chapter 150, sec. 53, is exactly the same. So ch. 149, sec 42, and ch. 150, sec. 61, are the same. That "any description of action may be prosecuted and maintained between the company and any shareholder thereof."

In ch. 150, sec. 53, there is a sub-section not contained in ch. 149, that "Any shareholder may plead by way of defence in whole or in part, any set-off," [that is, where the shareholder is not sued by a creditor of the company for his unpaid stock] "which he could set up against the company, except a claim for unpaid dividends or a salary, or allowance as a president or director."

This defendant has pleaded such a set-off, and the question is, whether it is a valid defence as pleaded or not?

The set-off is pleaded as follows: That Bowman recovered a judgment against the company, and duly assigned it to Glen, who duly assigned part of the money recovered by the judgment, to the extent of $500, to the defendant, at a date appearing by the pleadings to have been after the commencement of this action, and which sum he claims to set off against the claim of the plaintiff against the defendant.

The defendant also pleads payment of his stock as follows: That at a date appearing to have been after the commencement of this action, one Masson, the assignee of the remainder of the judgment, recovered a judgment against the defendant in respect of his unpaid stock, which recovery against the defendant he paid to and satisfied Masson, who released the company from their liability on the judgment against the company to the extent of the said $500.

The plaintiff says the set-off was without value, and was collusively given to and obtained by the defendant

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to defeat the plaintiff's claim. And as to the recovery by Masson against the defendant, and the payment to Masson, that the recovery was had and the payment made to defeat the plaintiff's claim, and the payment was voluntary and collusive.

The plaintiff also replies an assignment made by the company in January, 1881, before the commencement of this action, to trustees, for the payment of the creditors of the company, including all the unpaid stock of the company; and that such assets and effects are not sufficient to pay the liabilities of the company.

The same question which applies to the set-off as pleaded, applies to the payment as pleaded. The pleas shew the set-off accrued, and that Masson's judgment was recovered against the defendant, and the payment made thereof after the action was brought. I am assuming the pleadings are in proper form to let in a defence accruing during the pendency of the action, as nothing was said upon that subject, and as an amendment would be allowed if the form were objectionable.

There does not seem to be any objection to the defence either as to the set-off or as to the recovery by and payment to Masson, unless it be that the plaintiff had a prior or vested claim or lien upon or against the defendant's unpaid stock by reason of his priority of action. Because as to both set-off and payment, they are based upon an actual, valid, and subsisting claim upon the judgment which Bowman had recovered against the company; and whether he assigned it to Glen, or partly to Masson for value, can be of no consequence, as he had the right to dispose of it or to deal with it as he pleased. And whether Glen got or the defendant gave value to Glen for the assignment of $500, part of that judgment claim, cannot, for the like reason, be of any moment. Nor whether the recovery by Masson against the defendant, and the payment to him will cut out the plaintiff's title to recovery against the defendant or not, so long as Masson gave credit to the company upon the judgment which Bowman held

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against the company, of which in fact Masson was the assignee.

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There is no reason why the whole of Bowman's judgment might not have been divided by gift among many of the shareholders who had not before paid up their stock so far as it would extend, for in each such case the shareholder would, in respect of the gift, be a *bonâ fide* creditor of the company.

The principal question then is, did the plaintiff, by reason of his action against the defendant to recover from the defendant the amount of his unpaid stock, acquire a claim, interest, or lien upon, or against the unpaid stock, so as to preclude the defendant from pleading a set-off acquired or arising to him subsequently to the action, or preclude him from paying voluntarily without action, or by the form of an action, any other creditor of the company, save to bar the plaintiff's recovery.?

In the case of executors the rule was, that if a creditor of the testator commenced an action against the executor, of which action the executor had notice, he could not *voluntarily* pay any other creditor of the testator of equal degree to the prejudice of the testator who had brought his action: *Williams* on Executors, 6th ed., p. 965.

But if a second creditor of equal degree after such first action brought, had brought an action, the executor might have confessed the second action, and even after he had pleaded issuably to the first action, he might have confessed the second action, and upon judgment being entered in that action he might have pleaded such recovery as a defence in and to the first action.

It will make no difference when a judgment has been recovered in the second action upon such confession or preference given to the plaintiff in that action, that the executor knew of the pendency of the first action. For whenever a judgment was recovered, that judgment ranked first in point of preference among all creditors of the like degree with that judgment creditor: *Williams* on Executors, 6th ed., p. 966.

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If a creditor of the deceased sued the executor in equity on behalf of himself and of all other creditors of the deceased, and a decree was obtained for an account and distribution, the power of preference which the executor had at law among creditors of equal degree no longer existed: *Ibid* p. 968. See also *Archbold's* Practice, 11th ed., pp. 907-1220, to the like effect, and the cases of *Prince* v. *Nicholson*, 5 Taunt. 665; *Lyttleton* v. *Cross*, 3 B. & C. 317; and see also *Wolverhampton and Staffordshire Banking Co.* v. *Marston* 7 H. & N. 148.

In the last mentioned case the executrix after the plaintiffs had recovered their judgment, but three days before they had sued out execution upon it against the goods of the testator, made a deed of assignment of all the goods of the testator to the claimants in the interpleader in trust to pay the creditors of the estate.

Pollock, C. B., said that if a debtor in his own right could so assign his property to trustees for the payment of his creditors after a judgment recovered against him, but before execution issued upon it: *Pickstick* v. *Lyster*, 3 M. & S. 371, why may not his personal representative make such an assignment? And he held the assignment of the executrix valid. The other Judges concurred, although it was said the act of the testatrix might amount to a devastavit.

I presume a shareholder may without suit pay his unpaid stock to a judgment creditor of the company after a return of no goods has been made to the execution sued out upon the judgment, and he may pay one such creditor in preference to another.

It may also be that the judgment creditor of the company who first brings his action against a particular shareholder of that company does acquire such a claim, interest or lien upon the stock of that shareholder: that the shareholder cannot with notice of that action *voluntarily* pay any other creditor of the company, who does not sue him, and who although he does sue him has not obtained judgment against him before the creditor who has first

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sued him. It may also be that the judgment first recovered forms the first charge upon that stock. Either that must be the case or he may, as any ordinary debtor may do, pay whichever judgment creditor he pleases, so long as no execution has issued. Or the first execution delivered to the sheriff must attach whatever the order of recovery of the judgments may be.

If the creditor who brings the second action recovers the first judgment, and delivers the first execution to the sheriff, I should say he was entitled to his priority. The shareholder cannot to the second action against him plead the pendency of the first action againt him as a bar. Neither could an executor do so, yet I think after the first action is brought, and he has notice of it, he cannot *voluntarily*, that is. by any means short of a judgment against him, bar any other action against him.

A judgment by default or by confession is not considered to be a voluntary proceeding, for a defendant is not obliged to incur needless costs of defending the action where he has no defence to it.

I am disposed to think the first judgment recovered is as against this special fund the first charge or lien upon it. The company could make no call upon it after that, nor do I think any other creditor could sue the shareholder in respect of it either after such recovery. Although before judgment recovered the shareholder might be prosecuted by many creditors of the company for the same stock, which might not be sufficient to satisfy any one, or more than one of them. Many creditors may take proceedings on behalf of themselves and all the other creditors of the common debtor, but when one of them obtains a decree for administration of the estate, he gets the control of the proceedings for the benefit of all, and the other proceedings are all stayed.

I think a recovery of the first judgment against a shareholder for a sum sufficient to cover the whole of the unpaid stock is and should be a protection to the shareholder against any other proceedings, unless the recovery

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can be impeached on the ground of fraud, in which case as in recoveries against executors, and in other cases if fraud be shewn, the judgment affords no protection.

In this case Masson's judgment was recovered before that of the plaintiff, and has been pleaded as a bar—and I think it is a bar—but payment of it has also been pleaded, and that certainly makes it a good bar. The judgment was, no doubt, allowed by the defendant to be recovered without defence, and to give Masson a preference over the plaintiff. But that, I think, is not objectionable; and it may be a very proper and, perhaps, meritorious proceeding in some cases, so long as it is not prohibited by statute.

The plea of judgment recovered should be entered for the defendant.

If the company had recovered judgment against the defendant for the unpaid stock, I do not think this plaintiff, although the stock was unpaid, could recover another judgment in his own name against the defendant for it. It is said the mere pendancy of another action by a different party upon a bill of exchange is no defence to a second action: *Deuters* v. *Townsend*, 10 Jur. N. S. 1072, 5 B. & S. 613.

This action cannot be likened to a penal action, in which case the one who first sues for the penalty is entitled to his action as against all others.

The plea of set-off, procured by the defendant after action, brought, of part of the judgment which Bowman had recovered against the company, and, for the purpose of giving priority to the defendant over the plaintiff's claim, was a voluntary act of the defendant, and was with notice of the plaintiff's action; and, from what I have already said, it will not defeat the pending action, and is not a good answer to it.

If the set-off had accrued to the defendant in his own right, although after action brought, it would have been otherwise. Upon that part of his defence the finding must be against the defendant.

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It is not necessary to discuss upon what principles the case of *Macbeth* v. *Smart*, 14 Gr. 298, and the other analogous cases referred to, were decided. I am inclined to think it will be found that, so far as they may be supposed to rest upon the application of the winding-up acts to them, they are not sustainable, although they may be maintainable upon other grounds.

The motion of the plaintiff will be dismissed, with costs, and the motion of the defendant will be allowed to enter a verdict and judgment for the defendant upon the issue upon the plea of payment, with costs.

ROSE, J.—I agree that judgment must be entered for the defendant.

Further consideration of *Grissell's Case*, L. R. 1 Ch. 528, makes it clear that no distinction is there made between a creditor who is a stockholder, and a creditor who is not. It was there held that a shareholder who was a creditor was entitled to rank in winding up proceedings upon payment of calls made, but was not obliged to pay up the amount remaining unpaid on his shares. If that is good law it is apparent that a shareholder who is also a creditor is not postponed to other creditors who are not shareholders.

In giving judgment in that case, Lord Chelmsford, Lord Chancellor, says, at p. 535: "There is nothing to be found in it" (the Company's Act) "to limit the meaning of the word 'creditors.' On the contrary, the Act, in various parts of it, recognizes members of the company as creditors." He referred to the 7th clause of the 38th section which provided that nothing due to a member *in his character as member* should come into competition with debts due to outside creditors. Shewing that debts due to members otherwise than as members were left to the rule of law. He also referred to section 101, according to which a shareholder in a limited company is prohibited from setting off a debt due from the company to him against a debt due from him to the com-

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pany. This restriction does not extend to unlimited companies. He proceeds: "The Act would be a complete snare upon members of companies who are creditors if they were to be postponed to other creditors who are not members." He points out the distinction in the Act between limited and unlimited liability companies. In the former no set-off was allowed against calls on stock, otherwise a shareholder who was a creditor to an amount equal to the call made upon him might be paid in full, while other creditors not shareholders would only receive a dividend, but in unlimited liability companies set-off was allowed as it would not prevent the shareholder being called upon from time to time until all the debts were paid in full. Referring to the position of shareholders in limited companies, he adds, at p. 563: "The amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company."

Sir Roundell Palmer, Q. C., illustrates the injustice of a rule which would postpone creditors who were shareholders to creditors who were not, by suggesting a possible case of a shareholder in a limited company in which all the stock was fully paid up, being the owner of one share, and being a creditor for £10,000. It would be manifest that in the event of the company going into liquidation with a deficiency of assets, he never could get a dividend on his debt, because the time would never arise when all the outside creditors would be paid in full.

Looking at section 46 of the Ontario Joint Stock Company's L. P. Act, 1874, we find the liability of a shareholder to the creditors of the company defined, that is to an amount equal to that unpaid thereon. This amount is to be recovered by *action* with costs, "Provided that any shareholder may plead by way of defence, in whole or part, any set-off which he could set up against the company." Stopping here, and endeavouring to ascertain the right of set-off against the company, we do not find any limitation in the Act. We find section 29 providing for calls, section

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31 for enforcement of payment by action, which is in the form of an action for a debt, but no restriction as to set-off or other defence. If the section contained nothing further, we might well assume that the shareholder who is a creditor could set off his debt to the extent of his unpaid stock, and thus defeat the action. The remaining words of the section strengthen the view. They are, "Except a claim for unpaid dividends, or a salary, or allowance as a president or director." These words define an indebtedness which, to use the language in *Grissell's Case*, referring to the 7th clause of section 38 of the Companies Act, may be spoken of as a debt due to a member in his character as member," and is therefore withdrawn from the privilege of set-off. Our Act of 1874 apparently introduces into the charter of a limited company the provision as to set-off found in the charter of an unlimited company in England; and, therefore, as we find in our Act the provisions of the Companies' Act, clause 7, of sec. 38, and sec. 101, so far as it allows, and does not prohibit set-off, and as the company is not in process of winding up under the provisions of any winding-up Act, it seems to me that we may adopt the language of Lord Chelmsford, and say, "There is nothing to be found in the Act to limit the meaning of the word 'creditors.' On the contrary, the Act recognizes members of the company as creditors.

If I happen to be right in the conclusion at which I thus arrive, Mr. Ritchie's main argument fails. I am unable to accede to the argument which he pressed upon us, that the issue of the writ herein gave the plaintiff a lien on the amount then owing by the defendant to the company. If so, it must follow that the defendant could have pleaded in bar to the second action, the issue of the writ in the first. And for this proposition no authority was cited, and no warrant is found in section 46, and it would be contrary to all rules guiding the practice and procedure in other "actions."

It must be remembered that all the statute gives is a

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right of action, subject to be defeated as any other action, save as otherwise provided by section 46. *Cole* v. *Butler*, 43 Maine 401, was cited. The reasoning in that case is hardly consistent with that of *Ingalls* v. *Cole*, 47 Maine 530, 542, cited by Mr. Cassels in support of his contention.

I have not overlooked the reference made by Mr. Ritchie to *McCracken* v. *McIntyre*, 1 Sup. Ct. R., pp. 525, 544, 551. I do not think the dicta there found are inconsistent with the conclusion at which I have arrived, bearing in mind what was then before the Court. The cases referred to by Mr. Justice Henry, of *Watson* v. *Mid Wales R. W. Co.*, L. R. 2 C. P. 593, and *Maynard's Case*, L. R. 9 Ch. 60, do not furnish any authority in the plaintiff's favour.

As to *McGregor* v. *Currie*, 26 C. P. 55, and *Benner* v. *Currie*, 36 U. C. R. 411, 414, it is sufficient to observe that these cases were decided under the provision of 27 & 28 Vic. ch. 23, which did not contain clause 46 of the Act of 1874, where it first appeared.

As to the question of the proceedings being fraudulent and collusive, I remain of the opinion I formed at the trial for the reasons and on the authorities mentioned.

GALT, J., concurred.

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[COMMON PLEAS DIVISION.]

MAUGHAN v. CASCI.

Way—Short Form Act—Continuous easement—Way of necessity—Highway—Statute of Limitations.

S. by his will devised his farm to trustees, who divided up the property into six several parcels, designated parcel 1, parcel 2, &c., according to a plan which was registered, and by contemporaneous conveyances under the Short Form Act, conveyed the parcels to the testators, six surviving children. The description of parcel 2, included the lane in question, described as a right of way, the use of which was thereby reserved to the owners of parcels 4 and 6, to which it was a way of necessity. Parcel 3, which adjoined the way, was conveyed without any mention of the lane. During the unity of title some farm buildings stood upon parcel 3, adjacent to the lane in question, which was used as a means of ingress and egress thereto, but they had long since disappeared. By the Short Form Act, R. S. O. ch. 102, sec. 4, every deed, unless an exception be made therein, shall be held to include all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any wise appertaining or with the same, held, used, occupied, and enjoyed.

Held that the defendant claiming under the grantee of Parcel 3, could not claim a right of way over the lane: that sec. 4 of the Short Form Act could not, under the circumstances, be deemed to apply: that the right of way was not a continuous easement, or way of necessity; and that plaintiff's right thereto was not barred by the Statute of Limitations.

Held also that the defendant as owner of a part of parcel 4, could not claim the right to use the way as appurtenant to parcel 3.

STATEMENT of claim.

1. That the plaintiff was on the 1st of June, 1882, and since is the owner of 30 $\frac{37}{100}$ acres of land in the Township of York, parts of lots Nos. 7 and 8, in the 1st concession from the bay, which is styled on the plan of the subdivision of the estate of the late William Innes Small, filed in the registry office of the County of York as parcel No. 2. The description by metes bounds, so far as material, and the reservation of the right of way are given hereafter.

2. The said way is a private way or lane common only to the owners of the above described lands and of parcels 4 and 6, as shewn on said plan.

3. For a long time prior to the 21st of April, 1883, the defendant had wrongfully claimed to use the said way for his horses, carts, and waggons, on the alleged ground that a registered plan gave him the right to use the same, and the plaintiff had frequently warned him not to use the

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same, and that it was a private way common only to the above mentioned owners.

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4. The defendant has used the said way since the 1st of June, 1882, and has very often cut and broken down and removed a portion of the fence adjoining the said way in order to gain access thereto although warned not to do so.

5. The plaintiff claims damages for the wrong complained of; an order restraining the defendant from any repitition of the acts complained of, and such further relief, &c.

Statement of defence.

1. The roadway shewn on the said plan mentioned in the first paragraph of the statement of claim is a public highway dedicated to public uses, and free and open to the defendant.

2. That even if the said roadway, or any part of it was at any time heretofore vested in the plaintiff, or in any one from whom the plaintiff claims, the plaintiff's right to maintain the action is barred by the Statute of Limitations, the same having been used by the defendant and his predecessors in title without hindrance or molestation for over forty years.

3. The defendant is and was, before the commencement of the action, the owner of part of parcel No. 4 mentioned in the statement of claim, and as such owner was and is entitled to the use and benefit of the said way over which the plaintiff claims to exercise the rights of absolute ownership.

4. The defendant purchased the lands abutting on the said roadway according to a plan made and duly registered by the owners of the lands now claimed by the plaintiff, and the land of the defendant, which said plan shews the said roadway as open.

Joinder.

The action was tried before Osler, J., without a jury, at Toronto Summer Assizes of 1883.

The evidence shewed that the late Charles C. Small was the owner in fee of the whole of the land in question, and

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of other lands adjoining part of the same lots. He laid out, many years before his death, which was in 1862, a way or lane 30 links in width running from the Kingston road in an irregular manner in a northerly direction to the rear of his property. The whole land was used then for agricultural purposes. The site of the way or lane was and is well defined, and was not disputed.

In 1867, the devisees under his will made a partition of the land, according to a plan numbered 282, and deeds for that purpose were executed by the trustees of his will to the six parties, his children, who were entitled to it.

The deeds of partition were respectively dated the 26th of September, 1867, and were made under the Act to facilitate the conveyance of real property.

The description of parcel No. 1, so far as material, is: Commencing at the south-west angle of parcel No. 3, as shewn by the plan of sub-division; thence on a course north 26°, 42″, west 3 chains, 60 links to a stone monument; thence 68°, 51″, west 1 chain, 97 links to a stone monument. The last course along the Kingston Road is 6 chains 20 links more or less to the place of beginning. And it concluded, "reserving therefrom the right of way 30 links wide from the Kingston Road along the east limit, being the lane leading to the bridge crossing the Serpentine, as shewn on the registered plan of the said sub-division."

Parcel No. 2, so far as material, is described as follows: The description begins at the north-west angle of the parcel. The next course is to the north-east angle; the third course is from the north-east angle southerly 32 chains, 40 links, "to a point about midway on the bridge crossing the Serpentine, being the south-west angle of parcel No. 4: thence south 28°, 54′, east 5 chains, 24 links to a stone monument; thence south 68°, 51″, west 1 chain, 67 links to a stone monument, &c., reserving therefrom a right of way 30 links in width, as shewn on said plan of said sub-division through said parcel No. 2 for the use and benefit of the owners of parcels Nos. 4 and 6."

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The following is a combined plan of plans Nos. 282, 496 :

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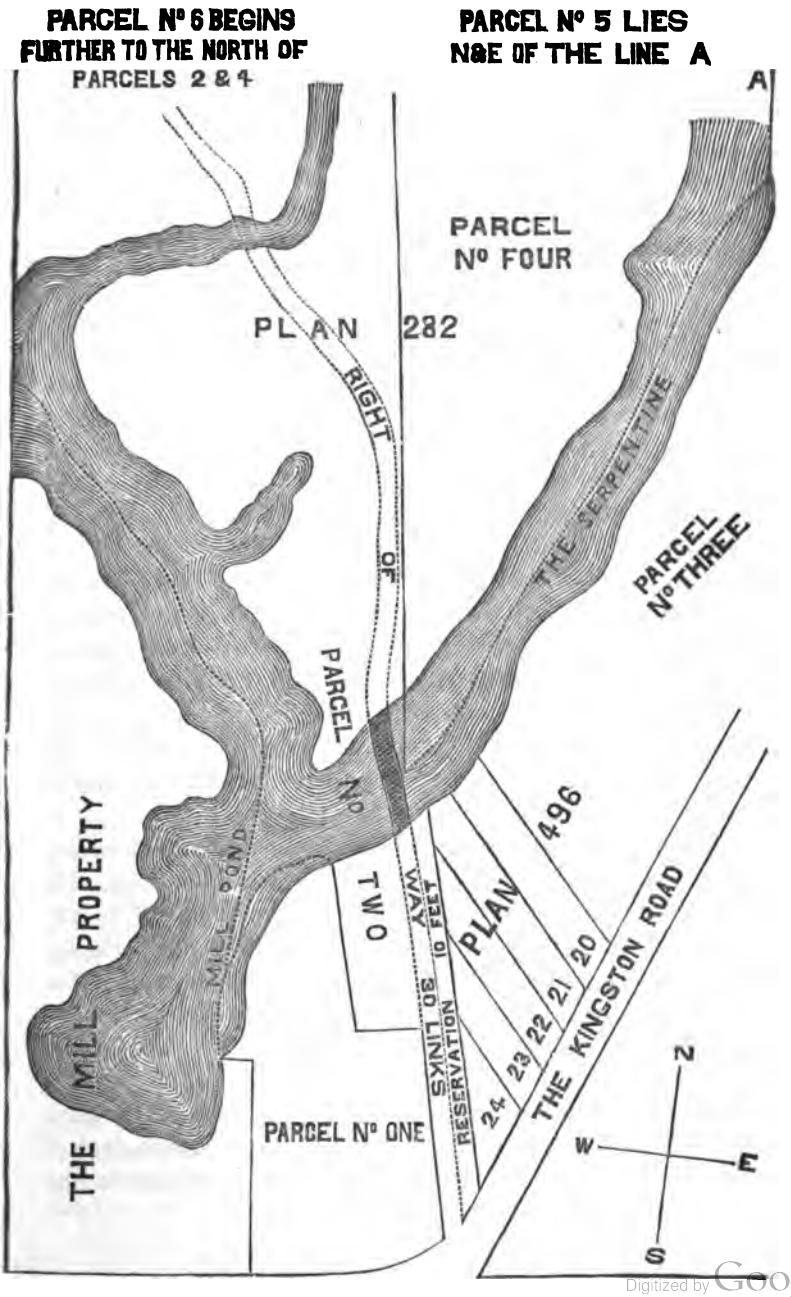

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Parcel No. 3 is described as follows: Commencing at the south-east angle of parcel No. 1, as shewn on the said plan of sub-division; thence north 26°, 42″, west 3 chains 60 links to a stone monument; thence north 28°, 54″, west 5 chains, 24 links to a point about midway on the bridge crossing the Serpentine, as shewn on the said plan; thence, &c., reserving therefrom the land occupied and used as a family vault, with twenty feet of land on all sides thereof, and a right of way from the Kingston Road thereto."

Parcel No. 4 is described as follows, so far as material: The description begins at the north-east angle; the second course from that point south 26°, 58″, east 9 chains, 76 links to a stone monument; thence in a southerly direction, following the centre of the Serpentine to a point about the centre of the bridge crossing the Serpentine. The said point is also the north-west angle of parcel No. 3, as shewn on the said plan of subdivision.

Parcel No. 5 is in no way interested in the right of way.

Parcel No. 6, which is immediately to the north of parcels 2 and 4, and through which the lane or way passes after describing the boundaries of the parcel concluded: "Reserving therefrom a right of way 30 links wide as shewn on said plan of said subdivision for the use and benefit of the owner of the lands situated on the north side of the Grand Trunk Railway, and immediately north of the said parcel No. 6."

John Small who, after the subdivision, acquired parcel No. 3 laid out the part of it upon the Kingston road, and on the 7th of January, 1882, he conveyed lots 16 to 23, both inclusive, to the defendant "as laid out on Berkeley plan of lots, which plan is filed in the registry office for the County of York as plan No. 496, together with the privilege of the water's use fronting on said lots to the centre of the Serpentine, and also with the use of the ten feet reserved on the said plan at the west end of the said lots and lot 24 to the lane." And by a subsequent deed of the 29th of January, 1883, John Small conveyed to the

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defendant "lot No. 37 as laid out on Berkeley plan of the subdivision of parts of lots Nos. 6 and 7, in the 1st concession from the bay, in the Township of York, which plan is registered in the registry office for the County of York, as plan No. 504, together with all the title and interest which the party of the first part has or may have in the right of way 30 links in width running through and between parcels Nos. 1, 2, 3, 4, and 6, as shewn on plan of the subdivision of the late William Innes Small, filed in the registry office of the County of York as plan No. 282, reserving, however, out of the land hereby conveyed a strip two inches in width across the north end thereof. The defendant on several occasions broke down the Plaintiffs fence adjoining the right of way in the pleadings mentioned in assertion of his alleged right to use the way.

The learned Judge delivered the following judgment:—

OSLER, J.—This action was tried before me at the Toronto Summer Sittings, 1883.

The facts are shortly as follows.

The late Charles Coxwell Small died in the year 1862, seized in fee of a farm known as Berkeley Farm, of which he had been the owner, and in the actual use and occupation for a period of forty years, or thereabouts. Leading through this farm, in an irregular direction, northerly from the Kingston Road he had made a way or lane, defined by fences or buildings throughout the greater part of its course and used for the general purposes, and the better enjoyment of the farm. On the east side of the lane, and some four or five chains from the Kingston Road, stables and other farm buildings were erected immediately adjoining the lane, and forming a part of its easterly fence, and access and entrance to which was obtained from the lane.

By his will, Mr. Small devised his farm to certain trustees who held it, in the events which happened, in trust to divide it equally between six surviving children, share and share alike.

In 1867 the beneficiaries determined to make a partition of the farm, and a plan of the intended sub-division was made, dated 24th June, 1867, and registered as No. 282.

There is no evidence of any verbal or written contract or agreement relative to the partition other than the plan and the conveyances by which it was carried out.

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On the plan the farm is divided into six parcels of unequal dimensions described as parcel No. 1, parcel No. 2, etc., and the lane or way referred to is delineated thereon and described as "right of way thirty links wide." It passes through parcel No. 1 immediately adjoining part of the westerly side or limit of parcel No. 3, and through parcel No. 2 into parcel No. 6, adjoining in its course the remaining part of the west side of No. 3, and also part of the west limit of parcel No. 4.

Contemporaneous conveyances of the several parcels, bearing date the 26th September, 1867, and expressed to be made in pursuance of the Act to facilitate the conveyance of real property were then made by the trustees to the respective parties, the lands being described by reference to the plan as parcel 1, parcel 2, &c., and also by metes and bounds according to the courses, distances, and monuments marked thereon, the latter description including in the case of parcels 1, 2, and 6, the land occupied by the lane, with the following reservations respectively: As to parcel No. 1, which was conveyed to Charles C. Small, "Reserving thereupon the right of way 30 links wide from the Kingston road along the east limit (*i. e.*, of parcel 1) by the lane leading to the bridge crossing the Serpentine as shewn on the registered plan." As to parcel 2 conveyed to John Small, and now the property of the plaintiff "reserving thereupon a right of way, thirty links wide as shewn on the said plan of said subdivision through said parcel No. 2, for the use and benefit of parcels 4 and 6." And as to parcel No. 6, which was conveyed to Mrs. Ripley, "reserving thereupon a right of way as shewn on the plan for the use and benefit of the owners of land situate on the north side of the Grand Trunk Railway, and immediately north of parcel No. 6." The lands referred to in this last reservation, formerly constituting part of Berkeley Farm, had been sold, it was said, during the testator's life time. There was no evidence as to the terms or extent of the right of way, if any, granted to the purchasers, but they had always used the lane as their necessary access to the Kingston Road.

Parcel No. 4 was conveyed to Geo. B. Small, and parcel No. 3, of which the defendant's land forms part, to Mrs. Louisa Goldsmith. Neither of these deeds in terms refers to the right of way or lane. The barn, stable, and farm buildings already mentioned were on parcel No. 3, but they have long since disappeared and have never been

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replaced. Parcels 1 and 3 abut, for their whole width, 6 chains 20 links in one case and 34 chains 92 links in the other upon the Kingston road.

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It was not stated whether the deeds of parcels 1, 2, and 6, were executed by the parties. Assuming that they were, the reservations would operate as a newly created easement by the grantees to the grantors: *Goddard* on Easements, 2nd ed., p 100; *Wilson* v. *Gilmer*, 46 U. C. R. 545, 551.

Parcel No. 3 was subsequently acquired by John Small, who subdivided the west part of it into a range of twenty-four building lots fronting on the Kingston road and with the Serpentine in the rear as shewn upon a plan, dated 17th November, 1881, and registered as No. 496.

This plan also shews that a strip of land ten feet in width is reserved between the westerly end or rear of lots 21, 22, 23 and 24, and the extreme west side or limit of parcel No. 3, and therefore immediately adjoining or contiguous to the way shewn on plan 282 from the Kingston road to the Serpentine, the latter being also shewn as a road on plan 496.

It was said that this reservation had been made with the view of widening the lane if the owners of parcels Nos. 1 and 2 would devote a similar strip on the other side for that purpose.

On the 7th January, 1882, Small by a deed expressed to be made in pursuance of the Act respecting short forms of conveyances, conveyed to the defendant lots 16 to 23 inclusive on plan 496, "with the use of the ten feet reserved on the plan at the west end of said lots and lot 24 to the lane."

The defendant afterwards, on several occasions, broke down the plaintiff's fence between the easterly side of parcel No. 2 and the ten feet reserve, in assertion of a right to use the way shewn on plan 282, and this action was brought to recover damages for the alleged trespasses, and to restrain the commission of further acts of a like nature.

The contention raised by the pleadings that this lane or way had become a public highway was not very forcibly urged at the trial.

On the evidence I find, as a fact, that it is not a public highway.

Nor can the defendant maintain any right to use it as being a way of necessity, for his land abuts upon a public highway, the Kingston Road, from which he has free access to every part of it.

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The defendant also relied on the Registry Act, R. S. O. ch. 111, secs. 82, 84, and the Land Surveyors' Act, R.S. O. ch. 146 secs. 70, 72, contending that as plan No. 282 was registered and parcel 3 sold in accordance with or by reference to it, he, as owning land in that parcel, is entitled to the use of all reservations which appear to be laid down thereon for lanes, streets, or right of way. But the provisions of these Acts do not, in my opinion, affect the case or give him by virtue of the registration of the plan more extensive rights than Mrs. Goldsmith, through whom he claims, acquired under the mere conveyance to her of that parcel by reference to that plan.

No allowance for a road is shewn or reserved upon it. What is shewn is distinctly described thereon as a right of way over some one else's land, and the purchaser of No. 3 could not acquire a right to use the way merely because as defined on the plan it adjoined her land: *Bolton* v. *Bolton*, 11 Ch. D. 968,

The case is not like *Rossin* v. *Walker*, 6 Gr. 619; *Cheney* v. *Cameron*, *Ib.* 623, to which I may add *Adams* v. *Loughman*, 39 U. C. R. 247, and others of that class in which it has been held that where building lots have been sold according to a plan, (whether registered or not is immaterial,) the portions of ground laid off as roads cannot afterwards be devoted to other purposes; because the plan only shews a right of way not necessarily appurtenant to parcel 3 or necessary in order to give the purchaser access to it; and also because Mrs. Goldsmith did not take that parcel on the faith of such right of way being appurtenant to it, either from its being described on the plan or otherwise.

From the descriptions I have referred to contained in the contemporaneous conveyances of other parcels, I should infer that the right of way was intended for the use of the owners of parcels Nos. 2, 4 and 6 only, and of owners of land north of the Grand Trunk Railway, and not for the purchasers of Nos. 1 and 3, which abut for their whole width upon the public highway.

As to the effect of a sale according to a plan, see *Squire* v. *Campbell*, 1 My. & Cr. 459; *Breynton* v. *London and North Western R. W. Co.*, 2 C. P. Cooper R. 108; *Randall* v. *Hall*, 4 De.G. Sm. 343; *Morton* v. *Corporation of St. Thomas*, A. R. 323,

A case of *Carey* v. *City of Toronto*, recently decided by

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my brother Ferguson, but not yet reported (*a*), was cited to me on the argument, but without a fuller statement of the facts than I have been furnished with, I do not see that it is in point. If the plaintiff's land there was described in his deed as bounded by a lane of defined width, without more, whether shewn upon a plan or not, and the plaintiff purchased on the faith of the existence of the lane, I can understand that the vendor might not be permitted afterwards, to close it up and say that there was no lane there: *Adams* v. *Loughman*, 39 U. C. R. 247. But that is not this case.

The real question is, whether, apart from the plan, which does not seem to be material, the right of way is appurtenant to parcel No. 3, or available for the owners of land in that parcel.

It is an easement or *quasi* easement which first existed or was created or used during the unity of ownership of the whole farm, and apart from the general words in the deed of the 26th September, 1867, the effect of which I will presently consider, it would not pass by implied grant, from the mere conveyance of parcel No. 3, not being an easement continuous in its nature, or necessary for the convenient and comfortable use of that parcel.

In *Polden* v. *Bastard*, L. R. 1 Q. B. 156, Exch. Ch., Erle, C. J., says, at p. 161: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language, shews an intention that they should pass."

To the same effect is *Pearson* v. *Spencer*, 1 B. & S. 571, 3 B. & S. 761. I refer also to *Harris* v. *Smith*, 40 U. C. R. 33, and in appeal, 50, where the subject is much discussed, and to *Goddard* on Easements, 2nd ed., pp. 89, 98.

In the case of *Ewart* v. *Cochrane*, 7 Jur. N. S. 925, 4 Macq. H. L. 117, upon which the defendant relied, there had been unity of possession of both tenements, but the earlier conveyance was of the *quasi* dominant tenement

(*a*) See note 3 Can. Law Times, p. 406.

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and the *quasi* easement (a drain) was a continuous one, which had been used and was necessary for the comfortable enjoyment of the part of the property first granted. I do not regard that case as decisive of or indeed as affecting the case before me.

It is not necessary to say what decision I should have arrived at upon this question of implied grant if the way, in addition to being defined and precise in its character, had been made and used solely for the purposes of and in connection with parcel No. 3 instead of for the general purposes of the whole farm: *Watts* v. *Kelson*, L. R. 6 Ch. 166, 172, 174; *Langley* v. *Hammond*, L. R. 3 Ex. 161, at p. 170, per Bramwell, B.

But it is also argued that by the terms of the deed, or rather by terms which are to be read into it, the right, to use the way in question passed.

The deed is expressed to be made in pursuance of the Act to facilitate the conveyance of real property, meaning the Act respecting short forms of conveyances: C. S. U. C. ch. 91.

By section 3 of that Act it is enacted that every such deed, unless an exception be specially made therein, shall be held and construed to include all houses, &c., *ways* and easements, and appurtenances whatsoever to the lands therein comprised belonging or in any wise appertaining or *with the same held, used, occupied, and enjoyed*, &c.

The way in question was one which, at the date of the deed, was used and enjoyed in connection with that part of the farm conveyed as parcel No. 3, in going to the farm buildings thereon, and in coming therefrom to the Kingston Road, and other parts of the farm.

In *James* v. *Plant*, 4 C. & E. 749, Tindal, C. J., says, at p. 761: "We agree also in the principle laid down by the Court of Queen's Bench, that, in the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one 'used and enjoyed with the land,' which forms the subject of the conveyance."

Barkshire v. *Grubb*, 18 Ch. D. 616, is the latest case I have seen on the subject. Fry, J., at p. 622, there states the result of the authorities thus: "I think that when there are two adjoining closes, and there exists on one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the

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general words, 'together with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

Watts v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360, are authorities to the same effect.

In *Harris* v. *Smith*, supra, Patterson, J., quotes a number or authorities and deduces the following proposition, *inter alia*, with reference to the point, at p. 61: "But if the intention appears from the deed to extend the meaning of the word appurtenances beyond its technical signification, and to embrace in it the right of way; or if the grant is of all ways 'used and enjoyed' with the lands granted; or if other words are used which are appropriate to indicate an intention to include existing ways in the conveyance, then a defined way actually existing and in use will pass."

Then the cases of *Edinburgh Life Ass. Co.* v. *Barnhart*, 17 C. P. 63, and *Adams* v. *Loughman*, 39 U. C. R. 247, are decisive in the defendant's favour as to the application of the general words imported by the statute into the short form of conveyance.

I think the effect of the deed, read in connection with the Act, was to pass a right of way to the purchaser of No. 3 as such right then existed or was used into, from, and out of that parcel over the way in question, namely, through the barn and buildings which then existed on it near the north-west corner.

No question was raised whether the easement had been extinguished by the subsequent conveyance from Goldsmith to Ripley, the owner of parcel 6, of that part of parcel 3 on which the barns, &c., were erected, or because the latter parcel had been laid out into building lots (see *South Metropolitan Cemetery Co.* v. *Eden*, 16, C. B. 42, 57,) the right of way being one, looking at the user which existed at the time of the grant, for agricultural purposes only. There is no evidence that the property, although subdivided into building lots, is not still practically used for those latter purposes.

Two points were made by Mr. Black which may be noticed, although their decision has become practically unimportant: one, that the action should have been brought by the trustees; and the other that the defendant, as the owner of a part of parcel No. 4, is entitled to use the way from parcel No. 3 to his land in parcel No. 4.

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As to the first, the answer is, that the plaintiff is clearly the owner of the land, subject to the right of way, and is the proper person to test the existence of the right, or to sue for any improper user of it. As to the second the right of way to parcel No. 3, and that to parcel No. 4, are different and independent easements, and the defendant cannot burden the plaintiff's land with the user of a way out of the former into the latter parcel: *Gale* on Easements, p. 557.

For the reasons already given the defendant is entitled to judgment.

During Michaelmas Sittings, *J. E. Robertson* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During the same sittings, November 27, 1883, *Bethune*, Q. C., and *J. E. Robertson* supported the motion. The contemporaneous conveyances, namely, the partition deeds, must be read together, and they expressly declare that the heirs of the late C. C. Small never intended to allow the owners of parcel 3 to use this lane, by limiting the use of it to the owners of parcels 4 and 6. There was no user of the way for the purpose of going to or from any parcels, as separate parcels. It was all one farm. As the deeds are contemporaneous, the intention must be looked at. The intention was clearly to reserve the use of the lane for the owners of parcels 4 and 6 alone. There is no implied burden of the easement in question. During the unity of ownership, no right of way would arise. It is clearly not a way of necessity. If any right of way existed, it has been abandoned. This appears also from a plan filed by Mr. John Small, with ten feet reserved for a lane in rear of the defendant's lots, and from John Small's and Etherington's evidence. There has been an extinquishment by alteration in mode of enjoyment; also by cessation of purpose. There was no user of the lane at the time Small conveyed to the defendant. The evidence shews that the farm buildings had long since disappeared and were never replaced. The rule is, that the surrounding circumstances may be looked at for the

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purpose of determining the subject matter of the grant. The ownership of a lot in parcel 4 cannot give the defendant the right he claims. It was purchased after the trespasses complained of. In any event the right to use it as appurtenant to parcel 4 cannot give the defendant the right to use it as appurtenant to parcel 3. The following cases were referred to *Swanborough* v. *Coventry*, 9 Bing. 305, 309; *Compton* v. *Richards*, 1 Price 27; *Wheldon* v. *Burrows*, 12 Ch. D. 31, 59; *Pyer* v. *Carter*, 1 H. & N. 916; *Dodd* v. *Burchell*, 1 H. & C. 113, 120-1; *Young* v. *Wilson*, 21 Gr. 144; *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761; *Worthington* v. *Gimson*, 2 E. & E. 618; *Ewart* v. *Cochrane*, 1 Jur. N. S. 925, 4 Macq. H. L. 117, 122; *Polden* v. *Bastard*, L. R. 1 Q. B. 156; *Suffield* v. *Brown*, 4 DeG. J. & S. 185; *Crossley* v. *Lightowler*, L. R. 2 Ch. 478; *Watts* v. *Kelson*, L. R. 6 Ch. 166, 171; *Brett* v. *Clowser*, 5 C. P. D. 376, 382, 383; *Kay* v. *Oxley*, L. R. 10 Q. B. 360, 365; *Langley* v. *Hammond*, L. R. 3 Ex. 161; *Harris* v. *Smith*, 40 U. C. R. 33, 50; *Barkshire* v. *Grubb*, 18 Ch. D. 616; *Henning* v. *Burnet*, 8 Ex. 187; *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8; *Castle* v. *Fox*, L. R. 11 Eq. 542; *Mead* v. *Parker*, 15 Am. 110; *Baird* v. *Fortune*, 7 Jur. N. S. 926; *United States* v. *Appleton*, 1 Sumner 492, 500; *Lampman* v. *Milks*, 21 N. Y. 505.

S. H. Blake, Q. C., and *Delamere*, contra. The right to the lane in question passed by virtue of the R. S. O. ch. 102, sec. 4, under the words therein contained, namely, all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any way appertaining, or with the same held, used, occupied or enjoyed. The deed being under the Short Form Act. The evidence shews that the way, at at the date of defendant's deed, had been so used, occupied, and enjoyed for upwards of forty years; and even if the so-called partition deeds are to be read together each one under the Statute must contain a grant to each grantee of a right of way over the lane. Under the Statute it is not essential that the easement should be a way of necessity,

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and therefore if the doctrine of implied reservation be limited to way of necessity as laid down in *Harris* v. *Smith*, 40 U. C. R. 33, 50, and *Wheeldon* v. *Burrows*, 12 Ch. D. 31, 59, it is inapplicable here. The fact of the conveyance to the plaintiff's predecessor in title, covering the lane in question could not take away the defendant's right of user. The defendant also purchased according to a plan, and on the plan the way is set out and clearly defined as a way appurtenant to his lot, and he therefore was entitled to use the way, and his right cannot be defeated by any registered deed which might qualify his right. The defendant also as owner of part of parcel four is entitled to use the way. They also referred to *Gale* on Easements, 5th ed. p. 95 note 102; *Barkshire* v. *Grubb*, 18 Ch. D. 616; *Watts* v. *Kelson*, L. R. 6 Ch. 166, 171, 175; *Wheeldon* v. *Burrows*, 12 Ch. D. 49, 55-8; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Ewart* v. *Cochrane*, 7 Jur. N. S. 925, 4 Macq. H. L. 117; *Edinburgh Life Assurance Co.* v. *Barnhart*, 17 C. P. 63; *Adams* v. *Loughman*, 39 U. C. R. 247; R. S. O. ch. 46 sec. 71, *et seq*; R. S. O. ch. 111, secs. 82-3; *Epsley* v. *Wilkes*, L. R. 7 Ex. 298; *Cousens* v. *Rose*, L. R. 12 Eq. 366; *Goddard* on Easements, 2nd ed., p. 90; *Dart* on V. & P., 3rd ed, 363-4; *United Land Co.* v. *Great Eastern R. W. Co.*, L. R. 17 Eq. 158.

March 7, 1884. WILSON, C. J.—The first thing to be determined is what the deeds say.

Parcel No. 1 commences at the south west angle of parcel No. 3 as shewn by the plan, and parcel No. 3 commences at the south east angle of parcel No. 1, as shewn on the plan. So far that shews nothing which is very certain. Then parcel No. 1 from that point runs north 26° 42′, west 3 chains 60 links to a stone monument, and parcel No. 3, is described in the like manner. Now upon the plan there is a stone monument shewn, upon the easterly side line of the lane just on that course, and at that distance from the point of the easterly side line of the lane where that line meets the northerly side of the Kingston Road. The starting

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point of parcels Nos. 1 and 3, that is, the south east angle of 1, and the south west angle of No. 3, is therefore at that point on the Kingston Road which is touched by the easterly side line of the lane. So that the lane is included in the description of Parcel No. 1, and is excluded from the description of parcel No. 3.

The second course of No. 1 proves the same thing, for it is: thence 68° 51′ west, 1 chain 97 links to a stone monument, and there is that monument shewn on the plan just at that distance, and on that course from the first mentioned stone monument on the *east* side line of the lane.

The description is therefore plainly along the *east* side line of the lane.

The second course of parcel No. 3 also proves that, for it is from the end of the first limit, then north 28° 54′, west 5 chains 24 links to a point about midway on the bridge crossing the Serpentine as shewn on the plan, that is manifestly keeping still upon the east side line of the lane.

The east limit of No. 1 is from west to east along the north side of the Kingston Road, 6 chains 20 links, more or less to the place of beginning, so that the southerly part of the lane as far northerly as the limit of No. 1 extends, is included within the description of No. 1, and it is just as plainly not included within the description of No. 3.

Then the *reservation* in the conveyance of No. 1, is of "the right of way" 30 links wide from the Kingston Road *along the east limit* being the lane leading to the bridge crossing the Serpentine as shewn on the registered plan of sub-division. While in No. 3 there is no such reservation, but a reservation of the family vault upon a different part of the property.

The second course in the description of No. 3 is to a point about the centre of the bridge, that line being as before stated necessarily on the *east* side line of the lane.

The second course of parcel No. 2 is southerly along the same line, and to the same point about midway on the bridge, and which point is described to be the south west angle of parcel No. 4. Now that point at the centre of the

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bridge in the description of parcel No. 4, is described to be also the north west angle of parcel No. 3, as shewn on the plan of sub-division. And looking at the plan, which is so important a part of all these conveyances, it is quite clear that the south west angle of No. 4 is upon a continuation of the *east* side line of the lane, and is the converging point where parcels Nos. 2, 3, and 4 meet.

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Then the third course of parcel No. 2 is from the point at the centre of the bridge southerly along the same line 5 chains 24 links, to the stone monument on the east side of the lane at which the course of the description of No. 3 terminates.

The description of parcel No. 2, plainly includes the lane from the most south easterly point of No. 2, which is at the distance of 3 chains 60 links the most north easterly point of parcel No. 1, that last distance being measured from the north side of the Kingston Road.

The *reservation* contained in parcel No. 2 is "reserving therefrom a right of way 30 links in width, *as shewn on said plan through said parcel No. 2*, for the use and benefit of the owners of parcels Nos. 4 and 6."

Then parcel No. 6 has reserved from it the right of way "for the use and benefit of the owners of the lands situated on the north side of the Grand Trunk Railway, and immediately north of the said parcel No. 6."

So far as the conveyances shew it appears parcel No. 1 by metes and bounds includes the lane from the Kingston Road, so far as the easterly limit of that parcel extends, that is, for the distance of 3 chains 60 links reserving thereout the right of way. Parcel No. 2, includes by metes and bounds the lane from that north east angle of No. 1 all the way "through said parcel No. 2," for the use of parcels No. 4 and 6, for all that distance the lane is wholly upon No. 2. And parcel No. 6 includes the lane, but the right of way is reserved for those upon the same township lot, who are north of the Grand Trunk Railway.

The owners of parcels Nos. 1, 2, and 6 own the fee simple of the roadway; the right of way being reserved by the

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grantors of these parcels in the partition deeds which they executed for the use of 1, 2, 4, 6, and those who are north of the Grand Trunk Railway. Parcels Nos. 3 and 5, have no kind of share or interest in that lane so far as the conveyances are expressed.

The learned Judge has found that the way in question, from the Kingston Road northerly for a considerable distance, and far beyond the place in question, was a well defined ancient way for a period of 40 years at least, marked by fences and other indications.

It was also found as a fact, that the occupiers of parcels 1 and 3 had no way or claim of necessity, as their lands are not of any great depth, and they have access to their lands along the whole of their properties, which have respectively long frontages upon the public highway of the Kingston Road.

The conveyances shew that Charles C. Small, the then owner in fee of the whole of the parcels already named, devised the whole of these lands to trustees in fee, to have and to hold the rents, issues and profits thereof, and apply the same for the benefit of his son, William Innes Small, for his natural life, and in the event of his son dying, leaving a child or children him surviving, then to convey the said land to such child or children, if more than one, in equal shares, his, her, and their heirs and assigns; and in the event of his son dying without leaving a child or children, him surviving then to divide the same amongst such of the testator's other children as should then be living; his, her, and their heirs and assigns, share and share alike.

William Innes Small died after the testator, unmarried, and without leaving any child or children. And the deeds of partition were made contemporaneously to the testator's six surviving children, in parcels respectively as before stated.

Up to the time of the making of these deeds, on the 26th of September, 1867, the whole of these parcels was held by unity of title.

These deeds having been made at the same time, must

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be considered and read as one single transaction: *Swanborough* v. *Coventry*, 9 Bing. 305; and the cases there cited and referred to with approval in *Wheeldon* v. *Burrows*, 12 Ch. D. 31. at p. 59; *James* v. *Plant*, 4 A. & E., at p. 759.

In the present case the owner of parcel No. 3, accepted of that parcel without any mention of right of way over the land and assented to the grant of the fee simple of the roadway being made to the parties who received conveyances of parcels Nos. 1, 2 and 6, and of a right of way being expressly granted only to the owners of parcels 4 and 6, and to the owners north of parcel 6, and north of the Grand Trunk Railway.

The provision as to the right of way to the grantees of parcels 4 and 6, is contained in the conveyance to the grantee of parcel No. 2, and is strictly a way of necessity to them. Can the grantee of parcel No. 3, or the defendant who claims under such grantee, claim a right of way over the lane, the fee in which is vested in the plaintiff as owner of parcel No. 2, when that parcel was subjected by the grantors only and expressly to a right of way in favour of the owner of parcels Nos. 4 and 6? That is, can such claim be made under the R. S. O. ch. 102, sec. 4, which enacts that, "every such deed" [made under that Act] "*unless an exception is specially made therein*, shall be held and construed to include all * * ways, * * liberties, privileges, easements, * * and appurtenances whatsoever to the lands belonging or in anywise appertaining, or with the same, held, used, occupied, and enjoyed, or taken or known as part or parcel thereof?"

If the grantors cannot derogate from their grant, and claim a right of way themselves over the way which runs through parcel No. 2, in respect of their ownership of some parcel of land abutting upon the part which they held in their own right, or could burden parcel No. 2 with any other servitude than that reserved for or granted to the owner of Nos. 4 and 6, neither can the owner of parcel No. 3, who acquired title at the same time, and as part of the one transaction and conveyance from the same owner;

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according to the case of *Swanborough* v. *Coventry*, 9 Bing. 305, before mentioned.

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And I think in this case the R. S. O. ch. 102, sec. 4, does not apply because there has been in effect "an exception specially made in the conveyance" to the grantee of parcel No. 3, of any right of way over the lane which runs through parcel No. 2, by reason of the special servitude which that parcel has been subjected to in favour of the grantees of parcels No. 4 and 6, with the knowledge and assent of the grantee of No. 3.

It appears to me the grantee of parcel No. 3 cannot make such a claim. The grantor could not claim such a right of way without an express reservation, for no reservation will be implied in his favour, but when the easement is one of necessity: *Harris* v. *Smith*, 40 U. C. R 33; *Wheeldon* v. *Burrows*, 12 Ch. D. at p. 50, *et seq.*; and the cases there cited. And the right of way here is not one of necessity, and it is not even a continuous easement: *Harris* v. *Smith*, 40 U. C. R. 33, 61, *et seq.* and cases cited: *Barkshire* v. *Grubb*, 18 Ch. D. 616, at p. 619; *Watts* v. *Kelson*, L. R. 6 Ch. 166.

If this defendant have the right of way in respect of his being an owner of part of parcel No. 4, he cannot exercise that right for the purpose of any part of parcel No. 3 *Henning* v. *Burnet*, 8 Ex. 187.

I am of opinion the conveyances shew the owner of parcel No. 3 upon, and by the deeds of partition which must be construed as all forming in effect, one conveyance did not by the terms of these conveyances, or by any of them obtain a grant of the right of way in question, and also that looking at the deeds of partition as being all one transaction the grantee of parcel No. 3 did not acquire by the operation of the R. S. O. ch. 102, sec. 4, any right of way over the lane in question.

I agree with the learned Judge in holding that the way was not, and is not a public highway; and that the right of the plaintiff to preserve the roadway has not been barred by the Statute of Limitations, and the finding is

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therefore against the defendant on the first and second paragraphs of his statement of defence.

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The third paragraph of the statement of defence claiming the right to use the way as owner of parcel No. 4, must be found against the defendant. That third paragraph is very defective, for it does not aver the defendant was such part owner of No. 4 at the times when the acts of trespass were committed, nor does it allege the said acts were committed in the assertion of his rights as such part owner, and for the necessary use and enjoyment of the part of No. 4 of which he was owner. If the third paragraph means all that, there is a perfect issue joined. If it do not, it is demurrable, or it should be struck out as insufficient, and leading to nothing definite.

In the first place it is not true, if it is to be assumed as averring, that the defendant was part owner at the times when, &c., because the trespasses were committed in August and September, 1882, and the defendant did not become part owner of No. 4 until January 1883. And in the second place, it is not true the defendant committed the trespasses in assertion of his rights as part owner of No. 4, because the trespasses were committed opposite parcel No. 3, and had no connection with any part of parcel No. 4. If that paragraph means what I have stated, it was plainly disproved at the trial. If it do not mean that, the defendant cannot have judgment upon it, because, even although true, he cannot get judgment upon it, so long as the facts proved are not sufficient in law to entitle him to judgment: O. J. Act, sec. 44.

In my opinion the third paragraph is bad in law, and would warrant a judgment on that ground being given against its sufficiency.

Then as to the fourth paragraph of the statement of defence. If it relate to the same part of parcel No. 4 which is mentioned in the third paragraph, it must fall with that paragraph; but if it mean, as it is said it does, and was intended to do, under the term, "the defendant purchased *the lands abutting on said roadway according*

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to a plan, etc.," to refer to a part of parcel No. 3, or to *any* land, or to *certain* land, *abutting on the roadway*, then the land the defendant purchased may be sufficiently identified. But if it be, what is the meaning of that paragraph? The paragraph is, that the defendant purchased this land abutting on the roadway according to the plan, "and which plan shews the said roadway as open." And that is the issue tendered. But what of it that the defendant bought land abutting on a roadway according to a plan, and what of it that the plan shewed the roadway as open?

It can make no difference whether the plan shews the roadway as open or closed. If the defendant have no interest in the roadway, and he does not say he has, and the fact of his land abutting upon the roadway does not of itself give him a right of way over it. Besides the plan, whatever it shews as to the roadway being open, is not conclusive of the fact that it was open or should be open.

But what does the defendant mean by saying the plan shews the roadway as open? Open in what way? Along the land of the defendant abutting upon it, or open at the termini? I should say the defendant means the former, that is, that his land abuts upon an open roadway. If so, the plan does not shew that, but the contrary. But if the roadway be open abutting on the defendants land, what difference can it be to him that it is open, if he have not the right of user of it; or what is there to prevent the party or parties having the freehold of the roadway from fencing it off as against the defendant whose land merely abuts upon it? That issue, so far as it is material, must be entered against the defendant, for a person may have a right of way over his neighbour's open field, and yet be limited to a particular part of it.

The result is, that all the issues must be entered in favour of the plaintiff. The statement of defence being disproved, and the statement of claim proved.

Upon the issues and pleading as they are now, there is no ground on which the defendant can set up a right of way by virtue or aid of the statute: not on the first and

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second paragraphs of the statement of defence, because the roadway is not a highway, nor is the plaintiff's right barred to maintain his action by reason of the long user of it by the defendant and his predecessors in title. Nor to the third paragraph, for that relates to part of parcel No. 4, to which the defendant had no title at the times when, &c. Nor to the fourth paragraph, for that sets up no right of way excepting that his land abuts upon it, which means nothing but the mere fact that the land does abut upon it.

The motion of the plaintiff must therefore be allowed and the verdict and judgment rendered for the defendant be set aside, and entered for the plaintiff with the $25 damages, and the costs of the action and of his motion; and that the defendant be, and he is hereby enjoined from trespassing on the land in question in this cause.

GALT, J., concurred (*a*).

(*a*) This case was argued before WILSON, C. J., and GALT, J., OSLER, J., having been appointed a Judge of the Court of Appeal, and the vacancy not having been then filled.

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[COMMON PLEAS DIVISION.]

MURPHY V. DALTON.

Clearing land—Fire—Sudden rising of wind—Negligence.

The defendant for the purpose of clearing his land, set out fire on the same, but before doing so consulted with the plaintiff, who had some lumber piled on an adjoining lot, and who agreed that the weather was favourable, the wind blowing in a direction away from the plaintiffs property, and to prevent it spreading thereto, the defendant burnt up the stubble etc. around the plaintiff's property. The fire was set out on Monday, the wind continuing in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep watch over the fire. On Thursday morning there were indications of a change of wind, and the defendant sent his son to watch the fire, but when the latter arrived on the ground the wind was blowing a heavy gale, at the rate of from thirty-five to forty miles an hour, and the fire communicated to the plaintiff's property, which was destroyed, and it appeared that even if the defendant had been watching he could not have prevented the fire spreading.

Held that the defendant was not liable for the damage sustained by the plaintiff.

THIS was an action for negligently setting out fire for the purposes of cultivation.

The cause was tried before Osler, J., without a jury, at Goderich, at the Fall Assizes of 1883.

The facts are fully stated in the judgment of the learned Judge at the trial, and of this Court.

The following is the judgment of the learned Judge:

OSLER, J.—Neither in the time or the manner of setting out the fire can there be said to have been any negligence on the defendant's part, and I find as a fact that it was done for a proper purpose, that of clearing the land, at a proper time and in a proper manner.

It is for the plaintiff to prove the existence of negligence causing or conducing to the damage.

The fire was set out on the Monday, the wind then blowing in a direction away from the plaintiff's property. It continued so during Tuesday and Wednesday, and in the interval there had been more than one fall of rain. On the Monday evening the defendant was at the fire with an assistant directing and setting it out in proper places. So long as the wind continued in the direction spoken of, there was no reason that I am aware of to apprehend danger to the mill premises, on the other side of which the plaintiff's lumber was piled. On Thursday morning

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there were indications of a change in the direction of the wind, and the defendant sent his son to watch the fire. By the time he arrived the wind was blowing a gale at the rate of 35 to 40 miles an hour (according to the evidence of a light-house keeper, Macdonald); and the chips, slabs, and rubbish on the mill premises had caught fire, speedily extending to the mill, and thence to the plaintiff's lumber.

It is charged against the defendant that he was not watching the fire, but this fact alone is not enough, in my opinion, to prove negligence, in the absence of evidence that the presence of a watchman would have prevented the injury. The evidence, as it seems to me, is rather the other way, and leads me to the conclusion that the fire originated in the sudden rising of a violent wind, carrying sparks from a distance to the mill premises.

There was a fallow on part of the defendant's land, over which the fire had burnt, next adjoining the mill premises (a parcel of three acres). One of the plaintiff's witnesses said there did not seem to be much fire there on Wednesday. What there was he thought was eating in logs and hollows. He thought the brush heaps had burnt up by that time.

It was urged that there was negligence in not seeing that all the inflammable material lying between the place where the fire was more actively burning and the mill premises was guarded or burnt up before permitting the fire to extend further; but was there any reason to believe that there was anything remaining in the fallow near enough, or in sufficient quantity, to be cause of danger? There is no evidence in fact that the fire which caused the damage came from there, or that there was any fire already burning in the fallow on the Thursday; and it is much more probable that it came, carried on the wind in the shape of sparks or small pieces of burning brush, from beyond the fallow.

In short, I think the evidence does not go far enough to establish negligence as the *causâ causans*, and therefore the plaintiff fails.

I assess the damages, in case the Court may think otherwise, thus:

The property destroyed consisted of sawn lumber:

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Ash, 16,017 feet,	at not more than	$15	per	M,	$240
Cherry, 692 feet,	at	27	"	"	14
Butternut, 1124	feet, at	27	"	"	27
Basswood, 2210	" "	9	"	"	18
Elm, 1580	" "	12	"	"	14
Hemlock, 2417	" "	5	"	"	12
					$325

Some deduction should be made for culling (as one of the witnesses said) and possible mistake or exaggeration of price. I think $300, under all the circumstances, would not be unreasonable.

As to costs, I make no order.

I refer to *Dean* v. *McCarty*, 2 U. C. R. 448; *Buchanan* v. *Young*, 23 C. P. 101; *Furlong* v. *Carroll*, 7 A. R. 145; *Henery* v. *Nourse*, 54 Maine 256; *Calkins* v. *Barger*, 44 Barb. 424; *Stewart* v. *Harding*, 22 Barb. 619.

At the Michaelmas Sittings *Osler*, Q. C., moved to set aside the judgment for the defendant, and enter judgment for the plaintiff for $300, as assessed by the learned Judge.

During Hilary Term, February 11, 1884, *Osler*, Q.C., supported the motion. There was negligence in the management of the fire. The defendant should have watched it, and have seen that it did not spread. There was negligence also in the setting out of the fire. All the rubbish in the direction of the mill should have been cleared away so that the fire could not spread there. He referred to *Jaffrey* v. *Toronto, Grey, and Bruce R. W. Co.*, 24 C. P. 271; *Dean* v. *McCarty*, 2 U. C. R. 448; *Johnston* v. *Hastie*, 39 U. C. R. 232; *Furlong* v. *Carroll*, 7. A. R. 145; *Holmes* v. *Midland R. W. Co.*, 35 U. C. R. 253.

Falconbridge, contra. The findings of the learned Judge are borne out by the evidence. There was clearly no negligence in setting out the fire. The evidence shews that the defendant, in setting it out, burnt up all the inflammable material, adjoining the mill, which would be likely to cause the fire to spread. In fact, the fire, in the direction in which it was burning, of itself caused all the intervening brush to be burnt up. Then, as to watching the

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fire, the evidence shews that the defendant did keep a sufficient watch on it. It must be taken into consideration that it rained in the interval between the setting out of the fire and the time when the plaintiff's lumber was destroyed, and at that time the wind was blowing away from the plaintiff's property. The cause of the damage was the sudden rising of the wind, and the defendant had no reason to apprehend its so rising. The evidence shews that even if a man had been watching at that time he could not have prevented its extending to the plaintiff's property: *Furlong* v. *Carroll*, 7 A. R. 145, where all the previous cases are collected. See also *Stewart* v. *Harding*, 22 Barb. 619; *Henry* v. *Nourse*, 54 Maine 256; *Shearman* and *Redfield* on Negligence, 3rd ed., sec. 329.

March 7, 1884. ROSE, J.—The facts, so far as material, are as follows: The defendant, on Monday, the 11th of September, 1882, being desirous of clearing his farm, the south half of Lot 1, in the Western Division of Ashfield, consulted the plaintiff, an adjoining proprietor on the east, as to the advisability of setting out fire on that day, the wind then blowing from the east. There was a three-acre lot taken off the south-east corner of the defendant's lot on which was erected a saw-mill, and adjoining the saw-mill the plaintiff had a quantity of lumber piled. The plaintiff had no interest in the saw-mill. The parties agreed that it was a favourable day. The plaintiff says that he told defendant it would be necessary to watch the fire, as he, plaintiff, was going away from his place for a few days, and defendant promised to do so. This the defendant denied.

On that day, in the afternoon, the defendant's two sons, and one Richard Jewell set out the fire, starting it in several places to the north and west of the mill premises, so as to burn up every thing that might occasion danger from the fire burning against the wind, and from a change of wind. I think the fair inference, from the evidence, is that all the brush immediately north and west of the mill lot

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was burnt up in this way. The fire continued burning on Tuesday, Wednesday, and Thursday, until about 10 A. M. with the wind blowing from the east. Wednesday was damp and showery, and on Wednesday morning rain fell for about two hours. The defendant did not give much attention to the fire after Monday evening, thinking there was no danger, as the fire had been burning northward and westward, away from the mill, and every thing having been consumed from which danger could have been apprehended.

I come to the conclusion, from the evidence, that on Thursday morning there was no fire burning near the mill premises except in some logs that had been set on fire, and had not been entirely consumed. The defendant says that he did not deem it necessary to watch the fire on Wednesday, owing to the rain, and the wind continuing to blow from the east.

The defendant gave this evidence: "I burned every thing that was considered dangerous to the mill in case there would be a change in the wind * * * I left my son on the ground still burning and watching. It took from then until about dark until I got back to the fire. Then I remained myself about an hour and a half * * * and I remained there between half an hour and three-quarters after examining the fire, and saw there was no danger, and we came to the conclusion it was useless to stop there when the fire had been extinguished * * * I left for home about nine that evening * * * It" the wind, "continued east till Thursday at ten o'clock. On Tuesday I was bound I would watch what point the wind came from. It was straight east on Tuesday. In the afternoon I sent him" my son, "up to see if there was any danger around the mill. Then on Wednesday the wind was from the same point still. There was a shower of rain in the morning, and I thought it was useless to send anybody up, owing to the burning that it got before this; but I was well aware that there was no danger on Wednesday after this shower of rain * * * Then, on

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Thursday, about 10 o'clock, we were working down at the lower end of the clearing, at home, and I noticed the wind changed to the north about ten o'clock, so I told my son to get on a horse and go up to the mill, and accordingly he did so, and then what occurred afterwards I cannot tell. Then, after that, between ten and eleven o'clock, it turned around to the west. * * * It blew strong when it turned to the west, but not so strong when it turned to the south. It changed to the west about half-past ten. * * * I remember it being the day the "Asia" was lost. That was one of the strongest gales we have had for years. I had not the slightest idea there was danger, because I had stuff there myself. I did not think the fire would reverse after going through the first time. * * The fire had not extended east at all from where we put it. * * We set out all the fire north of the mill. I set every thing that was north and west of the mill."

Richard Jewell says: "The ground was not overly dry at that time. * * There was considerable brush lying about. * * The idea was to burn it out while the wind was favourable. * * I did not think there would be any more danger when I left. * * Well, there were some old logs there, but I would not have considered they were dangerous if the wind had not got up a heavy gale, and came back over them again."

Cornelius Dalton: Q. Then, on Wednesday did you go over there? A. Yes. Q. How was the wind when you started from home? A. It was rather from the south east. Q. Did it begin to blow a little more than it had been? A. Yes, a little more than there had been the days before. When I got about half-way I noticed that the wind changed to the west, and blew up a strong gale all on a sudden. When I found it changed to the west, I went as quick as I could. I was driving a horse, and when I got up there, there was fire all around the mill in hemlock logs and in all the old bark, and all the dust around the mill was on fire. * * I worked at it for a while, trying to quench it, but I saw it was no use * *

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The fire had not reached the timber-pile when I got there. The fire was around to the south of the mill. The fire came in from the west, and was south of the mill, and was in the saw-dust and logs and old bark. It was into four or five logs right there. * * The logs were all on fire between the boundary of the mill and the new fallow (*i. e.* the defendant's, to the west). * * I got up there about half-past eleven."

It appears from defendant's evidence that his house was about 3½ or 4 miles from the mill. The mill and lumber were burned up. The light-house keeper at Goderich, a few miles distant, testified that the wind blew at the rate of from 35 to 40 miles an hour from the westward, which he called "a heavy storm," and that the wind changed about ten o'clock Thursday morning, and was blowing from the west at noon.

One Daniel Keep gave evidence that when the wind sprang up he, with others, were threshing with a machine, and between ten and eleven, as nearly as he could state, "the machine had to stop on account of the heavy gale from the west, and we had to erect temporary barricades to protect the belt. It was a very heavy gale, blowing furiously at the time."

One Thomas Hussey gave evidence to the effect, that on Thursday, about noon, after the wind changed, he had a notion to go and see about some logs he had at the mill, "but considering that the weather was damp for two days before, he thought he would not go, as he thought there was no danger.

The learned Judge, at the close of the case, reserved judgment to enable him to re-consider the authorities cited, but expressed an opinion that the fire was occasioned by the sudden rising of the wind, and that the plaintiff would probably have to shew more than he had shewn to entitle him to recover. Afterwards the learned Judge delivered a carefully-considered judgment, finding for the defendant, and assessing damages in case of reversal of his judgment at $300.

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The result of the cases, as I gather it, is this: That in this country a man has the right, in the ordinary course of cultivation, to set fire to brush, logs, &c. That he must not do so in a negligent manner, that is, by setting it out at a dangerous time, *i. e.*, when a high wind is blowing towards his neighbour in an extraordinarily dry season. (Per Hagarty, C. J., in *Jaffrey* v. *Toronto, Grey and Bruce R. W. Co.*, 24 C. P. 271 at p. 291.) Nor must he be guilty of negligence in not watching the fire with reasonable care. That he is not bound to anticipate the sudden rising of the wind, and, in consequence, to take extraordinary care to prevent the spread of the fire: *Buchanan* v. *Young*, 23 C. P. 101, 105-6. That having the right to have the fire on his premises, he is only bound to use his best endeavours to prevent its spreading, and is not responsible if in so doing he fails: *Furlong* v. *Carroll*, 7 A. R. 145 at p. 161, citing *Dean* v. *McCarty*, 2 U. C. R. 448. That the damage or accident having been occasioned by a *vis major*, is the same as if by the unlawful act of a stranger, that is, if a stranger had carried the fire from the defendant's premises to the plaintiff's: *Box* v. *Jubb*, 4 Ex. D. 77, 79. And that even if the defendant was negligent in setting out or in not watching, or otherwise, he will not be responsible unless the damage is caused by such negligence. See *Skelton* v. *Thompson*, 3 O. R. 11, where the Court held that, though the defendants had wrongfully permitted the water from the roof to be discharged upon the sidewalk, they were not responsible, as the accident or damage was caused not by the wrongful act, but by the freezing of the water upon the sidewalk, which the jury found the defendants were not guilty of any unreasonable delay in removing.

I understand, also, the rule which should govern an Appellate Judge is, that where he gravely doubts he is to affirm, or, as it is otherwise put; "To gravely doubt is to affirm;" by which I understand that if I interfere with the finding of the learned Judge in this case, I must not only gravely doubt its correctness, but clearly conclude it is

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erroneous. This I am unable to do. I think had I been Judge of first instance I should have found for the defendant. I do not believe, on the evidence, he was guilty of negligence in setting out the fire, nor that, *under the peculiar circumstances of this case*, he was negligent in not watching it on Thursday before a change of wind, that is, in view of the fire having burned on Monday from north to west, until everything dangerous had been consumed, and in view of the rain of Wednesday. Nor do I think that if he had a watcher there he could have saved the lumber from destruction in view of the very sudden and severe gale; nor that he could reasonably have supposed that the fire would be carried from the burning logs, if indeed it was so carried; and if it was not so carried, then that the fire would have been carried from the burning brush-heaps at a distance from which it more probably spread.

If a jury had found for the defendant on this evidence, it seems to me I could not have interfered.

To use language with which we have become familiar, I think the decision of the learned Judge is entitled to be treated with the same respect as that of an intelligent jury.

The plaintiff complains that the fire was not well set out: that if it had been set out with more care there would have been nothing to burn when the wind changed. There is no evidence that the fire spread from any brush that caught fire when the wind changed. The inference would be to the contrary, from the shortness of the time between the change of the wind and the burning of the mill. The witness Johnson, called by the plaintiff, probably gave a more accurate account of the condition of the ground than the plaintiff.

In my opinion the motion must be discharged, with costs.

WILSON, C. J., and GALT, J., concurred.

Motion dismissed.

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[COMMON PLEAS DIVISION.]

Re Watson v. Northern Railway Company.

Railway—Compulsory powers—Land—Material.

The Northern Railway Company of Canada have no power to take land compulsorily under sec. 7, sub-sec. 2, or sec. 9, sub-sec. 10, of the Railway Act of 1868, incorporated in their special Act 38 Vic. ch. 65 D., for the purpose only of obtaining therefrom gravel or other material for the repair or maintenance of their road, because these sections do not confer compulsory powers to take land

Nor have they such powers under sec. 9, sub-secs. 38 and 39 of the Railway Act of 1879, because that Act does not apply to their railway.

Semble, even if compulsory powers are conferred by sec. 9, sub-sec. 10 (1868) the powers are to take materials only, not the land itself, as was attempted in this case.

Hodgins, Q. C., moved on notice for a writ of Prohibition restraining the Judge of the County Court of the county of York from granting or issuing a warrant of possession to the sheriff of that county, commanding said sheriff to put the Northern Railway Company of Canada in possession of certain lands of one James Watson, being part of the west half of lot 23, in the 3rd concession of the township of Vaughan, and containing $2^{70}/_{100}$ acres more fully described in the notice of arbitration dated the 1st day of June, 1882, served by the railway company on said Watson

D'Arcy Boulton, Q. C., contra.

August 22, 1882 (*a*). Osler, J.—The question is, whether the Northern Railway Company are entitled to take land compulsorily and without the consent of the owner for the purpose only of obtaining therefrom gravel or other material for the repair or maintenance of their road.

The facts are as follows: On the 1st June, 1882, the railway company served on the applicant a notice that they required the lands in question "for the purposes of their railway," and tendered as compensation therefor the sum of $300, appointing one R. T. Banting as their arbitrator if their offer was not accepted.

(*a*) This case was to have been reported in the Practice Reports, and was only recently handed to the reporter of the C. P. D.

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The offer was not accepted, and the applicant appointed an arbitrator under protest, contending that the company had no authority to acquire the lands compulsorily.

The company then gave notice that they would apply to the County Judge for a warrant for the immediate possession of the land and premises described in their notice, in pursuance of sec. 28 of the Northern Railway Company Act, 1875. It was sworn and not denied that the land was not required for any of the purposes mentioned in sec. 9 of the Railway Act, 1868, which defines the lands which may be taken for the purposes of the railway without the consent of the proprietor: that it was no part of the track of the railway, and was about one-third of a mile therefrom, and about half a mile from the nearest station: that it was not required for off-sets or sidings, or for the erection of fixtures, or the delivery of goods, but that the company required and claimed a right to take it for the purpose of obtaining gravel and material therefrom, for the construction, maintenance and repair of their track, and for no other purpose. The company rely upon sec. 7, sub-sec. 2, of "The Railway Act, 1868," or upon sec. 9, sub-secs. 38 and 39 of the Consolidated Railway Act, 1879, either of which, as they contend, give them the right to acquire the land in question. The applicant denies that the right exists under either Act—under the former because sec. 7, sub-sec. 2 only enables the company to purchase land or property by agreement with the owner. or under the latter, because that Act does not apply to this company.

I think it is quite clear that the company have no power to take this land compulsorily under sec. 7, sub-sec. 2 of the Railway Act, 1868, which is one of the sections expressly incorporated with and made part of their own special Act hereafter referred to, or under the corresponding section of the Consolidated Railway Act, 1879, if that Act applies to them. This clause confers upon them power and authority to *purchase*, hold and take, (as clause 1 empowers them to *receive*, hold and take voluntary

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grants, &c.,) of any corporation or person, any land or other property necessary for the construction, maintenance, occupation and use of the railway and also to alienate, &c., the same. It is an enabling clause, placing the company in the same position as a natural person, as regards the power, to purchase, hold, take, alienate, dispose of, and sell lands, &c. Further provision is needed to empower them to take land compulsorily, which is found in section 9 and its sub-sections, also incorporated in their special Act. The land which may be taken without the assent of the proprietor is there defined; and the manner in which it is to be done and the price ascertained if the parties cannot agree, is pointed out. Mr. Boulton argued that the words "other property," mentioned in sec. 7, sub-sec. 2, must be taken to include property of the description now sought to be taken, and that the language of the section was wide enough to enable them to take it compulsorily. I cannot accede to this view, partly because, as I have said, the section does not, looked at alone, confer compulsory powers and partly because, even if it be thought to do so, no way is provided by which they can be exercised as regards lands required for taking material therefrom, such lands not being included in the description, or within the limitation mentioned in sec. 9.

Sub-sec. 10 of sec. 9, was not referred to in the argument, probably because it was felt not to aid the company's contention. I refer to it here so that it may not be supposed to have been overlooked. This sub-section provides, that after one month from the deposit of the plan, &c., and from notice thereof, &c., application may be made to the owners of lands, or to parties empowered to convey lands, *or interested in lands which may suffer damage from the taking of materials, or the exercise of any of the powers granted* to the railway, and thereupon agreements may be made touching said lands, or the compensation to be paid for the same, or for the damages, &c. Provision is made for arbitration in case of disagreement. This enactment is contained in the same terms in the original Railway

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Act, 14 and 15 Vic. ch. 51; in the Railway Act, Consol. Stat. Can. ch. 66, and "the Railway Act of 1868," and in the Consolidated Railway Act, 1879. The language is, "interested in lands which may suffer damage from the taking of materials," and even if this expression be held to confer a power to take "materials" (which are part of the land) compulsorily from any lands other than those mentioned in sec. 9, which is doubtful—see *Erie and Niagara R. W. Co.* v. *Great Western R. W. Co.*, 19 Gr., at p. 46, per Spragge, C.,—it gives none to take the land itself, which is what the company are here attempting to do. In many special Acts which incorporate the enactment I have quoted, express power is nevertheless conferred to acquire lands necessary for gravel pits, &c., which is a strong indication that the company could not do so, or take materials such as gravel, being part of the land itself under their ordinary powers. See *e. g.*: The Toronto, Grey, and Bruce Railway Act, 31 Vic. Ont. ch. 40, sec. 29; Toronto and Nippissing Railway Act, 26 Vic. ch. 41, sec. 30; The Buffalo and Lake Huron Railway Act, 19 Vic. ch. 21, sec. 28-33; The Fort Erie Railway Act, 20 Vic. ch. 151, and 27 Vic. ch. 59, the latter of which contains provisions (secs. 18 and 19), similar to those now introduced for the first time into a general Railway Act, by the Consolidated Railway Act, 1879, sec. 9, sub-secs. 38 and 39. See also *Bentinck* v. *Norfolk Estuary Co.*, 8 DeG. M. & G. 714; *Eversfield* v. *Mid-Sussex R. W. Co.*, 3 DeG. & J. 286; Great Western Railway Act, 18 Vic. ch. 176, secs. 20; *Pew* v. *Buffalo and Lake Huron R. W. Co.*, 17 U. C. R. 282; *Mitchell* v. *Great Western R. W. Co.*, 35 U. C. R. 148; *Wrigley* v. *Lancashire, &c. R. W. Co.*, 9 Jur. N. S. 710, 4 Giffard 352.

The case is therefore reduced to this, whether the company can exercise the powers they now seek to exercise under the Consolidated Railway Act, 1879, which they admittedly can by taking the proper proceedings, if that Act applies to them.

Sec. 9, sub-secs. 38 and 39, provide that where stone,

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gravel, or any other material is required for the construction of a railway, the company may acquire by compulsory proceedings, if they cannot agree with the owner, either the fee simple in the land itself or the right to take material for any time they deem necessary; and the notice, in case arbitration is resorted to, shall state the interest and the powers required.

The notice given here is defective in that respect, but the case was argued on the broader ground.

The corporate powers of the company, known as the Northern Railway Company of Canada, were, until their consolidation by the Act, 38 Vic. ch. 65, D., 1875, to be found in the statutes of many years, extending from 12 Vic. ch. 96, 31 Vic. ch. 86, by which last Act their railway was declared to be a work for the general advantage of Canada. They were not, however, subject to the provisions of the Railway Act, 1868 (31 Vic. ch. 68, D., passed 22nd May, 1868). This Act consisted of two parts, the first of which, comprising secs. 5 to 22, both inclusive, was to apply (sec. 2, sub-sec. 2,) to every railway *thereafter* to be constructed under the authority of any Act passed by the Parliament of Canada, *i. e.*, not of old Canada, but of the Dominion, and unless expressly varied or excepted by the special Act, should be incorporated therewith, form part thereof, and be construed therewith, as forming one Act. Sec. 3 provided in what manner any of the sections forming Part First of the general Act might be *excepted* from incorporation with the special Act, viz: by enacting in the latter, that the sections of the former proposed to be excepted, referring to them by the words forming the headings of such sections respectively, should *not* be incorporated with such special Act.

Sec. 4, dealt with Part Second of the Act, and provided that it should apply *inter alia* to all railways which might thereafter be constructed under the authority of any Act passed by the Parliament of Canada, and to all companies thereafter incorporated for their construction and working.

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Clearly, therefore, the Railway Act of 1868, did not apply to the company before the passage of "The Northern Railway Company Act, 1875," 38 Vic. ch. 65 (D.) This Act is entitled "An Act to re-arrange the capital of the Northern Railway Company of Canada, to consolidate the enactments relating to the said Company, to enable the Company to change the guage of its railway, and to amalgamate with the Northern Extension Railways Company, and for other purposes."

It recites, among other things, that the company and the Northern Extension Railways Company (incorporated by Act of the Provincial Legislature), had petitioned that the railways of the latter company might be declared to be works for the general advantage of Canada, and that powers might be granted for the amalgamation of the companies.

Part Second of the Act then declares the works of the Northern Extension Railways Company to be works for the general advantage of Canada, and provides that the two companies may amalgamate, and how and on what conditions, providing also, that the expression, "the Company," in the Act shall mean the Northern Railway of Canada, as well after as before the amalgamation, and that the corporate name of the company shall remain the same.

Sec. 17, sub-sec. 1, provides that the agreement for the amalgamation should contain (*a*) provisions, *inter alia* to the following effect, viz: (1) The franchise or charter of the Extension Company, with all its powers, &c., shall be transferred to and vested in the Company.

Part Third of the Act recites *seriatim* the statutes relating to the company, and that under the circumstances set forth in the Act a consolidation of the statutory and other regulations affecting them "will greatly assist in understanding their affairs, and will therefore be very beneficial."

Sec. 24 repeals all the Acts recited, except only the declaration that the company is a work for the genera advantage of Canada, and except also such portion of the

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same Acts as authorized the construction of the works in the Act mentioned, and which works had not been constructed or completed, and the time for the completion whereof had not expired before the passing of the Act. The works referred to are those mentioned in sec. 26, which defines what the undertaking of the company shall consist of.

Sec. 25 enacts that the company shall continue to be a body corporate under the name of the Northern Railway Company of Canada.

Sec. 28 enacts that certain sections of the Railway Act of 1868, *inter alia*, secs. 7 and 9 and their sub-secs., except sub-secs. 12 and 19 of sec. 7, shall be incorporated with and shall apply to the company, and that "this Act" shall be deemed to be the special Act mentioned as well in the said sections as in any other portions of the Railway Act of 1868, subsequently incorporated therewith by sec. 58.

Sec. 58 enacts that subject to the other provisions of the Act, the 19th and 21st secs., and sub-secs. 11, 12, 13, 14, and 15 of sec. 22 of "The Railway Act, 1868," and the whole of Part Second of that Act, and also the sections of the Acts amending the said Railway Act, shall also be incorporated therewith, and shall apply to the company, "but the sections and parts of sections included in part first of the said Railway Act, and not herein expressly incorporated, shall be excepted from incorporation herewith, and shall not apply to the company."

We have, therefore, in the Northern Railway Act of 1875, a special Act consolidating the existing statutory enactments affecting the company, into one Act, expressly incorporating with it parts of "The Railway Act, 1868," and repealing former Acts, *except* such parts thereof as were necessary to enable the company to complete the works authorized by such Acts.

No part of the railway is to be constructed, as was argued, under the authority of the special Act, So far as it was completed it had been constructed under the repealed and consolidated Acts, and so far as it was incomplete

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those Acts remained in force. Therefore, it was not a railway constructed, or to be constructed under the authority of any special Act passed by the Parliament of Canada, and "The Railway Act, 1868," though to a large extent, expressly incorporated into and made part of the special Act by the terms of that Act, did not apply to the company, and was not incorporated with their special Act, by virtue of the 2nd, 3rd, or 4th secs. of the Railway Act itself, as is the case with the special Acts to which the Railway Act does apply. The case of *Evans* v. *Lancashire and Y. R. W. Co.*, 1 E. & B. 754, may be referred to on the question of the incorporation of the general Act, but it is quite distinguishable from the present case.

It was also argued, that as the works or some of the works of the Northern Extensions Railway Company yet remained to be done, and the companies had been authorized to amalgamate under the powers of the special Act, the railway must be taken as having been constructed or to be constructed under the Dominion Act. This argument, however, does not hold, inasmuch as the works of the Northern Extensions Railway are all performed or to be performed under the authority of the Provincial Acts, the franchise, &c., only being transferred to the Northern Railway Company and operated by them under the agreement for amalgamation.

Having shewn that "The Railway Act, 1868," does not apply as such to this company, and turning to "The Consolidated Railway Act, 1879," it appears to me that the first part of that Act, which alone is important here, cannot apply to them either for much the same reasons. Part First applies *inter alia* to "every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada:" sec. 2, sub-sec. 2; (and see the interpretation clause, sec. 5, sub-sec. 1.) Part Second, which deals with the railway committee, traffic arrangements, &c., is applied *inter alia* "to all railways which have been in or since the year 1868, or which may be hereafter constructed under the authority of, or *made*

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subject to any special Act passed by the Parliament of Canada ;" sec. 4.

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The difference of expression in secs. 2 and 4, as probably indicating a more extended application of part second is observable, and reading sec. 4 in connection with sec. 65 of the Northern Railway Company Act, 1875, would indicate that Part Second of the Act of 1879 may apply to the company ; but as to this I express no opinion.

The repealing clause of the Act of 1879, sec. 102, has been referred to. It repeals the Act of 1868, and the several Acts amending the same, and declares that the Act of 1879 shall not be construed as a new law, but as a consolidation and continuation of the repealed Acts, subject to the amendments or new provisions thereby made and incorporated with them, and that any reference in any former Act or document to such repealed Act, or to any provision in any of the said repealed Acts, shall hereafter be construed as a reference to the Act of 1879, or the corresponding provision therein.

This section does not help the railway company, because their special Act, which incorporates some of the provisions of the repealed Act, can not be repealed as to such provisions by the language of the repealing clause of a general Act, there being no reference therein to the special Act, and no inconsistency in the two Acts standing together ; for these provisions of the general Act being incorporated in the special Act by express reference thereto in the latter, it is precisely the same as if they had been set out *verbatim* and re-enacted therein. The expression at the end of the repealing section, "reference in any former Act to such repealed Act," can not in my opinion, by the most liberal construction be taken to include sections or parts of the Act actually incorporated with or re-enacted in another Act, and even if it could, there is no provision in the Act of 1868, 'corresponding' to sub-secs. 38 and 39 of sec. 9 of the Act of 1879.

On the whole then I am of opinion that the railway company have no power to take the material or land in

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question, and that further proceedings by them for the purpose before the County Judge should be restrained by prohibition. The applicant is entitled to his costs. See *Campbell* v. *Northern R. W. Co.*, 26 Gr. 522.

[COMMON PLEAS DIVISION.]

McDONALD V. MURRAY ET AL.

Agreement—Foreign document—Impossibility of production—Secondary evidence—Admission at a former trial—Evidence of witness taken before examiner in shorthand—R. S. O. ch. 50, secs. 165, 166, 41 Vic. ch. 8, sec. 8, O; O. J. Act Rules, 282, 285, 311—Evidence in reply—Right of reply—Interrupting Judge's charge—Misdirection.

In an action on an agreement for the sale of land in Winnipeg, Manitoba, the agreement, which was registered by defendants was produced by the Registrar of Winnpeg, in whose official custody it was, on his examination under a commission. The Registrar refused to part with it, but left a copy certified under his hand and official seal to be a true copy, which was attached to the commission, and produced at the trial. One M., who was examined under the commission, and also at the trial, proved that the agreement produced by the registrar was the original, and that it was signed by the defendants, and that the copy attached to the commission was a true copy.

Held, that the Registrar's certificate as to the copy was sufficient under O. J. Act. Rule 203, and that a certificate by the commissioner was not required; that the absence of the original was sufficiently accounted for to enable secondary evidence to be received by means of the copy.

At a former trial a copy of the agreement was admitted in place of the original.

Held, that the admission so made was good for the subsequent trial.

Evidence given by one F., a witness, was taken before an examiner in shorthand, by question and answer. The evidence was duly certified by the examiner and an office copy put in at the trial.

Held under R. S. O. ch. 50, secs. 165, 166, as amended by 41 Vict. ch. 8 sec., 8, O. and O. J. Act Rules, 282, 285, the evidence was properly received: but that this was immaterial, for apart from F's evidence, there was sufficient evidence to support the finding of the jury, and under Rule 311, where no substantial wrong or miscarriage is occasioned, the Court will not interfere.

The learned Judge at the trial nonsuited, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The defendant's counsel cross-examined one of plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination.

Held that by reason of such re-examination the plaintiff was not deprived of his right of calling witnesses in reply to the defendant's evidence of fraud, at all events this was a matter for the Judge at the trial, and also the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply.

The defendants objected that by reason of frequent interruptions and reading of text books by plaintiff's counsel during the delivery of the Judge's charge injustice was done defendants, and the jury improperly influenced thereby.

Held, that this was a matter for the Judge at the trial, and it would have to be a very strong case for the Court to interfere, and the Judge had made no complaint.

Held, also that it was no objection that the land in question was situate in Manitoba, and out of the jurisdiction of this Court, for relief may be given, if necessary, by proceedings operating *in personam*.

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THIS was an action tried before Morrison, J. A., and a jury, at the Spring Assizes of 1883. The case had been previously tried before Cameron J., and a jury, when a nonsuit entered, which was set aside, and a new trial granted. See report of the case, 2 O. R. 573.

It was brought on an agreement, which was as follows:

"Mem. of agreement between John McDonald, of the city of Winnipeg, gentleman, and Captain James Murray, of St. Catharines, Ont., and Robert Cuthbert, of Toronto, Ont. The said McDonald sells, and the said Murray and Cuthbert agree to purchase lots 5 and 6 (Main street,) of block 3, H. B. Reserve, at and for the sum of sixty thousand dollars, payable as follows: $4,000 to be paid at the signing hereof, $40,795 to be paid within sixty days from the date hereof, the balance of $15,205 to be on mortgage at 7 per cent. Dated 23rd Feb., 1882."

The statement of claim then alleged that the defendants, at the time of making of the said agreement, paid the said sum of $4,000, but have not paid the said sum of $40,795, and claimed that the defendants may be ordered to pay the said sum of $40,795, and for further or other relief.

The statement of defence was:

1. That the defendants did not enter into an agreement with the plaintiff for the purchase of the two lots of land, or either of them, as mentioned in the plaintiff's statement of claim.

2. That the plaintiff has no title to the land; he was not the owner, and could not and cannot give a good title to the defendants, and that plaintiff should repay what has already been paid.

3. That defendants entered into such contract believing that the certain statements made by the agent of the plaintiff were true, which were untrue, and were made fraudulently, with the intention and for the purpose of inducing them to enter into the agreement.

4. That during the negotiation for the said purchase the agent of the plaintiff procured other persons to make

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fictitious offers for the land for the purpose of inducing them to become purchasers.

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5. A conspiracy with other persons to induce the defendants to purchase the said lands.

6. A general allegation that the defendants being strangers, and wholly ignorant of the value of the lands, relied entirely upon the plaintiff and his agent.

7. That the defendant Cuthbert, since the date of the agreement, having assigned his interest to one Fish, the said Fish should be made a party to the suit.

At the trial, the evidence given by the plaintiff to prove the agreement, was the examination under a commission of the Registrar of the city of Winnipeg, who produced an agreement purporting to be signed by John B. McKilligan, for the plaintiff, and by the defendants. This document was recorded on 24th February, 1882, on the oath of one Austin Loder, who is the subscribing witness. John B. McKilligan was examined on the same commission, and also at the trial. He swore that the instrument there produced by the Registrar was signed by himself, and that he was present and saw it signed at the same time by the defendants.

The Registrar swore: "I cannot part with it, as it belongs to the records of my office. I produce a certified copy of said agreement, under my hand and official seal." This copy was also annexed to the commission.

An objection was taken at the close of the case that no agreement had been proved. (There were several objections, but it is only necessary to refer to the one on which the learned Judge expressed an opinion.) His Lordship said, "he would have to nonsuit, on the ground that there was no proof of the agreement itself; the agreement had not been produced, which was the very foundation of the whole action."

The learned Judge, however, allowed the case to proceed, subject to a nonsuit at the close, that the issues on the pleas of fraud might be determined by the jury. The jury found the issues on these pleas in favour of the plaintiff.

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The judgment entered by the learned Judge on the copy of the pleadings is as follows: "I think the plaintiff should be nonsuited for the nonproduction of the agreement, and for the reasons given by Dr. McMichael at the end of the case with costs (except as to the pleas of fraud;) and if the Court should be of opinion that I was wrong as to the nonsuit, then I find that the plaintiff is entitled to have payment for $40,795, with interest from the 23rd of April, with costs; and if the Court should be of opinion that the nonsuit is right then the defendants should have no costs, of the pleas of fraud."

During Easter Sittings the plaintiffs moved, on notice, to set aside the judgment of the learned Judge for the defendants, and to enter a judgment for the plaintiff, on the grounds:

1. That the plaintiff proved the agreement sued on herein.

2. That the finding of the learned Judge that the plaintiff had not produced the agreement and established his claim was erroneous.

3. That the plaintiff was not bound to produce the original agreement at the trial hereof under the circumstances established at the trial.

4. That it being established that the original agreement was registered in the proper Registry Office and that the same having been produced under commission issued herein, and the execution thereof having been duly established, the plaintiff was not further bound to produce the said agreement or to have it at the trial.

5. That the said agreement having been registered by the defendant herein and placed beyond the control of the plaintiff, the plaintiff was not called upon to produce the same.

6. That the defendants having received the original agreement from the plaintiff were bound to produce the same, if the original of the said agreement was required at the trial.

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7. That the original agreement having been produced before the commission, and a certified copy thereof put in under the directions of the commission issued out of this Court, such copy was sufficient evidence of the original agreement at the trial hereof to dispense with the production of the original agreement at the trial.

8. That the said original agreement having been registered, and the plaintiff not being able to produce it at the trial, the plaintiff was at liberty to establish the agreement by secondary evidence, and the same was so established.

9. That the execution of the agreement having been admitted in this cause at the former trial hereof, it was unnecessary to require the plaintiff to produce the original agreement at the last trial hereof.

10. That it having been admitted at the former trial of this cause that the said original agreement and the execution thereof had been established, it was unnecessary to prove or establish the said agreement, or to produce the original agreement.

Or why leave should not be granted to prove the said original agreement before the said Court, or to give such evidence as and when the Court may deem necessary respecting the said agreement and the execution thereof, and why upon such further evidence being given judgment should not be entered for the plaintiff;

Or why the order absolute made herein during the last sittings of the Divisional Court, directing a new trial should not be amended so as to limit the issue to be so tried to the question of fraud, or at all events to exclude the trial of the issues raised by the first paragraph of the statement of defence herein so as to make the said order absolute conform to the judgment of the said Divisional Court, when granting such new trial and to limit the issues to be tried under the said order absolute to the questions of fraud raised by the statement of defence, or why judgment should not be entered for the plaintiff on the finding of the jury.

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During the same sittings, May 29, 1883, *Osler*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a verdict for the defendants, or for a new trial, upon the ground that the said verdict is against evidence and the weight of evidence, in this, that the evidence clearly shews that fraudulent misrepresentations were made by the plaintiff's agents upon the faith of which the alleged purchase was made; and upon the ground of the reception of improper evidence, in this, that the evidence of one Flummerfelt was admitted as taken before a special examiner, the same not having been signed by the said Flummerfelt, and being so taken that perjury could not be assigned for any false swearing contained therein; and because of evidence having been given by the plaintiff before the closing of his case as to the value of the land in question and to meet the charge of fraud made in the pleadings, the plaintiff should not have been at liberty to give evidence in reply after the close of the defendants' case, either as to such value or as to such fraud; and upon the ground that the issues before the jury being confined to issues, the onus of which was upon the defendants, the defendants' counsel ought to have had the right of a general reply, or in any event to have had the right to reply as to the evidence given upon such issues; and upon the ground that upon the said misunderstanding between the Court and the plaintiff's counsel, the defendants' counsel was compelled, out of deference to the position in which the Court was so placed, and protesting against the right of the plaintiff's counsel in that behalf, to permit the plaintiff's counsel to reply upon the said issues; and upon the ground that the learned Judge who tried this cause was in his charge so interrupted and interfered with by the plaintiff's counsel who insisted upon reading extracts from text books and discussing questions of fact before the Court and jury, that the said charge did not go fairly to the jury, and in fact by reason of such frequent interruptions and reading from text books and comments by the plaintiff's counsel the said charge was not com-

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pleted and remained unfinished; and upon the grounds disclosed in the evidence taken herein and the report of the learned Judge's charge and the proceedings therein.

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On the case coming on for argument, *McCarthy*, Q. C., objected that a notice of motion was not the proper mode of moving in such case but that an order *nisi* should have been obtained. The Court, without deciding as to whether the plaintiffs should have moved by notice of motion or for an order *nisi*, granted leave to the plaintiffs to issue an order *nisi*, returnable *instanter*, but under the circumstances, enlarged the case to the following sittings.

During Michaelmas Sittings, November 28, 1883, *Lash*, Q.C., and *Holman* supported the plaintiff's motion and order *nisi*. [*McCarthy*, Q.C., renewed the objection to the granting of the order *nisi*, so as not to be precluded from raising it if the case should go further.] The agreement was produced by the registrar before a commissioner at Winnipeg, and was proved. The registrar refused to part with it, but gave a certified copy of it, which was the document produced at the trial. The commission is part of the trial, and what takes place on the commission is the same as if at the trial. If the registrar had appeared at the trial, and after producing the registered document, had refused to part with it, but had left the copy, it could not be said that there was no proof. The plaintiff has done all he can to produce the document, but being in the possession of a public official he could not compel its production at the trial. The registrar at Winnipeg is a public official. The Court will assume in absence of evidence to the contrary, that the law of Manitoba and Ontario is the same, and there is no question that according to the Ontario law he is a public official: *Re O'Brien*, 3 O. R. 326. Moreover, the different provinces of the Dominion can inform themselves of the law of another province, and by the law of Manitoba he is such public official: *Macdonald* v. *Worthington*, Sup. Ct. R. (*a*). The copy is therefore sufficient: *Taylor* on Evidence, 7th ed., sec. 438; *Alivon* v. *Furnival*, 1 C. M. & R. 277; *Boyle*

(*a*) Not yet reported.

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v. *Wiseman*, 10 Ex. 647; *Quilter* v. *Jorss*, 14 C. B. N. S. 747; *Crispin* v. *Doglioni*, 32 L. J. N. S. Prob. 109. The copy was properly attached to the commission, and it was certified by the commissioner to be a true and correct copy. The copy was put in without objection before the commissioner, and therefore cannot afterwards be objected to at the trial: *Robinson* v. *Davies*, 5 Q. B. D. 26. The document was registered by the defendant. The witness McKilligan states that he gave it to the defendant Murray, and the registrar states that the defendant Murray registered it. The defendant Murray in his affidavit on production, which was put in at the trial, states that he received the original and registered it in the Registry Office at Winnipeg. The defendants having registered the agreement and put it beyond the control of the plaintiff, he was not called upon to produce it. The defendants having received the agreement from the plaintiff were bound to produce it if required to do so. McKilligan swears positively that there was no duplicate original, and that the word "duplicate" which occurs in the affidavit of execution, must have been inserted by mistake of the clerk who drew it. The defendants were served with a notice to produce it, and having failed to do so the plaintiff could give secondary evidence of it. The defendants admitted the agreement on the previous trial, and the admission is good for any subsequent trial: *Doe dem. Wetherall* v. *Bird*, 7 C. & P. 6. Leave is now asked if necessary to prove the original agreement. The new trial was granted on the question of fraud, and this is the only question now open to the defendants.

McMichael, Q.C., and *McCarthy*, Q.C., contra. McKilligan at first swore that there was only one agreement, but on its being pointed out to him that in his affidavit of execution that the agreement was executed in duplicate, he then said there might be a duplicate. It must be assumed therefore that there was a duplicate, and this being so, the plaintiff had the duplicate, and therefore so long as the plaintiff has the duplicate he cannot compel the defend-

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ants to produce the original in their possession and give secondary evidence in default of their doing so. The copy put in before the commissioner is not evidence. The defendants cannot be held to have admitted it, for they had no opportunity of objecting to its admissibility until the trial. The copy was not properly received, because it is not stated by the commissioner to be a true and correct copy of the original, which was produced before him. There is nothing to shew that the registrar is a public official. The Court cannot assume that law of Ontario and Manitoba is the same. This should have been proved. The cases cited by the plaintiffs are clearly distinguishable. The admission made at the former trial here cannot be used at the subsequent one. There is no doubt that the admission made for one trial is good for any subsequent one: *Elton* v. *Larkins*, 5 C. & P. 196, 1 Moo. & R. 385, but this does not apply here. The defendants merely waived proof of the copy after evidence was given for the absence of original. Moreover the admission itself was not proved. The action is not properly brought. The claim should have been for damages for not accepting the land, and not for the purchase money. In *Laird* v. *Pim*, 7 M. & W. 474, it is laid down that where a party is let into possession of land under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase money, and no conveyance is executed, the vendors cannot recover from him the whole amount of the purchase money, but only the damages actually sustained by the breach of contract. The law with regard to sale of goods and land is the same: *Benjamin* on Sales, 4th Amer. ed., p 978. The plaintiff must also shew title; and, without impugning the previous judgment, we can raise this under the equitable jurisdiction of the Court, and the defendants have set up the want of title. It does seem monstrous that the defendants should be compelled to pay a large sum of money for land as to which the defendants have not shewn any title: *Thompson* v. *Brunskill*, 7 Gr. 542. In any event there must be a new trial.

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Lash, Q.C., in reply. The case of *Thompson* v. *Brunskill*, 7, Gr. 542, merely shews that the Court, in case for specific performance may exercise equitable jurisdiction, and refuse specific performance unless title is shewn, but does not apply to a case of this kind. There can, however, be no difficulty, for the plaintiff is prepared to shew title, and is willing that there should be a reference to the Master for such purpose.

During the same sittings, *McMichael*, Q.C., and *Osler*, Q.C., supported the defendants' motion. There was clearly evidence of fraud and misrepresentation. The whole transaction was a conspiracy to get the defendants, who were utter strangers, and had no knowledge of the value of the property to purchase it at the exhorbitant sum at which they did. The sum paid for the property in itself shews fraud: *Dimmock* v. *Hallett*, L. R. 2 Ch. 21; *Kenner* v. *Harding*, 28 Amer. R. 615, 617, 85 Ill. 264; *Bagshaw* v. *Seymour*, 18 C. B. 903; *Bedford* v. *Bagshaw*, 4 H. & N. 538; *Watt* v. *Stubbs*, 1 Madd. 70; *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Smith* v. *Chadwick*, 20 Ch. D. 27. The defendants are not bound by the contract signed by McKilligan, for he had no authority from the plaintiff McDonald to sell, and Young, who had a half interest, is no party to the contract at all. Flummerfelt's evidence should not have been received. There is no authority to take the evidence of witnesses in shorthand, and then to put in a certified copy of it. The evidence should have been read over and signed by him. Perjury could not be assigned for any false statement contained in it. The plaintiff in his evidence in chief having given evidence on the question of fraud should not have been allowed to put in further evidence in reply to the defendants' evidence, and after having been warned that if he gave such evidence his right to give further evidence would be objected to. The learned Judge having decided to nonsuit on the ground that the agreement was not proved, and the case having gone to the jury on the issue of fraud alone, the burden of proof of which rested on the defendants, the defendants should have had the right of reply. The

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frequent interruptions made by the plaintiff's counsel during the delivery of the Judge's charge, reading text-books, &c., influenced the jury, and prevented their coming to an impartial decision. Under the circumstances there should be a new trial. The magnitude of the claim is of itself, where there is any doubt, a reason for a new trial.

Lash, Q.C., and *Holman*, contra. The charge of fraud was clearly disproved. The learned Judge charged most fully and fairly, and the jury found in the plaintiff's favour. Flummerfelt's evidence was properly received. He was a witness on the part of the plaintiff, who was to leave the province, and was examined under an order. This is expressly authorized, and it is not essential that he should sign the evidence when it is taken by question and answer, as was done here, and in the absence of any request of the parties that he should sign: R. S. O. ch. 50, secs. 165, 166; 41 Vic. ch. 8, sec. 8, O.; O. J. Act, Rules 219, 282, 285. Apart from his evidence there was overwhelming evidence to justify the verdict of the jury, and under Rule 211 a new trial will not be granted, unless some substantial wrong or miscarriage has been done. The plaintiff did not give evidence of fraud as part of his evidence in chief. He merely re-examined a witness cross-examined on the question of fraud by the defendants, and therefore he had a perfect right to call witnesses in reply to the defendants' evidence of fraud. This, however, was a matter entirely in the discretion of the Judge at the trial. The defendants' counsel, at the trial, expressly waived the right to reply, but in any event the plaintiff clearly had the right of reply. There was nothing to take the case out of the ordinary rule, giving the plaintiff the right of reply. As to the alleged interruptions by the plaintiff's counsel at the trial, they were in answer to remarks improperly made by defendants' counsel. The learned Judge at the trial had complete control of the case before him, and if he makes no objection it does not lie in the mouth of the counsel to do so. The case went fully and fairly to the jury.

McMichael, Q.C., in reply.

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March, 7, 1884. GALT, J.—In my opinion the absence of the original agreement is sufficiently accounted for. The witness Kennedy, in whose official custody it is, swore that he could not part with it, as it belonged to the records of his office. No question was raised before the commissioner as to the correctness of this statement, and nothing was urged before us on this head to shew that this was erroneous. This case is very similar to that of *Alivon* v. *Furnival*, 1 C. M. & R. 277, where it was said by Park, B., at p. 291: "The first objection is that the agreement was not properly proved; this divides itself into two branches, one, that even if there were no evidence of a duplicate original being in existence this proof would not have been sufficient, because the original deposited with the notary ought to have been produced, or clear proof given that by the written law of France it could not be removed. * * It seems to be clear that this document was not acknowledged before a notary, and is therefore not to be deemed a notarial act. It was simply deposited for safe custody; but there was sufficient evidence in the testimony of M. Colin of the established usage, at least in France, though it was not a provision of the written law, not to allow the removal of the documents so deposited, and consequently to let in secondary evidence of the contents; for such evidence is admissible where it is in effect out of the power of a party to produce the original."

The judgment entered by the learned Judge on the copy of the pleadings, at the conclusion of the trial, is as follows: "I think the plaintiff should be nonsuited for the non-production of the agreement, and for the reasons given by Dr. McMichael at the end of the case, with costs, (except as to the pleas of fraud): and if the Court should be of opinion that I was wrong as to the nonsuit, then I find that the plaintiff is entitled to have judgment for $40,795, with interest from 23rd of April, with costs; and if the Court should be of opinion that the nonsuit is right, then the defendants should have no costs of the pleas of fraud."

In giving the judgment I fear the learned Judge has

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overlooked the provisions of the 28th section of the Judicature Act, in which it is expressly declared, "that a Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or point in a case, for the consideration of a Divisional Court."

I think, therefore, we have to consider this as an absolute judgment of the learned Judge, and not regard it as containing any reference to the Court. This is, however, of very little importance, as by rule 321: "Upon a motion for judgment or a new trial the Court may, if satisfied that it has before it all the materials necessary for finally determining the question in dispute, or any of them, or for awarding any relief sought, give judgment accordingly."

It is manifest we have the whole evidence as regards this agreement before us, because after the learned Judge had, at the close of the plaintiffs case, expressed his intention of nonsuiting the plaintiff, the case of the defendants, on the question of fraud was gone into; and although it cannot, I think, be said this was done at the request of the defendants, it was done, and consequently all the evidence is now before us.

In *Allen* v. *Cary*, 7 E. & B. 463, it was held, "that the plaintiff was not entitled to enter a verdict on the ground that there was no proof for the defendant at the close of the defendant's original case." The single question in this case was as to the existence of a set-off. So the defendant began, and at the end of his case the plaintiff's counsel contended that there was no evidence of the set-off. The learned Judge refused to direct a verdict for the plaintiff, but reserved leave to move to enter one. The plaintiff's counsel then called witnesses, and the defendant gave evidence in reply. The jury, upon the evidence given subsequently to the close of the defendant's original case, considered the set-off to be proved. Verdict for the defendant. Application was made to enter a verdict for the plaintiff, on the ground that the case ought to have been stopped at the close of the original case for the defendant.

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Lord Campbell, C. J. said at p. 446: "That as the plaintiff's counsel had elected to continue the case after the leave reserved, he was not entitled to object to the subsequent evidence having been taken into consideration."

In a question of this kind it can be of no manner of consequence whether the evidence was brought before the Court, or not so long as the Court is satisfied that it is fully possessed of the case.

Apply that rule to the present case. An instrument is produced which is said to be the copy of an original which it is not in the power of the plaintiffs to procure. The defendants object that the original must be forthcoming. Evidence then is given on another branch of the case, by which it is shewn that the original was given to the defendant, and if it cannot be produced, it was in consequence of his own act. It is true the defendant Murray denies having put the instrument on record. He admits having received it, but alleges he gave it to his solicitor. In this, I think, he is mistaken. He never signed but one, which was delivered to him, and McKilligan identifies that as the instrument now on record. It has been clearly traced to his possession, and I think, under the circumstances, secondary evidence was admissible, and that, so far as the execution of the agreement is concerned, judgment should be entered for the plaintiffs. It must be borne in mind that in directing judgment for the plaintiffs on this branch of the plaintiff's claim, we do not in any way interfere with the verdict of the jury, for this question was not submitted to them.

The notice of motion, therefore, of the plaintiff will be made absolute to enter a verdict for him on this branch of the case.

The findings of the jury on the defence of fraud remains to be considered. At the close of the evidence the learned Judge charged the jury at considerable length, and carefully directed their attention to each of the alleged statements of fraud and conspiracy, and left several questions to them, each of which was answered in favour of the

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plaintiff. The defendants have no reason to complain of the charge of the learned Judge. His remarks were certainly not calculated to mislead the jury as respects the circumstances of the case.

The evidence is very voluminous. I have gone very carefully through it, and I fully concur in the findings of the jury; in fact I hardly see how they could have come to a different conclusion. The agreement was made on the 23rd February. Both the defendants were strangers in Winnipeg, but we find they remained there for some time after, and no complaint was made by them, or either of them, until the plaintiff demanded payment of the second instalment, the sum now in question. On the contrary, we find that the defendant, Cuthbert, sold his interest to one Fish, on the 20th March, at an advance of $25 a foot, the said Fish being himself a land agent in Winnipeg, and on the 11th April, 1872, the defendant Murray addressed the following letter to Fish:

"Your letter of 5th inst., is received, advising me of the purchase by you of the one-half undivided interest in lots 5 and 6, Main street, Winnipeg. Your suggestion to borrow a further sum on the property does not appear to me quite practicable in the present condition of the property. However, if a further sum could be borrowed at a moderate interest, and such sum paid over to Mr. McDonald, I have no special objection. As I have arrangements which will require my attention elsewhere for some time to come, I have decided to sell my interest in these lots on favourable terms; in fact, to close the matter out, I would sell my interest in those lots for $2,000 net cash."

It does appear to me that, considering the sale to Fish and the letter to him from Murray took place long after the parties had ample opportunity of examining the property, it is vain for them now to urge that they were the victims of fraud and conspiracy when they signed the agreement.

The rule therefore will be discharged, with costs.

The reception of the evidence given by one Flummerfelt,

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before a special examiner was received at the trial, although objected to by the learned counsel for the defendants. The examination took place before an examiner in short hand, and was duly certified by him, but is not signed by the witness.

The R. S. O. ch. 50, sec. 166, is a re-enactment of sec. 194 of C. S. U. C. ch 22, which was under the head "Summary applications and proceedings." In ch. 50 it appears under the title "Preliminary examination of parties," &c., the sub-division in which sec. 166 is contained, is in italics "discovery"; but it is manifest that no change was intended to be made by the alteration, and if any doubt existed on that point I think it is amended by the 41 Vic. ch. 8, sec. 8, by which it is enacted, "The Revised Statute respecting the procedure of the Superior Court of Common Law * * is hereby amended, by inserting after section 166 the following: '166 *a*, Notwithstanding any thing in this Act contained where an examination in a cause or proceeding in any Court is taken by the Examiner, or any other duly authorized person in shorthand,' (as was done here) 'the examination may be taken down by question and answer; and in such case it shall not be necessary for the depositions to be read over to, or signed by, the person examined, unless the Judge so directs where the examination is taken before a Judge, or in other cases unless any of the parties so desires.'" No such direction or request was given or made in this case and the evidence was properly received.

As respects the complaint made in the rule as to the admission of evidence in rebuttal, and the plaintiff's counsel being allowed the general reply. The former is a matter entirely for the consideration of the learned Judge at the trial, and as to the latter, I never (before it was done in this case) heard the right of the plaintiff to a general reply questioned where he was obliged to open the case. If the defendants had relied solely on the defence of fraud they would have been entitled to open and close the case, but, as they pursued a different course, and contested the entire claim of the plaintiff, his counsel had the

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right to reply on the whole case. It can make no difference that they called evidence to establish their defence after the learned Judge had expressed an opinion against the plaintiffs' right of action. The case went on in the usual manner, and of course subject to the, I may say, universal practice.

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As to the remaining part of the rule, it is the first and we hope it may be the last time such a subject will be brought before the Court. The learned Judge is the proper authority to preserve order at the trial, and unless such a subject was brought to our notice by the learned Judge himself, we consider we should trespass on his authority by interfering.

WILSON, C. J.—One of the points argued was, that the agreement upon which the action was brought was not proved. The evidence showed it was duly registered in Manitoba, and the Registrar would not part with it but attached a copy of it to the commission under which he gave his evidence.

At the former trial the defendant objected to a copy being received in evidence, and the learned Judge said he would postpone the trial until the ensuing Assizes, when the defendants counsel, rather than have the cause put off admitted a copy of the agreement in place of the original, and the trial went on.

Upon this trial the certified copy of agreement produced before the commisioner and attached to the commission was proved at this last trial by Mr. McKilligan to be a true copy of the original. He drew the original, and he executed it for the plaintiff as agent. He saw both Murray and Cuthbert sign it.

In *Elton* v. *Larkins*, 5 C. & P. 385, admissions made for the purposes of the trial were held to be admissible for a subsequent trial. Tindal, C. J., said at p 386: "If the defendant desires that admissions made on a former trial should not be used on a new trial, he should take out a summons before a Judge to withdraw them; for the former

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trial is described as no trial, and the new trial, being of the same cause, is therefore, unless such courseis pursued subject to the same admissions."

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In *Doe dem Wetherall* v. *Bird*, 7 C. & P. 6. the same course was followed;

Upon that ground the copy admitted at the first trial is evidence admissible in like manner on the second trial.

The copy was also admissible because it was a sworn copy of the original, which original the proper officer having the custody of it in Manitoba refused to part with: *Alivon* v. *Furnival*, 1 C. M. & R. 277; *Boyle* v. *Wiseman*, 10 Ex. 647; *Quilter* v. *Jorss*, 14 C. B. N. S. 747; *Crispin* v. *Doglioni*, 32 L. J. N. S. Prob. 109.

The copy annexed to the commission, it is said was not admissible in evidence, because it was not "certified by the commissioner to be a true and correct copy or extract," which was annexed to the witness's deposition. The certificate was by the Registrar and not by the commissioner according to Rule 203 of the Judicature Act.

In *Steinkeller* v. *Newton*, 2 M. & Rob. 372, a witness examined under commission referred to papers for refreshing his memory, which were partly in his own writing and partly not, and which he refused to allow to be seen as he considered them private memoranda. Objection was taken at the trial to the reception of such evidence. Tindal, C. J., said at p. 373: "It is a matter of discretion with the Judge, whether a witness should be permitted to refer to particular papers in the course of his examination. I must take it that the commissioners by proceeding with his examination, exercised their discretion in that respect," and the examination was read.

In the same case 9 C. & P. 313, tried three years before the last trial just referred to, the witnesses evidence taken under commission as to the contents of letters which he did not produce was rejected.

The case of *Robinson* v. *Davies*, 5 Q. B. D. 26, seems applicable to the present case.

Evidence under a commision was taken abroad, copies of

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documents, and answers of witnesses with regard to the contents of such documents were received in evidence by the commissioners for the plaintiff without objection by the defendant who joined in the commission. The copies were appended to the depositions, and returned by the commissioners, and it was held that secondary evidence of the documents having been taken without objection on the part of the defendant, was receivable before an arbitrator to whom the case was referred, and it was too late then to take objection on the ground that the original documents were not produced.

Here both parties were represented before the commissioner. The Registrar of Winnipeg refused to part with the original agreement, but he said he would give a certified copy of it, which he did, and it was attached to the commission without objection.

There is no English rule under the Judicature Act similar to ours. Our Order XXXIII including Rules 286 to 300, both inclusive, contains in substance the provisions inserted in the rules or orders for commissions, or in the commissions which are issued in England under the 1 Wm. IV. ch. 22. See *Chitty's* Forms, which accompany *Archbold's* Practice; so that the decision last referred to is of like effect as if given upon a rule of the Judicature Act And upon the authority of that decision the copy of the document attached to the commission is properly receivable in evidence.

The next point which was argued was that relating to the title of the plaintiff, and in connection with it his right to recover the sum sued for before making a conveyance of it to the defendants, or tendering one.

I do not regard that part of the argument which was put forward as an insuperable objection to any recovery by the plaintiff, that as the land was situate in Manitoba, and out of the jurisdiction of this Court complete relief cannot be given to the defendant. Relief may be given if it be necessary to do so by proceedings operating *in personam* just as it was settled might be done in *Penn* v. *Lord*

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Baltimore, in the time of Lord Hardwicke, 2 W. & T. L. C., 5th ed., 939; *Jackson* v. *Petrie*, 10 Ves. 164.

It was perhaps somewhat out of place to discuss that part of the case as it had been already argued and disposed of in the motion to set aside the nonsuit on the first trial, and which decision is now before the Court of Appeal. I now add the following case to those which were before cited.

The defendants covenanted to pay £4,000 for the purchase of certain land within six months after the passing of a proposed Act of Parliament, and before the railway company entered on the land. The plaintiff also covenanted that on payment by the defendant of the said sum, and interest after the expiration of six months after the passing of the bill to the day of payment the plaintiff should convey the land to the defendant. Held the covenants were wholly independent, and it was not necessary to aver in an action for the money that the plaintiff was ready and willing to convey the land. There being a positive covenant to pay the money at a specified time, and it was the intention of the parties that the covenants should be independent. The payment was to be made for the purchase of the land. Not upon the purchase, nor for the conveyance of it, and that the condition had arrived upon which the money was to be paid, and there was no other condition precedent: *Sibthorp* v. *Brunel*, 3 Ex. 826.

The principle is the same in all the cases on the subject. The enquiry is, whether the covenants were dependent or independent, concurrent or discurrent.

There were several other objections taken against the verdict, of a technical and formal nature, besides the charge of fraud, which was again elaborated.

My brother Galt has disposed of that part of the case, and I entirely agree with him on the conclusion he has formed that there is not a particle of fraud in the whole transaction, except it may be in the attempt of the defendants to escape from the bargain they now think is not a beneficial one. The price is large, the quantity of

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land small, but the actual idea of the parties was that the land was worth the money. The expectations of the parties were extravagant as judged by later events, but they were reasonable when considered by the condition of things in Manitoba at that time, when people were venturing all they had, and all they could command, to throw into land of some possible use, or into towns which had no existence, or into lots anywhere in a city which had an area of thirty or forty square miles, and which, or most of which, lay still in its primordial condition. There was a frenzy prevailing for a time. Yet the people knew what they were about. They did exactly just what they intended to do—the race and rage for money were upon them—and they have no right to lay the blame of their losses upon those with whom they dealt, or to charge them with fraud, because they gave exactly what the others wanted, and at the prevailing prices. Those who buy in a tulipomania market must pay the tulipomania prices. That is just the position of the defendants, they bought voluntarily ; they kept what they bought; they tried to sell it at a profit ; they failed to do that. If they had done so they would have been the fraudulent vendor, just as they say now this plaintiff is. But they would have been no more guilty of fraud than the plaintiff is, and the jury have very properly found there is no ground for the charge of fraud, conspiracy, or misrepresentation.

This is the description of the state of things given by one of the witnesses called at the trial: " After dark the excitement began, then it was a perfect pandemonium. You would have thought the roof of the house was going off in the excitement." And, again he said : " As to speaking of the value of property. If you offered a piece of property at $1,000,000 a foot, and a man gave that figure for it, then that was the value of it. There was no real value."

It would be difficult to establish fraud in such a market as that.

I do not refer to *Kerr* on Fraud, or to the decisions of

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Courts upon the doctrine of fraud and the like, which were quoted. They are as useless here as they would have been in the times of the Mississippi Scheme, or the South Sea Bubble. The ordinary civil law is designed for the usual transactions of life, and not to business in periods of mania.

I can only say there was no fraud in fact in the making of this contract, and although it was freely charged it was not proved, but disproved.

It was also argued that Flummerfelt's evidence by way of examination under order should not have been received. It was said to have been taken in shorthand and certified by the reporter, and that such a practice was not allowable in the case of witnesses, although it was in the case of parties to the action. An office copy of it was then put in but objected to at the trial by the defendants' counsel.

By Rule 282, the Court or Judge may order evidence to be taken by affidavit or examination on such conditions as may be reasonable. Rule 285 empowers the Court or a Judge if necessary for the purposes of justice to make an order for examination of any witness, and to direct the deposition to be filed, and that any party to the cause may give the same in evidence.

The C. L. P. Act, secs. 165 and 166, and the amendments of the last section by 41 Vic. ch. 8 sec. 8, authorize the like course of procedure, and that the examination may be taken in shorthand and that a copy of the depositions so taken and certified by the person taking the same as correct, should for all purposes have the same effect as the original depositions in ordinary cases.

These provisions do apply to examination of witnesses as well as to the parties to the cause, and so far the objection fails.

Then as to the office copy being used sec. 165 expressly allows it.

If there were any force in the objections we should allow them now to be cured. Besides the case would stand substantially as it is if the whole of Flummerfelt's

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evidence were struck out as no substantial wrong or miscarriage has been occasioned by the admission of the testimony objected to: Rule 311.

It was next objected that the plaintiff after having given evidence in disproof of the fraud pleaded by the defendants, was allowed also to give further evidence in reply, in support of his original case by way of repelling the evidence given on the part of the defendants to establish the fraud. The evidence shews the plaintiffs' counsel did not enter into the question of fraud upon his examination in chief. The defendants' counsel cross-examined the witness as to fraud, and the plaintiffs' counsel merely re-examined upon that cross-examination as he was obliged to do, otherwise he would have been compelled to recall the witness by way of reply for the mere purpose of explaining or clearing up the cross-examination, which would be highly inconvenient and confusing. The plaintiff did not anticipate the trial of the issue of fraud by going into evidence of it as part of his case, and the defendants cannot force him to do so by their cross-examination upon it, nor does the plaintiff by his re-examination upon the cross-examination of the defendants relating to the fraud, make the trial of that issue a part of his case. The plaintiffs' counsel was therefore quite right in calling his own witnesses in reply to disprove the charge of fraud.

The next objection I believe was that as the learned Judge decided to nonsuit the plaintiff because the agreement had not been sufficiently proved, he still allowed the case to go on for the trial of the issue of fraud by the jury, and for the assessment of damages, and that the trial from that time forward became a trial upon an issue, the proof of which rested upon the defendants, and therefore the reply should have been given to them.

We think there is no such rule of procedure as that. The case went on just as if a nonsuit had not been mentioned, excepting that after the findings of the jury were rendered, the nonsuit was to be entered, and nothing could

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be more embarrasing than to decide the conduct of the trial in the manner contended for by the defendants.

The last objection was a complaint of the plaintiffs' counsel for the frequent interruptions, which it is said he made to the charge of the learned Judge to the jury.

We are not inclined to interfere with the general disposition of the case now before us for that cause. If the learned Judge himself complained of such conduct, or if we were satisfied, assuming the complaint to be well founded, that it had occasioned injustice to the opposite party by improperly influencing the jury, or otherwise so that by reason of it there had been a mis-trial, we do not doubt our power to correct the wrong done by ordering a new trial.

It would require a very clear case that injustice had been done to the party complaining to require or justify the interference of the Court, for the general conduct of the trial rests with and depends upon the Judge who presides at it. And I see no ground—still assuming the charge to be well founded—for interfering upon this occasion. *Bradlaugh* v. *Edwards*, 11 C. B. N. S. 377, shews how complaints of conduct at the trial will be considered by the Court.

Upon a consideration of the whole case, I agree the nonsuit should be set aside, and a verdict entered for the plaintiff for the damages which were awarded to him.

Judgment accordingly.

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[COMMON PLEAS DIVISION.]

IN RE H. L. LEE.

Extradition—Information alleging that prisoner is accused, &c.—Surplusage—32 & 33 Vic. ch. 30, sec. 11, D., ch. 29, sec. 27, D.—Plea to informations necessity for—Depositions—Sufficiency of proof of—Corroboration.

In extradition proceedings the information charged that the informant "hath just cause to suspect and believe, and doth suspect and believe that H. L. Lee," the prisoner, "is accused of the crime of forgery," &c., "for that the said H. L. Lee," &c., "did feloniously forge" some 78 orders for the payment of money. The 79th charge was, that the said H. L. Lee, at the aforesaid several times, &c., did feloniously utter, knowing the same to be forged, the said several orders, &c.

Held, sufficient, for that the information charged that the prisoner "did feloniously forge," &c.; and the allegation that the informant believed that the prisoner "is accused," &c., might be treated as surplusage; but even if objectionable at common law, it was good under sec. 11 of 32 & 33 Vic. ch. 30, D., and 32 & 33 Vic. ch. 29, sec. 27, D.; and moreover the 79th charge was free from objection.

Held, also, that in these proceedings, a plea to the information is not required.

Certain foreign depositions used were sworn to before E. G., a justice of the peace for Cincinnati township, Hamilton county, Ohio. A certificate was attached, commencing, "I, Daniel J. Dalton, clerk of the Court of Common Pleas for said Hamilton county," certifying as to the signature of E. G., and that he was a duly qualified justice of the peace for said county, and entitled to take depositions of witnesses, &c.; and concluded, "In testimony whereof I have hereunto set my hand and affixed the seal of the said Court at Cincinnati," &c. D. J. Dalton, by Richard C. Rohner, Deputy. To this was attached the certificate of the Governor of the State of Ohio, under the great seal of the State, certifying that D. J. Dalton, "whose genuine signature and seal are affixed to the annexed attestation, was at the date thereof clerk of the said Court," &c.; that "he is the proper person to make such attestation, which is in due form, and that his official acts are entitled to full faith and credit."

The Court, without specially pronouncing on the question refused to allow an objection, which as a matter of fact was not taken, to the sufficiency of the depositions under 45 Vic. ch. 25, sec. 9, sub-sec. 2 (*a*) D., for the official seal of D. J. Dalton is attached, and the Governor certified that he was the proper person to make such attestation; and also there was *viva voce* evidence given in proof thereof, so that the "papers were authenticated by the oath of some witness" under sub-sec. (*b*).

Per WILSON, C. J.—In these proceedings, the evidence of interested parties need not be corroborated.

THE prisoner was committed by the Judge of the County Court of the County of York, for extradition, for forgery committed at Cincinnati, in the State of Ohio.

A writ of *habeas corpus* was issued returnable before the Divisional Court of the Common Pleas Division; and a writ of *certiorari* was also issued to bring up all the papers and proceedings before the said Court.

On the return of the writs, the writs and the return thereto were filed, and the discharge of the prisoner moved for.

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Murphy supported the motion. The first objection is that the information before the County Judge does not state a charge against the prisoner sufficient to justify his arrest or imprisonment. The information charges that the informant has just cause to suspect and believe, and doth suspect and believe that the prisoner is accused of forgery. The information should have been, not that the informant believed that the prisoner is accused, but that the deponent suspected and believed that the prisoner had committed the crime of which he was charged. The next objection is, that the prisoner did not plead to the indictment, but refused to do so; and the learned Judge did not enter a plea for him, and without a plea the charge could not be entered into. The next objection is, that the documentary evidence is not properly certified as required by the 48 Vic. ch. 25, sec. 9, D. It is not authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of the Foreign State. The depositions objected to are certified by D. J. Dalton, the Clerk of the Court of Common Pleas of Hamilton county, &c., by Richard C. Rohner as the Deputy of Dalton, and there is no certificate of the Governor that Rohner is such deputy; and in any event the clerk of the Court of Common Pleas is not a Minister of State within the statute. The copy produced of Woodrough & McParlen's account in the ledger of the bank was not admissible. The bank book itself should have been produced. The copy would clearly be inadmissible at Nisi Prius or Oyer and Terminer. Assuming that the documentary evidence should be excluded, the only evidence of the forgery is that of members of the firm who suffered by the forgery, and the evidence being that of interested parties, it should, under 32 & 33 Vic. ch. 19, sec. 54, D., have been corroborated, and there is no sufficient corroboratory evidence.

Fenton, County Crown Attorney, for the authorities of Ohio, contra. The words, "is accused," in the information, are a mere recital under sec. 21 of the Extradition Act of

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1877, 40 Vic. ch. 25, D, introduced to make the information conform to the operative words used in the forms in schedules to said Act, and is also in accordance with the form given by schedule T. to the Criminal Act of 1869, 32 & 33 Vic. ch. 31, D.; but the words may be rejected as surplusage, and the information still contains the formal charge of forgery. Besides 32 & 33 Vic. ch. 30, sec. 11, D., expressly declares that no objection to the information shall be allowed. See also sec. 27 of the 32 & 33 Vic. ch. 29, D. As to the second objection, the depositions are certified in exact conformity to the Extradition Act, 1877, sec. 9; *Regina* v. *Matthew*, 7 P. R. 199; *Re Counhaye*, L. R. 8 Q. B. 410. As to the third objection, the copy of the prosecutor's account in the bank ledger is admissible. The ledger being a public document the entries may be proved by an examined copy: 1 *Taylor* on Evidence, 7th ed., p. 396; *Roscoe's* Nisi Prius Evidence, 8th ed., 12; *Boyle* v. *Wiseman*, 10 Ex. 649. Besides the ledger is deposited in a foreign country, and cannot be produced. The bank refuses to permit its removal to Canada, therefore a copy of the entries may be proved: 1 *Taylor* on Evidence, 7th ed., 395-7. As to the fourth objection, the 54th section of the Forgery Act applies only to proof at the trial, and does not apply to mere preliminary investigation prior to trial such as this. *Regina* v. *Bannerman*, 43 U. C. R. 549, shews that there is abundant corroboration. Corroboration is not needed in extradition investigations. The evidence of accomplices alone is sufficient to justify extradition: *Re Caldwell*, 5 P. R. 217. Besides, the Coun Judge is of opinion that the evidence is sufficient to justify his being put on trial for the offence, and this Court is not a Court of Appeal from his decision, the case being within his jurisdiction, and there being some evidence to support his decision: *Ex parte Huguet*, 29 L. T. N. S. 41.

March 10, 1884. WILSON, C. J.—On the argument of this case several objections were taken by Mr. Murphy, the counsel for the prisoner. In point of order they are

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as follows: — (1) That the information does not state a charge against the prisoner sufficient to justify his arrest or imprisonment. (2) The prisoner has not pleaded to the charge, but refused to do so. (3) The depositions taken in the State of Ohio were not duly authenticated and certified according to the statute. (4) The copy of part of the ledger of the bank was not admissible in evidence; the original book should have been produced. (5) If the foreign depositions and copy of part of the ledger of the bank were not admissible in evidence, there was no corroboration of the evidence of the two principal parties, who were both interested in the prosecution.

The information, so far as it is material, states the charge as follows: "The information of, &c., taken upon oath this 18th of February, 1884, at the City of Toronto, &c., before, &c. The said informant saith that he hath just cause to suspect and believe, and doth suspect and believe that Harry L. Lee, late of the said City of Cincinnati, is accused of the crime of forgery, and utterance of forged paper within the jurisdiction of the United States of America, to wit: at, &c., as follows: for that he, the said Harry L. Lee, at, &c., on the seventy-eight several times next hereafter mentioned, did feloniously forge the seventy-eight several orders for the payment of money next hereinafter mentioned and described, with intent to defraud, that is to say: For that he, the said Harry L Lee, on, &c., at, &c., did feloniously forge," &c. and so setting out in like terms the other seventy-seven alleged forged orders for the payment of money.

The 79th charge is stated as follows: And also for that he, the said Harry L. Lee, at the aforesaid several times when he committed the aforesaid seventy-eight several forgeries hereinbefore charged, at, &c., did feloniously utter (knowing the same to be forged) the aforesaid seventy-eight forged orders for the payment of money hereinbefore mentioned, with intent to defraud."

The objection to the information is, that it states the informant "hath just cause to suspect and believe, and

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doth suspect and believe that Harry L. Lee *is accused* of the crimes of forgery, &c.," while it is said the allegation should have been, not that the person *is accused*, but that the deponent suspected and believed he, the said Harry L. Lee, *had committed* the crimes, &c.

Mr. Fenton, for the prosecution, referred to the Criminal Acts of 1869, ch. 31, relating to summary convictions before Magistrates (schedule T.), where the general form of information on oath is given, and in which the language is, that the informant "saith that (he hath just cause to suspect and believe, and doth suspect and believe that) A. B.," &c., "did (here set out the offence, &c.), contrary," &c. He referred also to the 40 Vic. ch. 25, sec. 21, D., and to the schedule of forms referred to in that Act.

Sec. 21 declares "The forms set forth in the third schedule to this Act, or forms as near thereto as circumstances admit, may be used in the matters to which such forms refer, and when used shall be deemed valid." And the following are the forms: *Warrant of apprehension.*—"Whereas it has been shewn to the undersigned," &c., "that late of is accused (or convicted) of the crime of," &c. *Warrant of committal.*—"Be it remembered that on," &c., "and forasmuch as I have determined that he should be surrendered in pursuance of the said Act, on the ground of *his being accused* (or convicted) of the crime of," &c. *Order of Minister of Justice for surrender.*—"Whereas late of accused (or convicted) of the crime of," &c. He referred then to the Criminal Acts of 1869, ch. 30, sec. 11, relating to charges before Magistrates for indictable offences.

The section declares that "No objection shall be taken or allowed to any information and complaint for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution, before the justice or justices who take the examination of the witnesses in that behalf."

He also referred to ch. 29 of the Criminal Acts of 1869, sec. 27, which enacts that the forms of indictment in the

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schedule of the Act shall be sufficient "as respects the several offences to which they respectively relate; and as respects offences not mentioned in the schedule, the said forms shall serve as a guide," &c., "and the indictment shall be good if, in the opinion of the Court, the prisoner will sustain no injury from its being held to be so, and the offence or offences intended to be charged by it can be understood from it." And sec. 1, of that Act, declares "the word '*indictment*' shall be understood to include '*information*.'" &c.

The Summary Jurisdiction Act does not apply to this case. This is not a proceeding which the Magistrate can summarily dispose of. But if it were that Act does not sanction the form of this information, for the form there given is, that the informant hath just cause to suspect and believe, and doth suspect and believe that the party complained of *did* the act, not that he *is accused* of doing the act.

Nor does the 40 Vic. ch. 25, sec. 21, D. or the form in the schedule therein given, because the form of warrant and of the order set out are correctly stated by the officers who grant them, that the prisoner *is accused*, because they know no more than that fact, and it is the fact that *he is accused*; but the informant cannot use that language. He ought to say that he, the informant, *does accuse* the party complained of, and not that he, the informant, believes and suspects the party complained of *is* accused. Accused who by? For the complainant does not accuse him.

The language of the information states more than that however. It is that he, the informant, "hath just cause to suspect and believe, and doth suspect and believe that H. L. Lee is accused of the crimes of forgery and utterance of forged paper, * * for that the said H. L. Lee on, &c., at, &c., *did feloniously forge*. &c." That the informant believes that Lee is accused of forgery because he did forge, is either nonsense or surplusage. The informant does allege that Lee committed forgery, and therefore the statement that he believes Lee *is accused* of forgery is

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mere surplusage, and may be rejected. If the allegation mean that he, the informant, believes and suspects that Lee *is accused* of forgery by him, the informant, it is still insensible and surplusage.

It is impossible to give effect to that objection, even if it were available to the prisoner at the common law, when ch. 30, sec. 11, of the Criminal Acts of 1869, 32 & 33 Vic. ch. 30, D., declares "no objection shall be taken or allowed to any information and complaint for any alleged defect therein *in substance or in form*;" and when 32 & 33 Vic. ch. 29, sec 27, D., declares "the indictment," which includes the information, "shall be good if in the opinion of the Court the prisoner will sustain no injury from its being held to be so, and the offence or offences intended to be charged by it can be understood from it." For there is no doubt the prisoner will sustain no injury from this information being held sufficient, and there is no doubt the offences intended to be charged by the information can be and are perfectly understood by the Court and by the prisoner as well. The 79th count, too, is free from all objection.

The first objection is therefore over-ruled.

It is next said the prisoner has not pleaded to the information, but refused to do so.

The paper before us shews the prisoner's counsel required an adjournment before pleading, which the Judge would not grant. The prisoner's counsel being of opinion if he pleaded not guilty to the indictment it would be saying he was ready to go on with the indictment, whereas he was not ready to go on.

It does not appear that a plea of any kind is required upon such a proceeding. The 40 Vic. ch. 25. secs. 11, 12, 13, 14, D., do not require more than a warrant of apprehension, which may be issued by the Judge either upon the foreign warrant of arrest, or upon an information made before him. The case is then to be heard in the same manner, as near as may be, as if the fugitive were brought before the Judge charged with an indictable

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offence committed in this country. And in the case of a fugitive accused of an extradition crime, if such evidence is produced as according to the laws of this country, subject to the provisions of this Act, justify his committal for trial in case the crime had been committed in this country, the Judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign State or discharged according to law, but otherwise the Judge shall order him to be discharged. And if the Judge commits the fugitive to prison, he shall on such committal transmit to the Minister of Justice a certificate of the committal, with a copy of the evidence taken before him not already so transmitted, and such report upon the case as he may think fit.

There is nothing said here of any formal proceeding or record of the decision of the Judge being drawn up.

The evidence is to be taken, and a committal or discharge is to be pronounced thereon, and if a committal for surrender be directed, a warrant to that effect is to be drawn.

It does not appear that any such plea is required to be put in or noted. The proceedings are to be conducted as if they were carried on under the Criminal Acts of 1869, ch. 30.

The course there pointed out is as follows: By sec. 29, when the accused is brought before the Magistrate, the Magistrate shall, in presence of the accused, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of the different witnesses in writing, which shall be read over to and signed by the witnesses, and also by the Justice who takes the same. And by sec. 31, after the examination of all the witnesses for the prosecution has been completed, the Justice shall read the same to the accused, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say

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will be taken down in writing, and may be given in evidence against you upon your trial." He is not asked whether he is guilty or not guilty. He is not required to plead. He is merely asked whether he wishes "to say anything to the charge." And he is to be told: "You are not obliged to say anything unless you desire to do so." He need not therefore say a single word to the charge. The proceedings had at that time are an investigation, not a trial. The prisoner is told that if he do say anything it will be taken down in writing, and may be given in evidence against him *upon his trial.* The forms of the schedule shew that no plea is required. Nor can it be necessary where there is not to be *a trial.*

The second objection also fails.

3. The foreign depositions, it is said, have not been duly authenticated. Each of these depositions is signed and attested as follows: The deponent subscribes his name. Then follows: "Sworn to before me by said," (naming the deponent), and by him subscribed in my presence, this," (naming the day month and year), "Edward Gettigan, Justice of the Peace in and for Cincinnati Township, Hamilton County, Ohio."

This certificate is then attached: "State of Ohio, Hamilton County: I, Daniel J. Dalton, Clerk of the Court of Common Pleas within and for said County of Hamilton, do hereby certify that Edward Gettigan, whose name is signed to the affidavit hereto attached, of," (naming the deponent), "taken before the said Edward Gettigan, was at the time of subscribing the same a legally acting Justice of the Peace in and for said Hamilton County, duly elected, commissioned, and qualified, and that I am well acquainted with his handwriting, and verily believe his signature to be genuine, and that he is authorized to take the depositions of witnesses, acknowledgments of deeds, &c. In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Cincinnati, this," (naming day, month and year.) (Signed), "D. J. Dalton, Clerk H.C.C.P.O." "By" (Signed), "Richard C. Rohner, Deputy." [L.S.]

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There is only one of these certificates signed apparently by D. J. Dalton himself, the certificate attached to the deposition of Frank Insilke. The others are all signed by Rohner as deputy. Then follows the certificate of the Governor of the State of Ohio, under the great seal of the State, certifying that Daniel J. Dalton, whose genuine signature and official seal are affixed to the attestation hereto attached, was at the date thereof Clerk of the Court of Common Pleas of Hamilton County, in said State, duly commissioned and qualified; that he is the proper officer to make said attestation, which is in due form; and that his official acts are entitled to full faith and credit. In testimony whereof, &c." [L. S.]

The Act 40 Vic. ch. 25, sec. 9, D., declares that "Depositions or statements taken in a foreign State on oath or on affirmation, where affirmation is allowed by the law of the State, and copies of such depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence on proceedings under this Act; (2) Such papers shall be deemed duly authenticated, if authenticated in manner provided for the time being by law, or if authenticated as follows: (*a*) If * * the depositions or statements * * purport to be certified to be the originals * * by a Judge, Magistrate or officer of the foreign State. (*b*) And if in every case the papers are authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of the foreign State; of which seal the Judge shall take judicial notice without proof." Sec. 9, and sub-sec. 2, and (*a*) apply to documents *stating the fact of conviction*, and therefore do not apply here. Clause (*b*) appears to be the only one applicable to this, a case of *accusation*, and to convictions also.

Are then these foreign depositions "authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some other minister of the foreign State?" They certainly are.

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If the certificate be correct, which is signed in the name of D. J. Dalton, the Clerk of the Court of Common Pleas of Hamilton County, in the State of Ohio, by his deputy, Mr. Rohner, and if the certificate of the Governor be correct, there is no certificate that Rohner is deputy of the Court. And the certificates of the Common Pleas officers, as well as of the Governor, are not quite correct in stating that "the genuine signature of D. J. Dalton," is affixed to the attestation, although the Governor's certificate quite correctly states that the "official seal" of D. J. Dalton is attached to the attestation.

The sub-section (*b*) referred to does not require the authentication to be under the hand or signature of the Minister of Justice, or other minister of the foreign State, but only that it should be "sealed with the official seal of the Minister of Justice, or some other minister of the foreign State."

Is the Clerk of the Court of Common Pleas of Hamilton County, of the State of Ohio, a *Minister* of State of Ohio, bearing in mind the language of the section: "The Minister of Justice or other minister of the foreign State?" That language appears to refer to persons of a different class from those who are named in sub-section (*a*) "a Judge, Magistrate or officer of the foreign State."

I am not satisfied the clerk of the Court of Common Pleas for Hamilton County can properly be described as a minister of the foreign State. But whether he is so or not his *official seal* is thereto attached, and the Governor of the State of Ohio declares that the clerk of that Court "is the proper officer to make such attestation." That may mean he is the only person or one of the only persons to act in such a case, according to the law there; or it may mean according to the law here, and if the latter meaning be the one intended it is plainly sufficient. So that he would be for the purpose before us a minister or *quasi* minister of State. We do not speak positively on the point, but I do not, nevertheless, refuse to accept the certificate as sufficient against the objection taken. Indeed I

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may add the specific objection was not taken. But besides that the *viva voce* oath of E. H. Blandschmitt, an attorney and counsellor-at-law of the State of Ohio, in Cincinnati, taken before his Honor Judge Boyd, before whom this investigation was conducted, shews that he, the witness, "was present when those statements" (the foreign depositions) "were sworn before the magistrate. I saw the deponents sworn, and deponents and magistrate signed them in my presence. Mr. Gettigan is a magistrate authorized under the law of the State of Ohio to administer oaths." So that under sub-sec. (*b*) "the papers are authenticated by the oath of some witness;" and the third objection fails

4. It is next objected that the copy of that part of the bank ledger produced was not admissible, and that the original should have been produced.

Upon the evidence taken here *viva voce*, it appears the book or ledger in question, being one of the books of a State bank, cannot be removed from the bank, and that the authorities refused to part with it. In that case a sworn copy is admissible, and that evidence has been supplied. We have had that question quite lately before us in the case of *McDonald* v. *Murray*, *ante* p. 559. We decide against this objection.

5. The last objection is, that if the copy of the portion of the ledger and the foreign depositions were not admissible there was no proper corroborative evidence of the parties interested of the fact of forgery.

As we think the copy of the portion of the ledger and the foreign depositions were fully proved and properly received in evidence, and as, in our opinion, the charge made is fully sustained by these documents, it is scarcely worth while to consider whether there is sufficient corroboration of the fact of forgery independently of these documents.

The principals McFarlane and Duhme do clearly prove it. Is their evidence corroborated?

The evidence is: The whole of each of the checks produced is the writing of the prisoner, excepting the signature

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at the foot. The stub of each check is also in his handwriting, and the pencilling on the back of each check is in his writing too.

The writing is not otherwise proved, apart from the foreign documents, than by the evidence of the interested witnesses. If the prisoner's writing were proved by a competent witness, comparison of writing would then be admissible and corroborative proof, but I think the writing proved by a witness disqualified, if not corroborated, cannot alone prove a writing to be genuine, and upon that evidence corroborate himself by a comparison of writing. The comparison is valuable and available only upon the assumption that a genuine writing has been first proved, by and according to which the comparison can be made.

If the body and figures of the checks, and the writing in the stub of the checks could be compared, that is, if the writing on them can be shewn to be of the writing of the prisoner, the fact of forgery may be inferred or proved sufficiently from the difference in the amounts of the checks and the amounts specified in the stubs, and the pencillings on the back of the checks corresponding with the sums drawn from the bank according to the amounts contained in the checks, but varying in amount from the stub.

The nature of the corroboration has been much questioned. In *Taylor* on Evidence, 7th ed., p. 813, it is said "Some Judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to the *corpus delicti* only; but others, with more reason, have thought it essential that corroborative proof should be given of the *prisoner* having actually participated in the offence; and when several prisoners are tried, that confirmation should be required as to all of them before all can be safely convicted:" *Regina* v. *Stubbs*, 1 Jur. N. S. 1115, 25 L. J. N. S. Mag. Cas. 16.

In *Rex* v. *Wilkes and another*, 7 C. & P. 272, Alderson, B., said: "There is a great difference between confirmations as to the circumstances of the felony and those which apply to the individuals charged; the former only prove the

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accomplice was present at the commission of the offence; the latter shew that the prisoner was connected with it. * * The confirmation I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular persons charged."

In *Regina* v. *Farler*, 8 C. & P. 106, Lord Abinger said at p. 107: "Corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man was to break open a house and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to his throat and did steal the property. It would not at all tend to shew that the party accused participated in it."

The case of *Regina* v. *Bannerman*, 43 U. C. R. 547, does not apply. There was in that case independent evidence that the note in question was in the writing of the prisoner, and the person whose name had been used by the prisoner swore it was not in his writing, for he could not write; and he said further, that he had not given authority to the prisoner to use his name. That was plainly evidence of the party interested corroborated by independent or *other legal evidence*. He was not bound to prove by other evidence he had not given the prisoner the right to use his name. That was a matter to be proved by the prisoner, and not to be disproved by the prosecutor. The prisoner could not by mere suggestion, without any proof to support it, require the prosecutor to repel such a suggestion. If the defendant had been in the habit of using the prosecutor's name, and that fact was shewn, the prosecutor might be required to disprove the power so exercised on this particular occasion; but there was nothing of the kind in that case.

Admitting that, apart from the foreign documents, there

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was not sufficient evidence to justify a jury in acting upon the evidence of an unconfirmed accomplice, is this proceeding to be governed by a rule of that kind?

The Criminal Act of 1869, ch. 19, sec. 54, admits the evidence of all persons in a prosecution for forgery, interested or not interested; but it enacts, "the evidence of any person or persons so interested, or supposed to be interested, shall in no case be deemed sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution."

This proceeding is not taken for the purpose of sustaining *a conviction*, nor is it taken *in support of a prosecution*. This is a preliminary proceeding to determine whether or not the party shall be prosecuted, and if *prosecuted*, whether he shall be convicted. This is an investigation only, and in my opinion the restrictive clause at the end of section 54 does not apply to such an investigation. The words, "In all *prosecutions* by *indictment* or *information*," are used but the prosecution there referred to is where the prosecution is *by* indictment or *by* an information, as the later language of that section shews, for it refers to the interest of the party giving evidence "on *the trial* of such indictment or information." So that excluding the foreign documents, the section of the Forgery Act referred to does not exclude the evidence of parties interested in the alleged forged instruments giving evidence, because this investigation is not to sustain a conviction, and it is not evidence on the *trial* of an indictment or information, and therefore the last objection fails as well as the others, and the evidence of McFarlane and Duhme is of itself sufficient to sustain the charge of forgery and uttering forged paper, knowing it to be forged, against the prisoner upon this particular charge and occasion. The motion before us is not by way of appeal. All we have to say is, whether that was evidence before the learned Judge of the County Court which was sufficient to justify him in making the order for the committal of the prisoner for the purpose of

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his being surrendered upon the charge which has been laid against him: *Ex parte Huguet*, 29 L. T. N. S. 41; *Ex parte Vaughan*, L. R. 2 Q. B. 114; *Mould* v. *Williams*, 5 Q. B. 469; *Regina* v. *Wood*, 5 E. & B. 49.

As we have decided upon all points against the prisoner, we must remand him to the custody from which he came, subject to be dealt with by the proper authority in such a case.

ROSE, J.—I agree the motion must be refused.

I think corroborative evidence unnecessary, as I agree that the restrictive clause of section 54 does not apply.

I have not been able to consider the statute providing for authentication of the depositions sufficiently to form an opinion as to the objections raised by Mr. Murphy. As, in my opinion, corroboration is not required, it has been unnecessary to form an opinion.

I do not dissent from the opinion of the learned Chief Justice on the point, but desire to leave myself open to consider the question if it ever becomes necessary so to do.

GALT, J., concurred.

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[COMMON PLEAS DIVISION.]

WEBSTER ET AL. V. LEYS.

Married woman—Next friend—Separate estate—O. J. Act—Rules 97, 494 Pending business.

In an action by a married woman commenced before the O. J. Act, it was held on demurrer that the plaintiff must sue by next friend, and an order was made accordingly. Subsequently, and after the passing of the O. J. Act, the next friend became insolvent. On an application to the Master in Chambers for the appointment of a new next friend, he made an order for such appointment, which was affirmed on appeal by PROUDFOOT, J., he holding that he was bound by the previous order: that even although under the O. J. Act, Rule 97, a married woman may sue in respect of her separate estate without a next friend, by Rule 434 this was not to apply to pending business.

On appeal to the Divisional Court the judgment of PROUDFOOT, J., was affirmed.

Per ROSE, J., that there was no evidence to shew that the woman had separate estate when the order appealed from was made.

THIS was an appeal from the judgment of Proudfoot, J., affirming an order of the Master in Chambers directing the proceedings herein to be stayed until a new next friend was appointed instead of a next friend who was insolvent, and directing that the new next friend should be liable for the past and future costs.

The judgment of Proudfoot, J., was as follows:

PROUDFOOT, J.—The Master in Chambers made an order on the 29th October, 1883, staying proceedings until a new next friend to the married women plaintiffs was appointed, instead of a next friend who was insolvent, the new next friend to be liable for the past and future costs of the defendant Leys.

The plaintiffs appeal from this order.

At an earlier stage of the cause I allowed a demurrer to the bill, because the married women sued without a next friend (25th June, 1879), and the plaintiff accepted that as a correct declaration of the law applicable to the case, and amended their bill by appointing a next friend.

The case afterwards came on for hearing on the 4th May, 1881, and a decree was made which bears date the 14th June, 1881.

It is said that the property was converted into personalty by the will in 1856, and under the authority of *Lawson* v. *Laidlaw*, 3 A. R. 77, it became the separate estate of

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the married women. But that did not dispense with the necessity of the married women suing by their next friend: 1 *Daniel's* Chan. Prac., 5th ed., 102.

It was only the Statute of 1872 that had that effect, and it did not apply to property acquired before the statute was passed. In *Shelley* v. *Goring*, 8 P. R. 36, the property was acquired in 1877.

But I think I must assume that my order upon the demurrer was correct, and that when it was made a next friend was necessary for the prosecution of the suit.

It is then said that under the O. J. Act, Rule 97, married women may sue without a next friend in cases relating to their separate estate.

That statute came into force on 22nd August, 1881, while the decree in this case was made on the 14th June, 1881. Marg. Rule 494 provides in respect to pending business in the Court of Chancery that all causes with three exceptions that do not apply to this case shall, so far as relates to the form and manner of procedure, be continued and concluded in the same manner as they would have been in the Court of Chancery.

I think that disposes of this case. Rule 97 does indeed say that married women may sue without a next friend in regard to their separate estate, but Rule 494 of the same Act in effect says they shall not do so when a decree has been obtained before the Act came into force.

The Master's order was therefore right, and the appeal is dismissed, with costs.

From this judgment the plaintiffs appealed to this Court.

During Hilary Sittings, March 6, 1884, the appeal was argued.

Davidson Black, in support of the appeal. The order of Proudfoot. J., 25th June, 1879, was wrong, and this Court can review it. The plaintiffs are merely resisting an application for stay of proceedings on the ground that they are entitled to sue without a next friend. The order does not render the matter *res judicata*. It is merely an order for security for costs, It is the constant practice to rescind orders of this kind when it is shewn that they are granted in error. The property in question was separate estate, and under the O. J. Act, Rule 97, a married woman suing in respect of her

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separate estate, is not required to sue by a next friend, and the matter being one of practice and procedure, the rule is retrospective. He referred to R. S. O. ch. 125, sec. 2; *Lawson* v. *Laidlaw*, 3 A. R. 77; *Sivewright* v. *Leys*, 28 Gr. 498; *Webster* v. *Leys*, 28 Gr. 471; *Mallory* v. *Mallory*, 7 P. R. 446; *Pruyn* v. *Soby*, 7 P. R. 44; *McPherson* v. *McCabe*, 1 Ch. Cham. 250; *Shelley* v. *Goring*, 8 P. R. 36; *Republic of Costa Rica* v. *Erlinger*, 3 Ch. D. 62.

R. E. Kingsford, contra. The order made under the judgment of Proudfoot, J., on the demurrer, renders the matter *res judicata*. The plaintiffs did not appeal from the order, but acquiesced in it, and acted under it. This is practically an attempt on the part of the plaintiffs to endeavour to get the benefit of an appeal. The order disposed of the question as to separate estate, and ordered the security to be given. Even if separate estate, this did not dispense with the requirement of a next friend. Rule 97 of the O. J. Act does not assist the plaintiffs, because under Rule 494, the procedure before the Act must govern. He referred to *Daniel's* Ch. Prac., 5th ed., p. 102, 6th ed., p. 138; *Maclennan's* O. J. Act, p. 147; *Wells* on *Res Adjudicata*, p. 370, sec. 446.

March 7, 1884. ROSE, J.—Admitting for the sake of argument, the contention of the appellants that the married women, plaintiffs, have separate estate, that does not entitle the appellants to succeed, unless they can take advantage of the new practice and procedure introduced by the O. J. Act. I am of the opinion they fail in doing so. I adopt the reasons of the learned Judge above set out.

I am also of the opinion that the appellants cannot contend that they were not bound to give security at the date of the order on demurrer, each question raised and decided by the demurrer being *res judicata*. I do not see anything before us to lead to the conclusion that at the time of making the order appealed from, the appellants had separate estate. They are found by the report to be largely indebted to the trustee, and so far as appears they

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have no separate estate. It was said at the bar that they were persons of no substance.

I am not moved in the appellants' favour by their appeal to the merits. At present they seem to be in the position of debtors desiring to carry on proceedings to avoid payment of amounts found by the Court to be owing by them to their trustee. While the report stands I cannot assume its incorrectness in any particular, and cannot speculate on the chances of further litigation if proceeded with.

In my opinion the appeal must be dismissed, with costs.

WILSON, C. J., and GALT, J., concurred.

Appeal dismissed.

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[CHANCERY DIVISION.]

SAUNDERS V. BREAKIE.

Will—Description of land—Waste.

A. Mc. L. S. being the owner of a 200 acre lot, and having disposed of 12 acres at the north east corner and 5 acres in the centre portion in his lifetime, by his will devised as follows. First I devise and bequeath unto W. A. S. the easterly part of my lot, No. 6, * * being described as one-third part of the length and the entire width, measuring westward from the easterly limit of the said lot, No. 6, and containing 66⅔ acres, more or less. Second, I devise and bequeath unto H. D. S., the middle part of my said lot No. 6, in * * being described as one-third part of the length and the entire width, measuring westward from the land hereinbefore devised, to W. A. S. of the said lot No. 6, and containing 66⅔ acres, more or less. Third, I devise and bequeath to my daughter, A., the wife of J. B., of * * the remaining one-third part of my said lot No. 6, in * *; being described as one third of the length and the entire width of the said lot No. 6, measuring westward from the land hereinbefore devised to H D. S., and extending to the westerly limit of said lot No. 6, containing by admeasurement 66⅔ acres, more or less. To have and to hold the said hereby devised land and premises, unto, and for the use of my said daughter A., for and during the term of her natural life, with remainder thereof on her decease to the children of her body, and their heirs and assigns for ever.

A codicil provided as follows. I do hereby alter my said will, so that should my said daughter A., the wife of J. B., die without issue, or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike.

Held, that each of the three devisees took under the will according to the measurements given, that is to say one-third part of the length of the lot, and the whole width of it, and only such portion of his or her respective parcel thus described, as the testator had title to and power to give, and that it could not be held that what land the testator had was to be equally divided amongst his three children.

Held also, following *Drake* v. *Wigle*, 22 C. P., 405, that a tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but that he cannot cut down timber even for the same purpose, *and sell it*.

THIS was an action brought by Henry D. Saunders, against his sister, Annie Breakie, her husband, James Breakie, his brother William A. Saunders, and three infant children of the said Annie and James Breakie, for the construction of the will of the plaintiff's father, Andrew McLaney Saunders, and to restrain the defendants Annie and James Breakie from cutting timber on the property in question.

The trial took place at the sittings at Toronto, before Ferguson, J., on the 28th and 29th May, 1883.

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Maclennan, Q.C., for the plaintiff.

C. H. Ritchie, for the defendants Annie and James Breakie.

T. S. Plumb, for the infant defendants.

The facts and the arguments are fully stated in the judgment.

March 10, 1884. FERGUSON, J.—The action is for the construction of the last will of the plaintiff's father, the late Andrew McLaney Saunders, who died on the 8th day of February, 1880; and to restrain alleged waste by the defendants Annie and James Breakie in cutting timber.

The date of the will is the 25th day of December, 1871.

The will and the first codicil disposed of lot No. 6 in the third concession west of Yonge Street, in the Township of York, containing 200 acres, excepting twelve acres thereof at the north-east corner, and five acres in the centre portion, which had been sold and conveyed by the testator prior to the date of the will.

By the second codicil, which bears date the 13th day of January, 1880, the testator merely republished and revised the will, which is as follows:

"First, I devise and bequeath unto my son, William Andrew Saunders, the easterly part of my lot No. 6, in the third concession west of Yonge Street, in the said Township of York; being described as one third part of the length and the entire width measuring westward from the easterly limit of the said lot No. 6, and containing by admeasurement sixty-six and two-thirds acres, be the same more or less, to have and to hold the said hereby devised land and premises upon trust, for the use of my said son William Andrew and his children, until his youngest child shall have attained the full age of twenty-one years, at which time the fee simple of the said premises shall pass to his children; upon condition however that said children shall pay to their father the annual rent of five pounds for and during the term of his natural life."

"Second, I give devise and bequeath unto my son, Henry Dennis Saunders all my personal property of every kind of which I shall be in possession at the time of my death, after my just debts and funeral and testamentary expenses shall have been duly paid therefrom. And I

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also devise and bequeath to my said son, Henry Dennis Saunders, the middle part of my said lot No. 6, in the third concession west of Yonge Street, in the said Township of York; being described as one-third part of the length and the entire width measuring westward from the land hereinbefore devised to my son William Andrew Saunders, of the said lot No. 6, and containing by admeasurement sixty-six and two-thirds acres, be the same more or less. To have and to hold the said hereby devised land and premises unto and to the use of my said son Henry Dennis Saunders his heirs and assigns forever."

"Third, I devise and bequeath unto my daughter, Annie, the wife of James Breakie of the said Township of York, farmer, the remaining one-third part of my said lot No. 6, in the third concession west of Yonge Street, in the said Township of York; being described as one-third of the length and the entire width of the said lot No. 6, measuring westward from the land hereinbefore devised to my son Henry Dennis Saunders, and extending to the westerly limits of said lot No. 6, containing by admeasurement sixty-six and two-thirds acres, be the same more or less To have and to hold the said hereby devised land and premises unto and to the use of my said daughter Annie for and during the term of her natural life, with remainder thereof on her decease to the children of her body and their heirs and assigns forever."

The first codicil is in the words following: "I do hereby alter section three, page two, of my said will, so that should my said daughter Annie, the wife of James Breakie, die without issue, or should outlive her issue, the remainder thereof shall revert to my own heirs share and share alike."

The second codicil I have already mentioned.

Mr. Maclennan, for the plaintiff, asked a judgment declaring that the defendant Annie Breakie is a tenant for life of the westerly one-third of the lot, and that her children are entitled in remainder in fee, subject to defeat by the executory devise over to the plaintiff and his brother as the heirs at law of the testator, in the event of Annie Breakie dying without issue living at the time of her death. All the counsel agreed in this view. There was no contention whatever about it, and I think that such is the true meaning of the will in this respect.

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As to the manner in which the land is divided by the will, there was much ingenious contention, but few authorities cited. Counsel for the plaintiff contended, that the leading idea of the testator to be gathered from the will, was that the area of land that the testator had at the time of the making of the will, and at the time of his death (there was no change in the meantime), should be equally divided amongst his three children, and that the measurement from east to west must be rejected as *falsa demonstratio*, and that the construction should be declared so to be, and the will should have effect accordingly.

This view in regard to the meaning of the will, was met by Mr. Ritchie in his usual incisive way, he contending that each of the three parcels of land was virtually described by metes and bounds, adding that the contention as to intended equality in making the gifts could not prevail, for (amongst other reasons) the same estates in the lands were not given.

Mr. Plumb followed, citing *Theobald*, 234; *Whitfield* v. *Langdale*, 1 Ch. D. 61; *Holtby* v. *Wilkinson*, 28 Gr. 550, contending that the westerly one-third of the lot was clearly given by the will to Annie Breakie for life, and afterwards to her children, subject as aforesaid, and that there appeared to be no *falsa demonstratio* in the gift at all, and that so far as his clients were concerned there was no room for contention as to what was given by the will.

At the close of the argument I noted my then view as to this part of the case, to the effect that each of the parcels of land given by the will was legally described by metes and bounds, and that these descriptions must prevail. Where lands are sufficiently described additional words, which have no application to any thing, may be rejected: *Doe d. Dunning* v. *Cranstoun*, 7 M. & W. 1, referred to in *Theobald*, 1st ed., p. 23. At page 10 Baron Parke says: "The rule is, that where any property described in a will is sufficiently ascertained by the description, it passes by the devise although all the particulars

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stated in the will with reference to it may not be true." Where there is a complete description, and the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words if inconsistent with the previous description may be rejected. *Theobald,* 1st ed., pp. 23 and 24. In this case, I think the statement of the quantity of land must be rejected.

I have since considered the matter, as well as I have been able, and I am of the same opinion as at the close of the case. Each of the three devisees takes under the will according to the measurements given, that is to say: one third part of the length of the lot, and the whole width of it; and each must be content with such portion of his or her respective parcel thus described as the testator had title to and power to give.

Then, as to the right of the plaintiff to sustain the action for alleged waste, Mr. Maclennan contended that the plaintiff, being one of those entitled upon a contingency to the estate of inheritence next after the present life estate, is in a position to maintain an action in respect of the timber alleged to have been wrongly cut and taken, the timber being the property of the owner of the first estate of inheritance next after the life estate.

Mr. Ritchie's contention was, that this would depend upon whether the heirs of the testator were to be ascertained at the time of his death or at the time of his daughter's death, and that if the heirs are to be ascertained at the time of the daughter's death, the plaintiff had only an expectancy, which would not entitle him to sue.

I am not disposed to question too closely the right of the plaintiff in this respect, for there are infants concerned, and either they or the plaintiff have the right to maintain the action, if timber has been unlawfully cut and taken off the lands. Then, has it been shewn that there was an unlawful cutting of timber?

The circumstances are these: there are 66 acres or thereabouts of the land. There were at the time the defendants Breakie and wife went into possession 30 acres cleared,

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the rest of the land being in bush. Breakie cleared four acres of this bush for the purposes of husbandry, and while doing so he made use of some of the timber on the place, and some he sold, and as he says, applied the money received for it, or an equal or greater sum, in improving the farm; and I suppose in doing the clearing he necessarily destroyed some parts of the timber, and perhaps many trees altogether. There was evidence shewing that some timber had been cut which stood outside of the boundaries of the land that the defendant had cleared. This was small in quantity, and the defence contended that it stood upon land, intended to be cleared for the purposes of husbandry, but was not so cleared because the defendants were stopped by the plaintiff from clearing as they intended. The evidence of the defendant Breakie himself, shews that there were seven oak trees cut in all; that three of those were on the four acres that were cleared, and that four of them were not, but were upon another part of the land. Two of these four oak trees were near the line of the four acres that were cleared, and it does not appear that the other two were.

A case of this kind presents in this country much difficulty. I have perused the authorities referred to by counsel, and many others, amongst which was a large number of American cases. A very large number of cases are referred to in the case of *Drake* v. *Wigle*, 24 C. P. 405. In that case, the plea that was held to be a good *primâ facie* answer, alleged that the defendant, for the purpose of cultivation, and for no other purpose, necessarily felled and cut down the timber standing and growing on forty-eight acres of the said land, reserving 15 acres of standing timber, being more than sufficient for fencing, fuel, repairs and other purposes, incidental to the enjoyment of the farm, and thereby rendered the cleared portion of it fit for cultivation, according to the custom of good husbandry in Ontario, and did lawfully fence and cultivate the same; and in doing so in no respect injured the plaintiff's reversion, but, on the contrary, made the land productive and of enhanced value to the reversioner.

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The proportion of timbered land in that case was much less than in this case. The learned Chief Justice, however, said, at p. 420: "I read the plea as justifying merely the 'cutting down and carrying away of the trees and underwood,' as charged in the declaration, merely for clearing purposes. Had the charge been of carrying away and selling the timber the defence would fail."

I think there is authority for saying that a tenant for life of land in this country may clear part of the land for the purpose of husbandry, if he does not injure the reversion by so doing; and I cannot yield to the argument that he can only do so, when no part of the land whatever has been before cleared, and brought into a state of cultivation. The extent to which he may do so is, I think, a question for a jury under the direction of a Judge.

This is the way in which many of the American cases state the law in that country, which is for the most part founded on the English Common Law. The Courts say that the principle is the same there as in England; but owing to the different conditions of the country, the application of the principle is different. The decision in *Drake* v. *Wigle*, 24 C. P. 405, seems to me to favour the view expressed in these American decisions, and I think I am to say, upon the evidence, whether or not the defendants, Breakie and wife have cleared and brought under cultivation an area of land which, taken together with that which was before cleared, constitutes so large a proportion of the whole of the estate as to be an injury to the reversion *disherison of the reversioner* as it is sometimes called; and I am of the opinion that they have not. I do not think any jury of this country would find that they have.

I can find no authority showing that a tenant for life may cut and sell timber off the land. It seems a strange conclusion that he may cut and fell for the purpose of clearing that land, and necessarily destroy some of the timber, and yet that he may not sell what he can destroy; yet, so far as I can at present see, such is the state of the law.

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I think there should be judgment for the plaintiff, in respect of the timber that was sold by the defendant Breakie.

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There will be a reference to the Master in Ordinary, to take an account of the timber sold, and an order that these defendants pay the amount, when ascertained, into Court, to abide further order.

These defendants, Breakie and wife, should be enjoined against cutting and selling timber from off the lands.

As the suit was brought mainly (I hope for the credit of the plaintiff I am correct in saying so) to obtain a construction of the will, there will be no costs down to and inclusive of the judgment.

The costs of the reference and if necessary further directions, will be reserved.

G. A. B.

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[CHANCERY DIVISION.]

RE BINGHAM AND WRIGGLESWORTH.

Conveyance—Limitations in deed—Trusts—Statute of Uses—Vendor and Purchaser Act—27 Hen. VIII. *ch.* 10—*R. S. O. ch.* 109.

A. by deed sold and assigned certain lands to B. his heirs, executors, administrators, and assigns, "to have and to hold the same unto B. his heirs, executors, administrators, and assigns in trust, for the sole and separate use of A. for life, and after A.'s decease, in trust for C. for her life; and after C.'s decease, in trust for the heirs of A., and in the event of A. surviving C., then in trust to convey and revest the said premises in A., his heirs, executors, administrators, and assigns, for their own proper use and benefit for ever. But should C. survive A., then and in that event, and in the further event of the decease of C. in trust to convey the said premises to such persons and in such manner as A. shall by his last will and testament order, designate, and appoint. But in the event of A. dying intestate, then in trust to sell and convey the said premises for A.'s heirs, executors, administrators, and assigns."

Held, that A took an estate in fee simple, subject to the intervening life estate of C.; for no such special trust was created as took the case out of the Statute of Uses.

Semble, applications under the Vendor and Purchaser Act should not be made for the mere purpose of settling questions of title when the existence and validity of the contract is not disputed.

THIS was a petition presented by George Wrigglesworth, under the Vendor and Purchaser Act, R. S. O., c. 109, setting out, that he had contracted to sell certain lands to John Bingham, who was satisfied with the petitioner's title, except that he had expressed doubts whether the petitioner could convey to him in fee simple, by reason of a certain deed of post-nuptial settlement made by the petitioner, who was the party thereto of the first part, and dated December 13th, 1880, the provisions of which are sufficiently set out in the judgment: that all the parties to the deed were living, and ready and willing to join in a conveyance to the said Bingham, and if necessary, to join in the present petition: and the petitioner prayed for a declaration that he and the other parties to the said deed, could convey the said lands in fee simple to the said Bingham; and that the said Bingham might be ordered to pay the costs of and incidental to this application.

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The petition was heard on Wednesday, April 5th, 1882, before Ferguson, J., (*a*)

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R. M. Fleming for the vendor. We place our case upon the rule in *Shelley's Case*, 1 Co. 93 b.

[FERGUSON, J., referred to *Lewin* on Trusts, 7th ed., p. 193.]

It is not material to my argument whether the trustee is a mere conduit pipe, or the owners of the fee. If he is a mere conduit pipe, the *habendum* should have stopped at the word "forever," where it first occurs in it. The whole estate is thus gone. It is to the husband for life, then to the wife for life, and then to the husband's heirs forever, which make up the fee simple, and the word *trust* will do for the word *use*. The following part directing a conveyance to the party of the first part means nothing, because in the event mentioned, he would have the fee, and a conveyance would be unnecessary. So also with the power of appointment, and also with the direction to convey to the heirs of the party of the first part at the end. This would be quite unnecessary. I refer to *Cooper* v. *Keynock*, L. R. 7 Ch., 398, and submit that the whole three parties to the deed can convey the fee simple to a purchaser.

W. N. Miller, for the purchaser. If the *habendum* stopped at "forever," there would not be any difficulty. The subsequent part, however, shows that the grantor did not use the word "heirs" as a word of limitation. Giving the word "heirs" the meaning "children," might possibly reconcile the words of the *habendum*. I refer to *Leith's Williams* on Real Property, p. 194; *Jarman* on Wills, 4th ed., p. 481; *Tudor's*, L. C. on Real Prop., p. 608; *Jordan* v. *Adams*, 9 C. B. N. S., 483.

(*a*) In consenting to entertain their petition, at the desire of both parties, the learned Judge observed that he nevertheless did not desire to make a precedent in practice, under the Vendor and Purchaser Act, of entertaining petitions on all questions of a like kind, as he thought he foresaw undesirable consequences, if all questions of title were to be settled in this way, when the existence or validity of the contract was not disputed.

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December 9th, 1882. FERGUSON, J.—This is a petition under the authority of the Vendor and Purchaser Act. What is asked is the meaning of a conveyance. The party of the first part is the husband of the party of the third part, and the party of the second part is the trustee. The land is the westerly half of lot No. 26, in the 9th concession of Esquesing, ninety-five acres more or less, and it is assumed that the party of the first part was possessed of an estate in fee simple in the lands immediately before the execution of the deed. The parts of the conveyance (which is not drawn pursuant to the Act respecting short forms) necessary to refer to are as follows: The party of the first part grants bargains, sells, assigns, &c., unto the party of the second part his heirs, executors, administrators, and assigns. The *habendum* is in these words:

"To have and to hold the same with the appurtenances thereto unto the said party of the second part, his heirs, executors, administrators, and assigns upon the following trusts, that is to say: In trust for the sole and separate use of the party of the first part for his natural life, and after his decease, in trust for the said party of the third part for her natural life, and after her decease, in trust for the heirs of the party of the first part forever. And in the event of the party of the first part surviving the party of the third part, then upon the further trust and confidence forthwith to convey and revest the said trust premises to and in the said party of the first part, his heirs, executors, administrators, and assigns for his and their own proper use and benefit for ever. But should the said party of the third part survive the said party of the first part, then, and in that event, and in the further event of the decease of the party of the third part, upon trust to convey transfer and make over the said trust premises to such person or persons, and in such shares, interests, and proportions, and for such estates and in such manner, and upon such considerations as the said party of the first part shall, in and by his last will and testament, order, designate, or appoint. But in the event of the said party of the first part dying intestate then in trust to sell and dispose of by private sale or public auction for the most money, or to convey, transfer, and set over the said premises for his heirs, executors, administrators, and assigns."

Looking at the whole of this clause in conjunction with the words of grant in the conveyance I am of the opinion that, notwithstanding the words employed, there is not created such a special trust as to remove the case from

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within the purview of the statute of 27 Hen. VIII. c. 10. I cannot see that it is really one of those kinds of trusts referred to in *Lewin* on Trusts 7th ed. at p. 193. Then I think the trustee is a mere *conduit pipe*, and the party of the first part took by the conveyance an estate in fee simple, subject to the intervening life estate of the party of the third part. It is stated that the three parties to this deed are willing to join in a conveyance to the purchaser, and I am asked to say whether they can in this way grant the fee simple. I am of the opinion that they can, and I see nothing to prevent their doing so. I do not think the words in the *habendum* that come after the word "forever" where it first occurs therein, make the meaning and effect anything different from what they would have been if these words had not been employed by the draftsman.

A. H. F. L.

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[CHANCERY DIVISION.]

ALLEN V. LYON.

Copyright—License—Writing—Injunction.

To create a perfect right under 38 Vic. c. 88, C., there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but without any writing, there may be such conduct on the part of the owner, in assenting to and encouraging the infringement complained of, as to disentitle him to relief in equity by way of injunction.

THIS was an action brought by Charles William Allen against James Walter Lyon, claiming an injunction restraining the defendant from printing, publishing, and selling a certain book, or any book containing extracts taken from a certain book of him, the plaintiff, or constituting any infringement thereof, an account, damages, costs, and further relief.

In his statement of claim the plaintiff alleged that certain passages in the book published by the defendant had been pirated from a copyrighted book of him, the plaintiff. He also alleged, that he had never authorized or consented to the said infringements of his copyright, and had suffered great loss and damage thereby.

In his statement of defence, the defendant set up that plaintiff consented to his publishing such parts of the plaintiff's book as had been published by him.

The action was tried at the Chancery Sitting, at Whitby, on October 20th, 1883, before Boyd, C.

W. Cassels, Q.C., for the plaintiff. Any consent or license must be in writing: 38 Vic. ch. 88, C. secs. 4, 11; *Copinger* on Copyright, 2nd ed., p. 431; *Jewitt* v. *Eckhardt*, L. R. 8 Ch. D. 404.

B. B. Osler, Q.C., and *Guthrie*, for the defendant. There is no clause in the Canadian Act requiring an assignment to be *written*. See *Copinger* on Copyright, 2nd ed., pp. 252, 253; *Morris* v. *Ashbee*, L. R. 7 Eq., 34. At all events

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there are no sufficient damages in evidence to warrant interference by injunction.

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The learned Chancellor held that a verbal consent or license on the part of the plaintiff had been proved, but reserved judgment as to whether the consent must be in writing.

Afterwards he gave judgment on this point as follows:—

November 21st, 1883. BOYD, C.—To create a perfect right under the statute (38 Vic. ch. 88 C.), there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but, without any writing there may be such conduct on the part of the owner, as disentitles him to relief in equity by way of injunction. I have found upon the facts in this case, that the plaintiff was aware of the defendant's intention to publish what is now complained of in pursuance of an assent given by the plaintiff, and encouraged the defendant in so doing. That is, in substance, the case of *Rundell* v. *Murray*, Jac. 311. See also *Saunders* v. *Smith*, 3 My. & Cr. 711. In both injunctions were refused, and the parties were left to their strict rights at law. I said, at the close of the argument, that the plaintiff's damages were but trifling, at the outside, not over $20, and if the case were before me in its purely legal aspect I would give no more. This amount is too small to litigate about in this Court; and I have no doubt my proper course is, to dismiss the action. I have hesitated about costs. It would, perhaps, be unreasonable to withhold costs from the defendant, who succeeds; yet there being some cause of action in the plaintiff he should not pay all costs; as a rough way of doing justice, I think that the plaintiff should get his costs on the lower scale.

A. H. F. L.

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[CHANCERY DIVISION.]

McGREGOR V. McGREGOR.

Occupation rent—Improvements under mistake of title.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him.

THIS was an appeal from the report of the Master, made in pursuance of a reference directed by the decree in this action, as reported 27 Gr. 470, and dated June 28th, 1882.

The contents of the report, and the grounds of this appeal, are sufficiently set out in the judgment of Ferguson, J.

The appeal was heard on Thursday, January 18th, 1883.

C. Moss, Q. C., and *George Lount* for the appellants. We have not been allowed enough for our improvements, and have been charged too much for rents and profits. Rent has been charged for the increased value arising from the improvements, which should not have been done. We refer to *Rice* v. *George*, 20 Gr. 221; *Fawcett* v. *Burwell*, 27 Gr. 445; *Carroll* v. *Robertson*, 15 Gr. 173; *Gummerson* v. *Banting*, 18 Gr. 516; *In re Brazill, Barry* v. *Brazill*, 11 Gr. 253.

W. Cassels, Q. C., for the respondents. *Barry* v. *Brazill*, and *Fawcett* v. *Burwell*, decide the contrary of what has been alleged. The rent should be, as it is, based on the enhanced value. As to the appeal, so far as it is one on questions of fact, we refer to *Day* v. *Brown*, 18 Gr. 681. The judgment of Spragge, C., reported 27 Gr. 470, concludes the matter as regards the commencement of the time during which there was a mistake of title. The appellant never believed himself to be owner until he got the conveyance from his father. He knew, up to that time, he was not the owner.

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C. Moss, Q. C., in reply, referred to the judgment in *Rivet* v. *Desourdi* (*a*), a copy of which was laid before the Judge.

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February 5th, 1883. FERGUSON, J.—The more important facts appear in the report of the case and the judgment of the present Chief Justice (then the Chancellor) 27 Gr. 470.

In the concluding part of this judgment, which was mainly against Malcolm's contentions, the learned Chief Justice says:—"Counsel for Malcolm McGregor asks that he be allowed for improvements under the statute as for improvements made under a mistake of title. I think this is not unreasonable, he in that case accounting for rents and profits from the time the title of the plaintiffs accrued that is, from the death of the father. It appears probable from the evidence that he really was under a mistake as to his title, as it was a general belief among his sisters and their husbands that the father was (as they phrase it) heir to his wife, and consequently that his conveyance to Malcolm was effectual to convey to him an absolute title."

This conveyance from the father to Malcolm was on October, 22nd, 1866, and the father's death took place on May 7th, 1873.

The decree drawn up in pursuance of this judgment contained, amongst many other things, a reference to the Master to take an account of the rents and profits received by Malcolm since May 7th, 1873, and to charge him with a proper occupation rent since that date, and also to take an account of the amount by which the lands in question had been enhanced in value by lasting improvements made thereon by Malcolm. Nearly all the evidence in the Master's office was taken under the decree in this form, and, as appears by a document produced from the offices, the Master had made a computation in which he stated the enhanced value from improvements made at

(*a*) Reported 12 C. L. J. 203.

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intervals from 1857 to 1873 to be $1,125, that he fixed the occupation rent at $150 per annum, that he took the accounts allowing Malcolm the taxes paid by him and allowing interest according to the case *Fawcett* v. *Burrell*, 27 Gr., 445, and found a result in favor of Malcolm of $1,200.96. This paper bears no date, but it is manifest that it was made out before the decree was amended as hereafter stated. On June 9th, 1881, an order was obtained to amend the decree by inserting in the part containing the reference to improvements, the words—"*Under the belief that the said lands and premises were his own*," and the decree was accordingly amended. The evidence taken in the Master's office after the amendment of the decree was taken in October, 1881, and was a few lines additional testimony given by Malcolm himself stating that he went into possession in 1857, that he paid taxes upon the land believing it to be his own, that he got himself assessed for it, that had he not believed it to be his own he would not have "cut a stick" or made any improvements upon the land, and being asked the foundation of his belief, he said, "*My father and mother persuaded me to take possession of the land, and they would give me a deed.*" (The land belonged to his mother.)

After this the Master appears to have made another memorandum, or computation paper, by which he allowed to Malcolm only the improvements made after the date of the conveyance from his father in the year 1866, and to have taken the accounts in other respects much on the same principle as before. He appears to have found a balance against Malcolm of $808.87 instead of the former balance in his favour of $1,200.96, mostly all the improvements having been made before the execution of the deed in 1866, and in the sixth paragraph of the Report the Master reported this balance against Malcolm McGregor This seems to be what mainly occasioned the appeal.

Many grounds of appeal were stated. These are shortly as follows:—

1. That too high an occupation rent was charged.

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2. That more than six years rent should not have been charged. That more rent should not have been charged than the defendant (Malcolm) submitted to be charged with, $100 per year for the first four years after his father's death, and $150 per year for the four following years.

3. That the Master should not have charged interest on the occupation rent.

4. That rents beyond the amount of improvements allowed should not have been charged, and in case the rents equalled or exceeded the improvements the taxes paid by Malcolm should have been allowed over and above the rent.

5. That the allowance for improvements and rent should not have been confined to the time that Malcolm was in possession after March, 1873, but the Master should have allowed what he allowed in what is called his former judgment, (by which is meant the memorandum to which I first alluded,) the same extending back to the period when the defendant Malcolm first went into possession.

6. That the Master was wrong in finding against Malcolm $808.27, and should have found the $1200.96 in his favor.

The chief contentions before me were as to the improvements and the occupation rent. The improvements that were made after Malcolm got the conveyance from his father were, as I understand the case, allowed for. It was contended, however, that all the improvements that were made by Malcolm from 1857, when he first went into possession, were made "under the belief that the lands and premises were his own," and that the Master had so found by what was called his first judgment, and it was argued that the meaning of the decree was the same before as after the amendment of it, and this argument was based (in part at least) upon the contention that the words used in the judgment of the Chief Justice "as for improvements made under a mistake of title," have really the same meaning as the words introduced into the decree by the amendment. But before the amendment neither of these

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was in the decree, and the Master was directed by it "to take an account of the amount by which the lands and premises were enhanced in value by the lasting improvements made thereon by Malcolm McGregor" without more. Since the argument I have, through the politeness of one of the officers of the Court, been able to see the Master's note book, he (the Master) having in the meantime been elevated to the bench of another Province,) and I find that on June 18th, 1880, on page 8 of the book, this note is made—"Mr. Brough objects (1) That nothing should be allowed except for improvements since conveyance of father. (2) Nothing for improvements except those made under a mistake of title." And the Master records his ruling in this way: "*I rule, as I have done during the examination that the decree by its wording settles both objections*;" and it is entirely plain, I think, that the Master by what is called his first judgment simply found what was the enhanced value by reason of the improvements as a fact without regard to any question of *mistake* of title or *belief* of Malcolm, and this, in obedience to the words of the decree as it then stood.

It was contended that the Master was, in making his report, erroneously under the impression that the Chief Justice had decided that there was no mistake of title prior to the time at which the conveyance was made by the father to Malcolm. There is nothing, so far as I have seen, to show that the Master decided as he did because of this passage in the judgment (the words of the passage I have before given), and besides the contention derived much of its force from its being supposed and stated that the Master had, before the amendment of the report, decided that Malcolm had been under a mistake of title from the time he first went into possession, and had made the improvements under the belief that he was the owner of the land which, as I have said, was plainly not the fact, and I think I must assume that the Master based his finding upon the evidence and the decree before him, and I cannot say that I consider the decision of the Master wrong on this point.

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From Malcolm's own evidence one cannot say that he had any ground, before getting the conveyance from his father, for believing that the lands were his own. He could in reason have had nothing more than the expectation that they would become his own by his getting the expected conveyance from his parents. In his answer, as appears in the report of the case, Malcolm said that owing to the distance they were from a conveyancer, the conveyance had been postponed until after the death of his mother, and after this he had spoken to his father saying that he (the father) might at any time die, and that he (Malcolm) would be obliged to take a child's share, when the father remarked that he would have the deed made at once. Assuming this to be true, I cannot think that Malcolm was then "under the belief that the lands and premises were his own." In any view of this part of the appeal I cannot perceive any good reason to reverse the decision of the Master.

The occupation rent that has been fixed by the Master is $150 a year, less the taxes paid by Malcolm. This appears to me on the evidence to be the full annual value of the premises as they are, and there can be no reasonable doubt that the Master so considered it. The Master has allowed interest on the enhanced value by reason of the small amount of improvements that he took into consideration and allowed. This so far seems to be in accordance with *Fawcett* v. *Burwell*, 27 Gr. 445, but there the whole increased value was allowed. Then should the Master have charged Malcolm with an occupation rent for the increased value by reason of the improvements that were not allowed him? In *Carroll* v. *Robertson*, 15 Gr. 177, Mowat, V. C., said, "If he is not allowed for these improvements he should not be charged with the enhanced rental which is owing to them." In the case *In re Brazill*, *Barry* v. *Brazill* 11 Grant, at p. 257, the present Chief Justice, then Vice Chancellor, said, "I disallow the improvements. But in so far as the rents may have been increased, if they have been increased, by these improvements, the plaintiff should not be charged with the increased rental."

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These cases when examined throughout seem to me to show that the full increased rental should not have been charged against Malcolm.

The grounds of appeal stated seem to show that Malcolm submitted to be charged $100 a year for the four years immediately after the death of his father, and $150 a year for the other four years, but this was, I apprehend, upon the assumption that he would be allowed the increased value by reason of all his improvements. It does not clearly appear how this was, but it was not contended that it was binding upon Malcolm.

More than six years rent was charged in *Carroll* v. *Robertson*.

There was no argument as to the interest upon the occupation rents.

I have read the copy of the judgment in the case *Rivet* v. *Desourdi*, which was handed in. I have not found the case reported (*a*). I was not referred to it as a reported case. So far as I can get at the meaning from the short judgment, I am unable to perceive its application to this case, and as the decree is framed I do not think the fourth ground of the appeal can be sustained.

I think there should be a reference back to the Master to have an occupation rent fixed upon the basis of the annual value of the premises without the enhanced value by reason of the improvements that have been disallowed, and the account recast so far as may be necessary by reason of this change.

In all other respects I am of the opinion that the appeal fails, and should be dismissed.

I have necessarily perused the greater part of the proceedings from the beginning, and I think that, under all the circumstances, there should be no costs of the appeal.

A. H. F. L.

(*a*) It is reported 12 C. L. J. 203.

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[CHANCERY DIVISION.]

COWAN v. BESSERER ET AL.

Will—Power of appointment—Duration of power—Election of widow—Dower—Separate Devises—Construction.

A testator devised certain lands to his wife, "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife, by deed, under her hand and seal, and to his heirs and assigns, forever." The widow married again, without having executed the power.

Held, that there being no specific limitation as to time, the whole period of the life of the donee was allowed for the execution of the power, and it did not cease upon her second marriage.

Quære, whether she could exercise it till after her second marriage.

The testator also devised certain lands to his widow, to have and to hold the same for the following uses: "To sell and dispose of the same as she should think proper and right, and the moneys thereupon coming and arising to use and apply for the payment of my just debts, and for the maintenance of herself and my minor children, and the education of such children as she may see to be fit and necessary," and he authorized his wife to convey the said lands in fee simple to the purchasers and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain 21, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children.

The testator was twice married.

Held, that the children and grandchildren of the testator's first marriage had no right to demand an account of the lands sold under the above provisions, or investigate the amount used for maintenance.

Semble, that the widow took absolutely the balance of the proceeds of sale not required for debts.

In the case of separate devises, through the wife may be barred of her dower in one, she is not therefore barred of her dower in the others.

THIS was an action far the construction by the Court of the will of one Louis Theodore Besserer, deceased. The plaintiff was the widow of the deceased. The defendants were the children and grandchildren of the testator, some by the plaintiff, and some by his former wife, and the present husband of the plaintiff.

The terms of the will are set out at length in the judgment.

The statement of claim set out the will, and alleged that the testator died on February 2nd, 1861: that about February 19th, 1869, the plaintiff intermarried with the defendant, her present husband, without having exercised the power of appointment mentioned in the will respecting lots 12

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and 13, on the north side of Daly street in Besserer Place, in Ottawa: that since the testator's death and previous to the marriage of the plaintiff the said lots became and were now worth so little, that no son of the plaintiff would accept the appointment to him of the said lots, subject to the payment of the charges imposed thereon by the will: that doubts and difficulties had arisen in consequence of the aforesaid intermarriage of the plaintiff, and the failure to make the appointment mentioned in the will in respect to the said lots, whether the plaintiff could make the appointment to one of her sons at the present time, and whether all the heirs and heiresses at law of the testator are interested in the said lots or only the children of the plaintiff: that the plaintiff was ready and willing to make the said appointment to one of her said children and she and her children were desirous that the said lots should be sold by the order of the Court, and the proceeds divided equally amongst the children of the plaintiff.

Then in the 12th paragraph of the statement of claim it was alleged that it was uncertain and doubtful whether certain lands which were the lands of the testator at the time of his death, other than the lots above mentioned, had been disposed of by the said will and codicils, and if the said lands had not been disposed of by the said will the plaintiff was entitled to dower therein, and the defendants were interested therein as the heirs and heiresses at law of the testator.

And the plaintiff claimed, (1) that the will and codicils in respect of the said lands might be interpreted by the Court, and the rights of all parties thereto ascertained: (2) that, if necessary, the said lands might be sold and the proceeds divided amongst the several parties thereto, according to their rights to be ascertained by the Court: (3) that the costs might be paid out of the proceeds and general relief.

The case came on by way of motion for judgment on May 23rd, 1883, before Proudfoot, J.

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J. H. Macdonald, for the plaintiff. As to the power of appointment, it is a power coupled with a trust. The intention is in favour of a class, viz., the children of the second marriage. There is no devise in default of appointment. But it is not material whether the intention is to benefit one, or all of the class. I refer to *Brown* v. *Higgs*, 4 Ves. 708, *S. C.* (on rehearing), 5 Ves. 495, *S. C.* in App. 8 Ves. 561; *Sugden* on Powers, 8th ed., p. 590; *Theobald* on Wills, 2nd ed., p. 570; *Lewin* on Trusts, 7th ed., p. 712; *Burrough* v. *Philcox*, 5 M. & C. 72; *Harding* v. *Glyn*, 1 Atk. 469; *Marlborough* v. *Godolphin*, 2 Ves. Sr. 61. The power of appointment still exists. There is nothing to restrict it to widowhood, In fact it could not be exercised until after marriage: *Chance* on Powers, p. 165-6; *Sugden* on Powers, 8th ed., p. 261; *Coleman* v. *Seymour*, 1 Ves. Sr. 209; *Parsons* v. *Parsons*, 9 Mod. 464; *Sutherland* v. *Northmore*, 1 Dick. 56. As to the right to an account claimed by the children, and grand-children of the first marriage, there is an absolute power to sell all the land in question, or some of it, and it is only the unsold parts that go to the children. There is no right to an account, *Jarman* on Wills, 4th ed., p. 402; *Thorp* v. *Owen*, 2 Hare 607; *Byne* v. *Blackburn*, 26 Beav. 41. As to dower, it is not expressly excluded, nor is the plaintiff put to her election: *Miall* v. *Braine*, 4 Madd. 119.

Z. A. Lash, Q.C., for the adult children of the first marriage. As to dower, it is only claimed in part of the lands; but it is a question which cannot properly be raised now, as it would require evidence to shew the circumstances. At all events, the plaintiff is put to her election. I refer, on this part of the case, to *Hall* v. *Hill*, 1 Dru. & War. 102; and *Patrick* v. *Shaver*, 21 Gr. 123. As to the right to an account, the second codicil directs that lots which are part of the residuary estate, are to go back to the residue in certain events. They are given to the wife for a special purpose, and those who are entitled to the residue, are entitled to ask an account of what has been done with it, to have an account of the proceeds used for maintenance

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and the payment of debts. I ask for an account of the rents and profits, up to the time when the youngest child came of age. As to the power of appointment, the time to appoint expired on marriage. The will must mean that she *shall* appoint before a second marriage, as the same expression is used as in the case of her death. It is a power only and not a trust. If the allegation that no one will take the lots is true, there is an intestacy as to them.

T. S. Plumb, for the infant children, expressed his agreement with the arguments of Mr. Lash, and cited the following additional authorities: *Rody* v. *Rody*, 29 Gr. 324; *Laidlaw* v. *Jackes*, 27 Gr. 101; *Courcier* v. *Courcier*, 26 Gr. 307; *Edwards* v. *Slater*, Tud. L. C. 384; *Haswell* v. *Haswell*, 2 DeG. F. & J. 456.

G. H. Watson for the adult children of the first marriage, also stated he was in the same interest as Mr. Lash, and cited the following cases: *Ackroyd* v. *Smithson*, 2 Wh. & T. L. C. (5th ed.), p. 981; *Harding* v. *Glyn*, 1 Atk. 469; *Murphy* v. *Murphy*, 25 Gr. 81; *Birmingham* v. *Kirwin*, 2 Sch. & L. 444; *Stewart* v. *Hunter*, 2 Chy. Ch. 336.

June 7th, 1883. PROUDFOOT, J. — Louis Theodore Besserer, died on February 2nd, 1861, having first made his will on February 15th, 1860, whereby, among other things, he devised as follows:

"And to my beloved wife Margaret Besserer I give devise and bequeath the possession occupation use and enjoyment of my present dwelling house and premises whereon the same is situate together with the out houses and all the privileges and appurtenances thereto belonging and appertaining being on the north side of Daly Street in Besserer Place aforesaid composed of lots Nos. 12 and 13 in the city of Ottawa aforesaid to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease or in the event of her marrying again then from and after such second marriage, I will and devise the said dwelling house and premises with the appurtenances unto my son who shall be named by my said wife by deed under her hand and seal and to his heirs and assigns forever upon condition nevertheless and I do hereby will and direct that my said son who shall be so named as aforesaid do and shall well and truly pay or cause to be paid to each of his six brothers and sisters of the full blood the sum of £215 one-tenth part thereof to be paid at the end of one year after the time when he shall become entitled to the possession of the said home and premises as aforesaid and a like one-tenth part yearly and every year thereafter until the

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whole of the said moneys be fully paid provided always that in the event of any one of his said brothers or sisters entitled to any of the said sums dying before the said sum be fully paid and leaving lawful issue such issue shall be entitled to have such sum equally divided among them and should any such die as aforesaid but leaving no lawful issue then the sum which would have been payable to the one who shall so die shall be equally divided among the surviving full brothers and sisters and the lawful issue of such as shall have died leaving lawful issue, if any *per stirpes*.

And I do hereby nominate and appoint my said wife Margaret Besserer sole executrix of this my last will and testament and guardian of my minor children during their minority and I do will and direct that my said wife shall have the sole possession control and management of the property and estate of my said minor children during their respective minorities whether the said property and estate be real or personal and shall have full power and authority to ask for demand collect receive and take to the use of herself and the said minor children all and every the rents issues and profits of such property and estate but without being liable to account for such rents issues or profits to anyone.

And as to all and singular the lands and tenements (except lands under mortgage to me) of which I shall die possessed or to which I shall be in any way entitled at the time of my death and not hereinbefore specially devised, I will and devise in manner hereinafter set forth, and direct and appoint respecting the same in manner following, that is to say: I will and direct that my said wife shall have the possession occupation rents issues and profits thereof to her own use and benefit until my youngest then surviving child shall attain the full age of twenty-one years and that either before or immediately after that time the same shall be divided into as many parcels or shares as nearly as may be equal in value as there shall be of my children who shall have died leaving them surviving legal descendants, if any such there shall be, and that one of such shares shall be apportioned or assigned by lot to each of my said children then surviving, and one to the lawful descendants of each of such my said children as shall have died leaving descendants them surviving such descendants to take *per stirpes*, and I further will and direct that such division and allotment shall be made by my wife and her brother Donald Cameron or the survivor of them or by such person or persons as he she or they shall by deed for that purpose appoint and I will and devise to my said children respectively and to the lawful descendants if any of my said children as aforesaid their respective heirs and assigns forever the respective parcels or shares of such lands and tenements as aforesaid as shall be to them respectively allotted in manner and form as aforesaid and I further will and direct that the person or persons who shall make such division and allotment as aforesaid shall make a record thereof under his her or their hand and seal or hands and seals and shall register the same in the Registry Office of the particular registration division or county within which such lands shall be, and that such record shall be evidence of what shall have been done under this clause of this my will. Provided always that should no such division and allotment as aforesaid be made within one year after the coming of legal age of the youngest then surviving of my children my said then surviving children and the legal descendants of such as shall then be dead having legal descendants, if any, their heirs and assigns shall take and hold the said lands and tenements in this clause mentioned as tenants in common, the said descendants if any taking *per stirpes*, and not *per capita*."

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After the execution of the said will the said Louis Theodore Besserer duly made two codicils capable of passing real estate in the Province of Ontario in the words following:

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"This is a codicil to the last will and testament of one Louis Theodore Besserer of the city of Ottawa in the County of Carleton, Esquire, which said will was executed and bears date on the 15th day of February in the year of our Lord 1860, which I hereby ratify and confirm except in so far as the same shall be altered or affected by this codicil thereto.

"Whereas since the making of my said will reasons have appeared for believing that another child may be born unto me hereafter.

"Therefore in the event of such other child being born of my wife before my death and surviving me or being born alive after my death I do hereby will and devise unto such child whether male or female out of my lands not specially devised by description to any of my present children in and by my said will the lands following, that is to say: lots 46, 47 and 48 on the south side of Stewart street, and lots 46, 47 and 48 on the north side of Wilbrod street on Besserer Place in the City of Ottawa, in the County of Carleton to hold the same unto such child during its natural life and after its decease I give and devise the same to its lawful heirs, and to their heirs and assigns forever. And I further will and direct and devise that this devise be read and construed as if it formed a part of my said will and were inserted among the special devises to my other children, and that it shall be subject to all the general provisions in my said will in the same manner as the devises to my other minor children contained in my said will.

"In witness whereof I have hereunto set my hand and affixed my seal to this codicil to my will this 20th day of April in the year of our Lord 1860.

(Signed) "L. S. BESSERER (L.S.)"

"This is a second codicil to the last will and testament of one Louis Theodore Besserer of the City of Ottawa in the County of Carleton, Esquire, as follow that is to say:

"I will devise and bequeath to my wife Margaret Besserer lots Nos. 2, 3 and 4 on the north side of Wilbord street and lot No. 2 on the south side of Stewart street and all such part or parts of lot No. 1 on the south side of Wilbord street and lot No. 1 on the north side of Theodore street as have not been sold and conveyed by me to have and to hold the same unto my said wife and her executors administrators and assigns forever, for the uses and purposes following, that is to say, to sell and dispose of the same either together or in separate parcels to such person or persons and at or for such price or prices and upon such terms of payment as she shall think proper and right and the moneys therefrom coming and arising to use and apply for the payment of my just debts and for the maintenance of herself and my minor children and the education of such children as my said wife shall see to be fit and necessary and I do hereby authorize and empower my said wife to convey the said lots of land and every of them and every part thereof in fee simple unto the purchaser or purchasers thereof his her or their heirs or assignees forever freed and absolutely relieved and discharged of and from all trusts whatsoever in as full large and ample a manner as I myself at the time of my death could or might have done.

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And I do hereby ratify and confirm my said will heretofore made and one codicil thereto except in so far as the same shall be altered or affected by this second codicil thereto.

And I further will direct and appoint that in the event of any of the lots in this codicil enumerated or any part or parts thereof remaining unsold at the time when my youngest then surviving child shall attain the age of twenty-one years then the devises and powers in this codicil contained shall cease and determine as to such remaining part or parts and the same shall then become and be subjected to the provisions contained in my said will as if this codicil had never been made.

"In witness whereof I the said Louis Theodore Besserer have to this codicil to my last will and testament set my hand and seal this 20th day of June in the year of our Lord 1860.

(Signed) "L. S. BESSERER."

At the date of his will he had three children living by a former marriage and seven children by his second wife, the now plaintiff. The plaintiff married a second time without having exercised the power of appointment given to her by the will.

This power to the wife to appoint the estate to the son who shall be named by his wife is a power collateral or in gross: the estate to be created by it cannot in any event affect the life or freehold estate of the wife: *Sug.* on Pow. Vol 1, 7th ed. p. 41. And it is not extinguished by a conveyance of the estate for life, or by the termination of the freehold estate: *ib.* p. 85.

The whole period of the life of the donee is allowed for the execution of the power, where it is general in its terms, unless it can be ascertained that an execution before a specified time was intended by the testator. Here there are two events in which the power might be exercised: after her decease; or, in the event of her marrying again, then from and after such second marriage. In the first case the appointment must of necessity have been made before the event; but that could not affect the construction of the second power. The language would rather seem to indicate that in the latter case the power might be exercised after the event; and unless there be a specific limitation of her power she might, as we have seen, execute it at any time during her life. Indeed, the doubt would rather appear to be whether she could execute it till after her

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marriage. In the *Countess of Sutherland* v. *Northmore*, 1 Dick. 56, referred to in *Sug.* on Powers, Vol. 1, 7th ed. p. 331, a settlement contained two powers: first, in case Lady Travell should die in Sir Thomas's lifetime, and there should be no issue of the marriage living at her decease, *then and in that case* she might at any time during her life, &c., &c., charge the estate; and, secondly, that if Lady Travell should survive Sir Thomas, and there should be no issue of the marriage living at her decease, *then and in that case* she might at any time or times during her life charge the estate. Lady Travell, in the lifetime of her husband exercised both powers, and having survived her husband and having no issue, it was held that the power to charge was well executed. The first power was, of necessity, to be executed in the lifetime of Sir Thomas, for it was only to operate if she died in his lifetime; but that could not affect the construction of the second power. There was no necessity for executing *that* power in his lifetime, for it was only to arise in case she survived him. The words, "at any time or times," might, without difficulty, have been construed after her husband's death in her lifetime.

And when the power is to husband and wife, or the survivor, and he only takes a life interest in the fund, yet the wife surviving without an interest and although the fund has fallen into possession, may take her whole life to execute the power: *Parsons* v. *Parsons*, 9 Mod. Rep. 464; *Haswell* v. *Haswell*, 2 DeG. F. & J. 456, not at variance.

I think, therefore, the power still subsists, and may be executed by the plaintiff.

The children and grandchildren of the first marriage ask that the plaintiff be ordered to give an account of the lands mentioned in the second codicil sold by her, and of the application of the proceeds. I think they have no right to this account. The lands are devised to the plaintiffs for the uses and purposes following: to sell together or separately, and to apply the proceeds for payment of the testa-

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tor's debts, and for the maintenance of herself and his minor children and the education of such children, as his wife should see to be fit and necessary; and in the event of any of the lands in that codicil enumerated remaining unsold when the youngest child attained twenty-one, then these unsold lands were to be subject to the trusts of his will.

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I rather think that the wife took absolutely the proceeds of the land sold not required for the payment of debts. The maintenance of herself and the minor children was the motive for the gift, but it was left at her discretion how much should be sold and used for that purpose: *Thorp* v. *Owen*, 2 Ha. 607. But if that were not the case, the minor children might have had a right to claim a maintenance had it been refused, but no such right could be claimed by the other children. All that was given to pass under the will was so much of these lands as remained unsold. They had no right to investigate the quantity sold, or the amount required for maintenance—what was fit and necessary was left to the determination of the wife.

A question has also been raised whether the plaintiff is entitled to dower in the lands mentioned in the twelfth paragraph of the statement of claim as to which it is said to be doubtful if they passed under the will. I do not know how the doubts arise, for the will devises all the lands of which he should die possessed (except lands under mortgage to him, and those not specifically devised). Those in the twelfth paragraph are not specifically devised in the will or first codicil, and only one of them is mentioned in the second codicil.

None of the gifts to the plaintiff are given in lieu of dower, and if she is to be deprived of it, it must be because the devises are not consistent with the assertion of the right. The cases may be found collected in Mr. Cameron's very useful book (*a*).

In *Laidlaw* v. *Jackes*, 25 Gr. 299-300, I have given reasons why, notwithstanding what was said in *Stewart* v. *Hunter*, 2 Ch. Ch. 336, in the case of separate devises

(*a*) A Treatise on the Law of Dower by M. G. Cameron, Toronto. 1882.

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though the wife may be barred of her dower in one, she is not therefore barred in the others. In the present case I think the devise of the possession, use, and enjoyment of the dwelling house situated on lots 12 and 13, on the north side of Daly Street, points to the personal use and occupation by the wife, and is therefore inconsistent with the claim of dower.

With regard to the lands in the second codicil which have not been sold, they are to be governed by the liability of the other land in the will mentioned in the twelfth paragraph. Of these the wife is to receive the rents, issues, and profits for her own use till the youngest child attained twenty-one, and then they were to be divided among the children. She got no freehold by this gift, as in *Westacott* v. *Cockerline*, 13 Gr. 79, and I do not think it at all inconsistent with the right of dower. Mr. Cameron, p. 453-4, cites a case in Pennsylvania, *Evans* v. *Webb*, 1 Yeates, (Penn.) 424, which expressly decides this point. The testator gave to his wife in consideration of her schooling and well educating the children, the profits of his farm until his sons came of age to possess it. He then ordered his farm to be divided into two parts, one of which he gave to one son, reserving a privilege of water for the part which he gave to another son, upon their coming of age; and directed one of the sons to keep a horse and cow for the wife, and to cut and lay firewood at her door during her widowhood. It was held that the devises to the wife were not in lieu of dower. And I agree with this decision.

If there are any lands which do not pass by the will, there can be no doubt that the widow is not barred. *Laidlaw* v. *Jackes*, 25 Gr. 299.

It is not necessary in the view I have taken of the case, to decide at present whether the power is one coupled with a trust or not. But I may say I do not think it is, and that there can be no trust impressed on a power unless an estate sufficient to answer the power be given to the donee, which is not done in this case.

A. H. F. L.

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[QUEEN'S BENCH DIVISION.]

IN RE LAPLANTE AND THE CORPORATION OF THE TOWN OF PETERBOROUGH.

By-law—Closing street—Providing access to lands adjacent—Month's notice—Arbitration.

A by-law was passed by the defendant municipality to close up and grant to a railway company a portion of a street, by which alone the applicant had access to a piece of land sold and conveyed to him by the municipality at a tax sale, without providing other convenient access to the land. The land was unpatented, but the applicant had paid all dues to the Crown Land Department. The by-law was objected to, on the ground that it did not provide other convenient access to the land: that a month's notice of the passing of the by-law was not given, the notice having been given, on the 28th of March, for the 28th April: that it provided for arbitration by the Mayor, and by two persons, one appointed by the railway company and one by the applicant, a mode different from that provided by the statute; and that the award was to be made within one month from the date of passing the by-law instead of one month from the appointment of third arbitrater.

Held, that all the objections were well taken, and that the by-law was invalid.

Held, also, that the application had sufficient interest in the land in question to entitle him to apply; and, at any rate, the municipality were estopped by their conveyance from setting that up: that an applicant affected by such by-law is not bound to wait until the road is actually closed before coming to the Court.

THIS was a motion for an order to quash a by-law of the town of Peterborough closing up a portion of Wolfe Street and granting it to the Ontario and Quebec R.W. Co.

Aylesworth, for the motion.

Watson, contra.

Counsel for the town took a preliminary objection that the relator had no interest in the property claimed by him, and was therefore not in a position to move, citing *Falle* v. *Tilsonbury*, 23 C. P. 167.

The facts, with the further objections taken by counsel, and the arguments, appear in the judgment.

June 13, 1884. ROSE, J.—The facts here are very different from the case in 23 C. P., referred to by counsel. The relator here claims as his land a portion of lot 2 on the north side of Wolfe street. The road closed up takes away all means of ingress and egress to and from such land, and

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unless it clearly appears he has no title, estate, or claim to such land, he is in a position to complain of any defect in the by-law.

It appears that in 1883 the town conveyed the land in question to him in pursuance of a sale for taxes: that the land was then unpatented, and lately he has paid the Crown Lands Department all moneys necessary to entitle him to his patent, no one claiming the land or making any objections to the issue of his patent save the Ontario and Quebec R. W. Co., who have desired to be heard by counsel before granting of the patent. It does not appear what objection the R. W. Co. have, and I may not unfairly assume that it is an endeavour on the part of the company to remove the opposition to the by-law in question. I do not think I can entertain the objection in face of the deed from the objectors. It seems more than probable that the patent will issue without much further delay. I overrule this objection.

Mr. Aylesworth took several objections, some of which were overruled on the argument, and I do not think it necessary to further consider them.

The first objection, most strongly urged, was that the municipality had no power under section 544 of the Municipal Institutions Act of 1883, to close up the road in question without providing some other convenient road or way of access to the relator's lands.

Mr. Watson was forced to admit that this was a valid objection, but urged that it was not a condition precedent: that the way of access might be provided by a separate and subsequent by-law: that the road was not in fact closed up and he asked that the by-law be not quashed on that objection, but that the municipality be permitted to pass a subsequent by-law remedying this defect. He relied upon *In re Thurston* and *The Corporation of Verulam*, 25 C. P. 593.

The facts in that case are wholly different. There a road had been provided and the question was as to its sufficiency. The present Chief Justice of the Queen's Bench Division in giving judgment said that he did "not

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think a by-law must be set aside because no provision is made in it for compensation to and provision by some other convenient road * * The compensation may be made by money or by some other means outside of the by-law. So a way, as a convenient road, may be already in existence and use, so that no further access has to be provided; or another by-law may, if necessary, be passed for the purpose." This is not a decision that the municipality may pass a by-law closing up the road and thereafter at their convenience pass another by-law providing a way of access.

In *re McArthur and the Corporation of Southwold*, 3 A. R. 295, Mr. Justice Burton, p. 300, expressly says that in his opinion "the amended Act extended the power of the council, and enabled them to close such a road, *provided they previously* furnished the proprietor with some other convenient road or way of access to his land." Such I understand to be the result of the observations of Mr. Justice Patterson, at p. 307, and such I venture to say is the clear meaning and intent of the Act. Whether the closing of the road spoken of in sec. 544 is the passing of the by-law declaring the road closed, or is the actual closing of the road itself, it may not be necessary to determine in this case. If it appeared necessary I am of the opinion that a party is not bound to wait until the road is actually closed before he can come to the Court. If the Council pass a by-law declaring, as in this case, that the road "is hereby closed up," and neither by prior nor contemporaneous by-law, nor otherwise, provide another convenient way, it would seem cruel that the party aggrieved should be compelled to wait until his property had in fact been rendered useless, all means of access being cut off, before he could lodge his complaint before the Court. It seems to me more in accordance with natural justice to hold, and I do hold, that the way of access must be first provided, and that a by-law closing up a road, no other way being provided, can at once be moved against.

It was also objected that the full month's notice required by sec. 546 had not been given.

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I think this objection also well taken. The notice was first given on 28th of March for the 28th of April. As was observed at the bar there cannot be two 28ths in one month. Whether the relator is precluded from taking this objection because he had knowledge *aliunde* is not necessary to determine. The expressions of Hagarty, C. J., in *Birdsall and The Corporation of Asphodel*, 45 U. C. R. 153-4, seem to point the other way. The clause of the statute is prohibitory in its terms, "No Council shall pass a by-law * * until," &c.

I do not think the adjournment by the Council to meet on a day subsequent to the 28th in any way remedied the defect in the notice, and is open to the objection taken that the by-law was considered and passed on a day not mentioned in the notice.

The further objection to the by-law, that it provided a mode of arbitration different from that provided by sec. 387 *et seq.* of the Municipal Act, must also prevail. The by-law provides for the Mayor being one of the arbitrators, the R. W. Co. and the person claiming compensation each to appoint one. The statute provides for appointment by the Municipality and the party claiming compensation, and these arbitrators so chosen to appoint a third.

The by-law provides for the award being made within one month from the date of passing the by-law (a date now passed). The statute provides that the award shall be made within one month from the appointment of the third arbitrator.

I think the proceedings fatally defective. I do not think they can be assisted by passing a by-law amending the present by-law; the prerequisite steps have not been taken; and I therefore make absolute the order quashing the by-law, with costs.

By-law quashed, with costs.

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[QUEEN'S BENCH DIVISION]

WALKER v. MURRAY.

Will—Construction of—Devise to Sisters of Charity—Statutes of Mortmain—Pedigree—Evidence.

A testator devised land to K., in trust to sell and pay the proceeds "to the Sisters of Charity of Hamilton, to be their property absolutely." There were also bequests to K. of money, to pay the same to the St. Mary's Hospital, an Orphan Asylum and a Convent. No evidence was given to show who the Sisters of Charity were. In an action to recover the land brought by the heirs at law of the testator,

Held, that a corporate capacity could not be imputed to the Sisters of Charity, in order to destroy the gift to them under the Statutes of Mortmain, and that the devise, might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity.

Declarations made by the deceased mother of the plaintiff, in the hearing of the plaintiff and of the plaintiff's son, as to the marriage of the plaintiff's parents, received in evidence to prove the plaintiff's pedigree.

ACTION to recover possession of land, tried at Hamilton at the last Spring Assizes, May 9, 1884, before Osler, J. A.

The facts were as follow:

Wm. Troy, of Portsmouth, Scioto County, Ohio, being seised in fee of Lot No. 5, on the south-east corner of Maria and Walnut streets, Hamilton, by his will, dated the 3rd June, 1877, devised as follows:

"I give and devise to my brother, James Troy, for and during the continuance of his natural life, the house and lot which I own in Hamilton, Canada West, said house and lot being all the property I own in Hamilton. Item 2nd. I give and devise to William Kenney, of Portsmouth aforesaid, as trustee, said house and lot in Hamilton aforesaid, subject to the life estate therein hereinbefore created in my said brother James Troy, in trust, however, as follows, to wit: The said William Kenney shall, as soon as practicable after the decease of my said brother James Troy, sell and dispose of said house and lot, and shall pay the proceeds of said house and lot *to the Sisters of Charity of Hamilton* aforesaid, to be *their property absolutely*; and I hereby authorize and empower the said Wm. Kenney, as trustee, to execute, and acknowledge, and deliver to the purchaser thereof a proper deed for said house and lot when sold as aforesaid."

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The testator also bequeathed to Kenney $3,500, in trust, to pay the interest thereon to his brother, James Troy, during his natural life, and at his decease to pay "to *the St. Mary's Hospital*, of Cincinnati, Ohio, conducted by the Sisters of St. Francis, the sum of $1,000, to be *the property of the said hospital* absolutely; and to the St. Peter's and St. Joseph's *Orphan Asylum* of Cincinnati the further sum of $1,000, to be *the property of the said asylum* absolutely; and *to the Convent* of the Little Sisters of the Poor, of Cincinnati, the sum of $1,000, to be the *property of the said convent* absolutely."

The testator died in July, 1877, leaving his sister, the plaintiff, and his brother, James Troy, his heirs-at-law.

In August, 1881, James Troy surrendered his life estate to Kenney, and by the same instrument granted and assigned all other right, estate, and interest which he had in the land, to Kenney in fee.

In the same month Kenney conveyed to Ryckman, through whom, by divers mesne conveyances, the defendant made title.

James Troy died intestate, on the 22nd June, 1883, leaving the plaintiff, as it was said, his heir-at-law, and his widow surviving.

The plaintiff's contention was that the devise to Kenney and the limitations over to him after the death of James Troy were void under the Statute of Mortmain, 9 Geo. II. c. 36; and that the conveyance from James Troy to Wm. Kenney only operated as a surrender of his life estate, so that the legal estate in the land had passed on James Troy's death to the plaintiff as heir-at-law of William Troy.

The defendant put the plaintiff to strict proof of her title, and contended that even if it should be held that the devise to Kenney was void the deed from James Troy to him was sufficient to pass his estate and interest as one of the heirs-at-law of William Troy.

The learned Judge reserved judgment.

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J. K. Kerr, Q. C., for the plaintiff.

Osler, Q. C., contra.

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The following cases were cited: *Rob.* & *Jos.* Dig. 1664, 1143; *Yelverton* v. *Longworth*, 10 Jur. N. S. 1209, *S. C.* 4 Macqueen, H. L. 746; *Cocks* v. *Manners*, L. R. 12 Eq. 574; *Thomas* v. *Howell*, L. R. 18 Eq. 198; *Nash* v. *Morley*, 5 Beav. 177; *R. S. O.* ch. 107, sec. 7; *Best* on Ev. 463; *Lyle* v. *Ellwood*, L. R. 19 Eq. 98; *Taylor* on Ev., secs. 540, 649; *Corporation of the Town of Whitby* v. *Liscombe*, 22 Grant, 203; *S. C.* 23 Grant, 1; *Lewis* v. *Patterson*, 13 Gr. 224; *Jeffries* v. *Biddle et al.* 8 H. L. Cas. 594; *Young* v. *Groves*, 4 C. B. 668; *Tudor* on Charitable Trusts, 42.

May 20, 1884. OSLER, J. A.—I was of opinion that on the pleadings the will of William Troy was sufficiently admitted.

The only points I have to consider are, (1) whether the plaintiff has sufficiently proved her title as one of the heirs of William Troy, and (2) whether the devise to Kenney is within the Statute of Mortmain. The defendant, apart from his possession, on which he rests in putting the plaintiff to proof of her title, has clearly made out his own title, either to an undivided half, under the conveyance of James Troy, or to the whole if the devise to Kenney is not affected by the statute.

On the first point the only evidence was that of the plaintiff and her son, George Walker. The plaintiff is upwards of 84 years of age. She was born in Ireland. When between ten and eleven years of age, her mother left her father and went with her to England, where she resided till the time of her death. She had then three other children—John, James, and William. She had lived with her husband and her children in the same house up to the time she left him. After that they never lived together again, though she visited Ireland twice subsequently and saw him there, as the plaintiff believes. I understood her to say that on one of those occasions she accompanied her mother and saw her father, while she was still a child. She said she had heard her mother say they were married:

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had heard them talk of the priest, one Father Kenney, who married them: one was a Protestant and the other a Catholic; and there had been some difficulty about the parish priest performing the ceremony in the then state of the law. The plaintiff married in England, and came to this country about forty-two years ago. Her father died in Ireland, April, 1834. Her mother survived him a few years.

George Walker, the plaintiff's son, said he remembered his grandmother in Manchester, England, when he was there at Christmas, 1839, being then a boy nine years old. He frequently heard her speak of her marriage with his grandfather; heard her say that the priest at Clogher would not take the responsibility of marrying them, and they were married by one Kenney, the priest of Banagher.

The declarations of the plaintiff's deceased mother thus proved would seem to be sufficient *primâ facie* evidence of a valid marriage between her parents. They are, at all events, admissible for that purpose, and as regards the plaintiff's own testimony I saw no reason to discredit it. I refer to *Rex* v. *Bramley*, 6 T. R. 330; *Vowles* v. *Young*, 13 Ves. 140; *Taylor* on Evidence, 6th ed., sec. 577; *Best* on Evidence, 6th ed., p. 631, sec. 498.

I cannot reject these declarations or neutralize their effect by assuming that the marriage may have been void under the 19 Geo. II. c. 13, s. 1, because celebrated "by a Popish priest between a professing Protestant and a Papist." It would be necessary to prove much more precisely that one of the parties was a professing Protestant at the time, even if all objections to the marriage on this score are not removed by subsequent legislation.

I think the case turns upon the question whether the devise is void, as being contrary to the Statute of Mortmain.

By the will the proceeds of the sale of the land are directed to be paid to the Sisters of Charity, of Hamilton, to be their property absolutely. No evidence was offered to shew who "the Sisters of Charity of Hamilton" were,

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whether a corporate body or a voluntary association of a communal character, or otherwise. It was argued that by the very terms of the description the gift must be taken to have been to a charitable association for a charitable purpose. No reference was asked on this point, nor should I, except upon terms, have been disposed to grant one, as the case came before me for trial in the usual way, and therefore ought not to be encumbered with the costs of a special reference. Adopting the language of one of the Lords Justices of Appeal in a case I shall presently refer to, I decline to impute to "the Sisters of Charity of Hamilton" the attributes of a corporate body, which they do not legally possess, or are not shewn to possess, merely in order to destroy the gift to them; and I may add that it was not suggested that they had any other existence than as members of a religious order or community. The gift may be supported, in any event, as a gift to the individuals who, at the time of the testators death, filled the character of Sisters of Charity at Hamilton, and if the terms of the bequest to them are contrasted with those of other bequests in the same will to the St. Mary's Hospital, the St. Joseph's Orphan Asylum, and to the Convent of the Little Sisters of the Poor, it is manifest that no violence is done to the language of the will, or the intentions of the testator, by holding that the Sisters of Charity take the beneficial interest as absolute owners. The recent case of *Re Delany's Trusts*, 9 L. R. Ir., Ch. D. 226, (1882-83,) and the cases of *Stewart* v. *Green*, 5 Ir. Eq. 470, referred to in *Tudor's* Leading Cases on Real Property, 3d ed. p. 540; and *Henrion* v. *Bonham*, before Lord St. Leonards, cited in *Re Delany's Trusts*, *supra*, are authorities which go the full length of upholding this view without at all conflicting with the case of *Cocks* v. *Manners*, L. R. 12 Eq. 574, relied on by Mr. Kerr.

In *Carne* v. *Long*, 2 D.F. & J. 75, the gift was "to the trustees of the Penzance public library, to have and to hold to the mand their successors forever, for the use, benefit, maintenance and support of the said library." The Lord Chancellor

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said: "The clear intention of the testator, as expressed by will, is, that this should be a gift in perpetuity to this institution at Penzance * * If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity."

In *Re Delany's Trusts*, *supra*, Deasy, L. J., after quoting the above extract, continues: "That is what exists here. The gift is to the Sisters of Mercy at Bantry. They are a class easy of ascertainment, and if it is construed as a gift to those who may answer that description at the death of the testator, which is its *primâ facie* meaning, it is perfectly valid."

In the case before me there is the additional circumstance that by the very terms of the will the money is to be paid to the Sisters of Charity of Hamilton, "to be their property absolutely."

I am of opinion, therefore, that the action should be dismissed, with costs.

I find the value of the land, without the improvements made thereon by the defendant Murray, to be $500, and the value of those improvements to be $975, for which sum he should be entitled to a lien either under the statute or upon the equity administered in *Gummerson* v. *Banting*, 18 Grant 516, in case the Court should think the plaintiff entitled to recover for a one-half interest in the land.

Action dismissed, with costs

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[QUEEN'S BENCH DIVISION.]

REGINA v. COUTTS.

Conviction—Hawkers and pedlars—Taking orders for goods—Subsequent delivery.

The defendant, who was a traveller for a tea dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then got the tea which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited "hawkers or petty chapmen and other persons carrying on petty trades," from selling goods in the manner pointed out by the Consolidated Municipal Act, 1883, sec 495 (3).

Held, that the defendant was not a "hawker," nor was the word pedlar used in the Act, and if he was a "petty chapman or person carrying on a petty trade," the conviction could not be supported, for he was "not carrying goods for sale."

Held also, that a municipality cannot pass a by-law prohibiting unlicensed traders from sending out agents to take orders from private persons for goods, and subsequently delivering the goods.

THIS was a motion to quash a conviction had at Walkerton on the 2nd of April, 1884, "For that the said Robert Coutts at the said Town of Walkerton, did on the 20th day of March, A.D. 1884, offer for sale and sell tea as a pedlar to a party who was not a retail dealer, without a license to sell same, such article not being grown or produced in Ontario, contrary to a certain by-law, &c."

May 23, 1884. *Delamere*, for the motion.
H. J. Scott, Q. C., contra.

The arguments and cases cited are referred to in the judgment.

May 26, 1884. ROSE, J.—Several objections were taken to the conviction, which I do not at present consider, the parties being anxious to have an opinion as to the general question.

The point submitted is, whether, under 43 Vic. ch. 24, sec. 13, consolidated in the Municipal Act, 1883, sec. 495, it is within the power of a municipality to pass a by-law prohibiting unlicensed traders sending out agents to take

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orders for goods, &c., from private persons not being retail dealers, and subsequently delivering the goods ordered.

In the case before me the by-law professes to be "a by-law for licensing, regulating, and governing hawkers or petty chapmen and other persons carrying on petty trade in the County of Bruce, or who go from place to place with merchandise for sale."

The enacting clause, No 1 (*a*), was no doubt intended to require licenses to be taken out, but by some inadvertence the operative words were left out, rendering it insensible Taking it, however, as effectuating the intent of the framer, it prohibits hawkers and petty chapmen and the other persons named in sec. 13, 43 Vict. ch. 24, from selling goods in the manner pointed out by that section without a license.

The persons named in sec. 13 are "hawkers or petty chapmen and other persons carrying on petty trades, or who go from place to place, or to other men's houses, on foot, or with any animal bearing or drawing any goods, wares or merchandise for sale in or with any boat, vessel, or other craft, or otherwise carrying goods, wares, or merchandise for sale." The proviso exempts persons selling to any retail dealer goods, &c., the growth, product, or manufacture of this province, not being liquors within the meaning of the law relating to tavern or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer, or by his *bonâ fide* servants or employees having written authority in that behalf.

The case of *Rex* v. *McKnight*, 10 B. & C. 734, was cited

(*a*) No hawkers or petty chapmen, and no other person desirous of carrying on a petty trade in the County of Bruce, and no person who goes from place to place, or to other men's houses, on foot or with any animal drawing any goods, wares, or merchandise, for sale to others than retail dealers, and not being the growth, produce, or manufacture of the Province, hawked or peddled by the manufacturer or producer thereof, or his bona-fide servant or employee, not being liquors within the meaning of the law relating to taverns or tavern licenses, or in or with any boat, vessel, or other craft, or otherwise carrying such goods, wares, or merchandise, for sale, save as aforesaid, or in or with any boat or vessel or other craft, or otherwise carrying such goods, wares, or merchandise, for sale within the said County of Bruce, without first having obtained a license under the By-Law authorizing him to do so.

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in support of the motion, and *Thomas* v. *Turner*, 20 C. L. J., 64, in support of the conviction. I have also perused *Regina* v. *Cuthbert*, 45 U. C. R. 19, and cases there cited; *Paley* on Convictions, 8th ed., pp. 101, 204, and authorities referred to; *Burn's* Justice of the Peace, 30th ed., 2d vol., p. 952, under the title, "Hawkers and Pedlars," where the imperial statutes and decisions are collected.

In the case in question the defendant, a traveller for a Toronto dealer, carried samples of tea with him, and calling at the several towns on his route, went from house to house soliciting orders from the samples. The orders thus obtained he forwarded to his principal from each town, and proceeded on his route. On his return he again called at the several places where he had previously obtained his orders and found the tea ordered awaiting his arrival, the dealer, in the meantime, having forwarded it by freight or express. The tea was generally in small packages of about four pounds each. He delivered the tea to the several parties ordering it, and received the money in payment. The facts are very similar to those in *Rex* v. *McKnight*. The head-note to that case is as follows: "A servant of a licensed tea dealer was sent by his master round the neighbourhood to ask for orders for tea, and was subsequently sent by his master to deliver small parcels of tea in pursuance of those orders. *Held*, that this was not a carrying to sell within the meaning of the Hawkers and Pedlars Act, 50 Geo. 3 ch. 51, so as to subject the servant to a penalty for trading as a hawker without a license."

The 6th sec. of 50 Geo. 3, ch. 51, provides for payment of duty "by every hawker, pedlar, petty chapman, and every other trading person or persons going from town to town, or to other men's houses, and travelling either on foot or with horses or otherwise, in England, Wales, or the Town of Berwick-upon-Tweed, carrying to sell, or exposing to sale any goods, wares, or merchandise."

The arguments addressed to me were all addressed to the Court in *Rex* v. *McKnight*, *i. e.*, that: 1. When the agent carried the article in pursuance of the previous

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order he literally "carried to sell." It will be observed that in the Act 50 Geo. 3, the words are, "carrying to sell or exposing to sale." There is, of course, no difference in meaning between "carrying to sell" and "carrying for sale."

The first point was pressed on the ground that there was no sale when the order was taken, as to have a sale involved "transmutation of property," and no property passed until delivery of goods, and therefore when the goods were delivered the sale was made.

2nd. That the case was within the mischief of the Act, *i. e.*, that hawkers and pedlars were enabled to carry on profitable trades in the country without contributing to any of its burdens, and to the great prejudice of the resident trader upon whom those burdens attached.

3rd. That the act of carrying to sell after orders received differed from that of carrying to sell without orders received only in this, that in the one case the hawker has rather a more certain expectation of selling than in the other: that in both cases the mischief is precisely the same: that he carries on a profitable trade in the towns through which he passes without contributing to the burdens of those towns, and to the great prejudice of the resident trader.

The opinion of Lord Tenderden, C.J., in *Rex* v. *McKnight*, was as follows: "The sale and delivery of goods are two distinct acts. The charge against this defendant is that he carried to sell and exposed to sale seventeen packages of tea. The proof was that on one occasion he had taken orders from several customers, and on a subsequent occasion carried the packages in order to deliver them. I think that that was not an exposing to sale, or carrying to sell, within the meaning of this Act of Parliament."

Bayley. J., said: "This is not a case within the words of the Act of Parliament; and I can only collect the spirit from the words. The Legislature may have intended to make a difference between a party who takes goods with him for the purpose of selling, and one who delivers goods

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in pursuance of a previous order. If the defendant had taken the articles with him, so as to enable another person to form a judgment whether he would buy or not, that would have been a carrying to sell, and he would have been in the situation of a shop-keeper; but if, instead of carrying the goods with him, he goes out to seek orders at a distant place without having the goods with him, he is in a very different situation. There is a difference between a bargain for and a delivery of goods. A man who carries goods in pursuance of an order previously given is entitled to have the price paid if they correspond with the order, and may declare for them as goods bargained and sold. Here the defendant did not carry to sell, but to deliver goods previously bargained for."

Littledale, J., said: "The charge against the defendant is, that he carried to sell, and exposed to sale, seventeen packages of tea. There is no pretence for saying that there was any exposure to sale, and I think that there was not a carrying to sell. Those words import a future contract. Here the bargain to sell was made before the goods were carried. There was a contract by the defendant to sell and deliver the goods, and he took the goods to the person who contracted to buy them. The question is, not whether the property passsed, but whether the defendant can be said to have carrried to sell within the meaning of the Act of Parliament, and I think he cannot."

I have thus given the opinions in full to shew that the decision is, that the goods were not carried to sell, and did not turn on the meaning of exposing to sale, although the Chief Justice was of the opinion that not only were the goods not carried to sell, but also were not exposed to sale.

The learned Judge of the County Court of Brant, for whose opinion I have the highest respect, in *Thomas* v. *Turner*, *supra*, 20 C. L. J., 64, declined on appeal to quash a conviction on facts similar to those in the case now before me, and distinguished *Rex* v. *McKnight* on the ground that 43 Viet. O., did not contain the words, "exposing for sale," and

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that the by-law in the case before him prohibited making sales by taking orders by samples or otherwise. If the by-law was not warranted by the statute, then the conviction should have been quashed. It seemed to have been drawn on the supposition that the statute warranted a by-law prohibiting taking orders by sample If it did not, the by-law was *ultra vires*.

Rex v. *McKnight* seems to have remained unquestioned until the year 1861, when the Imperial Statute 24 & 25 Vict. ch. 21, sec. 8, was passed, declaring that "persons going from town to town, or to other men's houses, carrying to sell, or exposing to sale any goods, wares, or merchandise, *or carrying and exposing samples or patterns of any goods, &c., to be afterwards delivered*, shall be deemed to be, and shall be trading persons within the meaning of this Act, and of the Acts now ln force relating to hawkers, pedlars, and petty chapmen. * *."

No such Act is in force in Ontario. The Act 43 Vic., O., is not so wide as 50 Geo. 3. There the words are "hawkers, pedlars, petty chapmen, and every other trading person or persons." * * * In 43 Vict. (O.) the words are "hawkers or petty chapmen, and other persons carrying on *petty* trades * * *." Hawker is defined to be "an itinerant trader who goes about from place to place, carrying with him and selling wares." "One who sells his wares by proclaiming them on the street." Pedlar, "a hawker in small wares." "One who travels the country with small commodities." See *Burn's* Justice of the Peace, 30th ed., 2nd vol., p. 952, title, "Hawkers and Pedlars." A chapman is described in the Imperial Dictionary as "a seller, a market-man." A petty chapman would therefore be a seller or market-man dealing in small or petty articles, and the words, "other persons carrying on petty trades," would have a similar meaning, though probably extending to traders not included within the word chapmen.

The word "pedlar" is omitted from the 43 Vict. (O.), and the words "every other trading person" are also

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omitted, and replaced with "other persons carrying on petty trades."

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The defendant in this case is convicted as a "pedlar." There is no such word in the statute. The evidence does not bring him within the definition of a hawker. If he is a person within the class designated by "petty chapmen and other persons carrying on petty trades," then the statute 50 Geo. 3, in force when *Rex* v. *McKnight* was decided, was certainly as broad as 43 Vict. (O.); and if a conviction could not be sustained under that statute against a defendant as a hawker, even by appealing to the words "carrying to sell or exposing to sale," I do not see how, under our statute, a conviction of the defendant as a "pedlar" can be sustained by appealing to the words "carrying for sale."

I am, moreover, of the opinion that under the statutes referred to it is not within the power of a municipality to pass a by-law prohibiting unlicensed traders sending out agents to take orders for goods, &c., from private persons not being retail dealers, and subsequently delivering the goods ordered. If it is deemed desirable that such power should be given to the municipalities, the Legislature can be applied to for an Act similar to the Imperial Act 24 & 25 Vic. The necesssity felt for such legislation in England, after the decision in *Rex* v. *McKnight*, confirms me in my opinion as to the effect of the 43 Vic. (O.)

It follows that the conviction must be quashed; I suppose, without costs, following the usual rule, although it does not seem quite just that a defendant should be put to so much expense to relieve himself from a position in which he has been illegally placed. It may be worth while for counsel to collect the authorities on the question of costs, and submit an argument as to the propriety of reconsidering the rule. If addressed to myself, I will have much pleasure in giving it my best consideration.

Conviction quashed, without costs

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[QUEEN'S BENCH DIVISION]

REGINA V. CARTER.

Criminal Law—Misdemeanor—Jurisdiction of justice—46 V. c. 15, D.

Justices of the Peace out of session have no jurisdiction to try misdemeanors in a summary manner, except on special statutory authority; and it was *held*, therefore that a conviction by two J. P.'s under 46 V., c. 15 D., for assisting in the distilling of spirits contrary to that Act, must be quashed.

THIS was a motion to quash a conviction by two Justices of the Peace "for that the said John Carter did * * unlawfully contravene sub-sec. (b) of sec. 154 of the Consolidated Inland Revenue Act, 1883, (46 Vic. ch. 15 D.,) by assisting in the distilling of spirits contrary to the said Act." The punishment awarded was a fine of $250 and costs, one month's imprisonment, and a further imprisonment of six months if the fine was not sooner paid.

May 30, 1884. *H. J. Scott*, Q. C., for the motion.
N. Murphy, for the Crown.

June 13, 1884. ROSE, J.—The first objection, and the only one which it is necessary in my opinion to consider, is, that the Magistrates had no jurisdiction to try the offence or make a conviction therefor, it being a misdemeanor, and not made cognizable by them. Indeed I expressed my opinion on the argument but Mr. Murphy requested me to give it formally for the guidance of officers acting under the Act, as some differences of opinion existed among those charged with that duty.

Mr. Murphy admitted that he was unable to cite authority for the general proposition he was instructed to advance, that Justices of the Peace out of session had power to try misdemeanors except upon special authority conferred and regulated by statute; and it is clear that such proposition is untenable. The history of the law as to the jurisdiction of Justices of the Peace may be found in the introduction to Mr. Paley's work on Convictions, and

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in cap. 1 of the same work, 5th ed., p. 16, it is said: "The examination and punishment of offences in a summary manner by Justices of the Peace out of their sessions, and without the intervention of a jury or an open trial, are founded entirely upon a special authority conferred and regulated by statute. No new case is cognizable in that manner unless expressely made so by Act of Parliament."

The Act in question declares certain offences against the Revenue laws felonies, others misdemeanors, and other offences punishable by penalty, without naming them as either felonies or misdemeanors. Section 154 is introduced by sec. 153, which provides that "In addition to the general provisions in this Act contained respecting penalties, those contained in the next following three sections apply to distilleries." Sec. 154 provides that "Any person who, after the passing of this Act, and without having a license under it then in force, shall * * (b) assist in distilling or rectifying any spirits, or in making or fermenting any beer or wash in any unlicensed place, * * shall be guilty of a misdemeanor, and on conviction thereof shall for a first offence incur and pay a penalty of not less than $100 and not more than $500, and shall be imprisoned," &c. No tribunal is provided for trial of the offence, and it must in my opinion be tried in the ordinary way by indictment.

Mr. Murphy also faintly urged that the conviction might be supported under sec. 108. That section provides for the recovery of the pecuniary penalty or forfeiture incurred for any offence against the provisions of the Act by suit before any Court of record having jurisdiction in the premises, a County Judge or Junior County Judge, or before a Police or Stipendiary Magistrates or any two Justices of the Peace having jurisdiction in the place where the offence was committed, by whom, and by whom alone, the complaint against the offender shall be dealt with as by law directed, on the oath of one credible witness; also for collection by fine and distress, and gives a discretion to commit to gaol for six months unless penalty and costs be sooner paid; and further provides that "any

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term of imprisonment imposed for any offence against the provisions of this Act may in like manner be adjudged and ordered by such Court, Judge, Magistrate or Justices, by whom, and by whom alone, the complaint against the offender shall be dealt with as by law directed."

I confess myself unable to apprehend the meaning of this section, and counsel were unable to assist me to any conclusion. I cannot, however, conclude that it gives, or was intended to give, Justices of the Peace power to try felonies and misdemeanors. Whatever else it may mean can be determined when occasion requires.

I think the conviction must be quashed, and order accordingly.

Conviction quashed.

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[CHANCERY DIVISION.]

HUGHES v. REES.

Foreign law—Post nuptial Settlement—Contract—Lex domicilii—Community property—Concurrent suit in Quebec—Locus of Bank stock—Banking Act 1871—Lex loci rei sitæ—Estoppel—Void trust deed.

A., being domiciled and carrying on business in Montreal, in 1875, executed at Toronto, where he was temporarily resident, a deed entered into between B., his wife, of the first part, and himself and C. of the second part, whereby A., B. and C. covenanted that certain Ontario Bank stock, which had been bought with certain moneys received by B. after her marriage, and which were then held in the name of A. in trust for B., should be duly transferred into the names of C. and A., and that this stock, as well as a sum of $4,000, which B. had received from her mother at the time of the marriage, and which had been put into the commercial business of A. in Montreal, should, with $2,000, the value of some furniture received by B., be held by C. and A. in trust to invest as therein mentioned, and to permit B., during her life, to receive the income to her own use, and after her death in trust for the children of the marriage, and in default of surviving issue over. In 1877 the bank stock was transferred in Montreal in trust pursuant to the deed. The head office of the Ontario Bank is in Toronto, but they have a stock registry in Montreal for convenience.

Held that inasmuch as all the property settled appeared on the evidence to have become, and to have been "community property," and inasmuch as, although the bank stock must be held to have been at the time of the execution of the deed and of the transfer, situate in Ontario, yet the deed not purporting to be a complete transfer of the property in the stock, but containing only a covenant to transfer, which was consummated afterwards, not in Ontario, but in Montreal, the case fell under the law of the owner's domicil, and applying that law, there was not a good transfer by the husband of the right of property in the stock.

Held, also, as to the money, that being at the time of the deed in Quebec, the validity of the transfer of it must depend on the law of that province, under which the transfer both as to the wife and the children was void; for even if the wife's signing the deed amounted, as contended, to an acceptance by the children, it was only the acceptance of a promise and not of a gift.

Held, on the whole case, that no property passed into the hands of the trustees by the transactions set forth.

When the husband's domicil is in the Province of Quebec, and there is no antenuptial settlement, the law there upon marriage makes a settlement of the property of the parties, wherever situate, including that acquired subsequently, though the ceremony of marriage may take place out of the Province. This is called "community property," and it is not in the power of the husband, during the coverture, to make a gift of it, directly or indirectly, to his wife, although he is the administrator of it, and may make gifts to the children, if the gifts are properly accepted.

The fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same cause in this Province.

THIS was a suit brought by one Patrick Hughes, as plaintiff, against Daniel John Rees, and Anna Maria Rees (by original bill), and Rachel Rees, Mary Josephine Rees, Anna Rebecca Rees, and Daniel John Arthur Rees, the last three being infants (by amended bill) defendants, for the purpose of the removal of a trustee from a certain trust

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estate, and the appointment of a new trustee, and for an account of the dealings of the existing trustees with the trust estate, and for other relief as hereinafter mentioned.

The facts of the case, and the evidence adduced, are fully set out in the judgment.

The case came on for hearing at Toronto, on December 20th and 21st, 1881, before Ferguson, J.

S. H. Blake, Q.C., and *G. Morphy*, for the plaintiff. The plaintiff is entitled to the fullest indemnity. He undertook the trust at the request of the defendant D. J. Rees who now seeks to avoid the deed. *Perry* on Trusts, 2nd ed., vol. 2, sec. 910; *Travis* v. *Illingworth*, W. N. 1868, p. 206; *Ex parte Chippendale, In re German Mining Co.*, 4 DeG. M. & G., pp. 19, 54; *Ex parte Watts, In re Attwater*, 3 DeG. J. & S. 394. It is important to bear in mind that the whole of this fund belonged to the wife, and also where it came from at the time of the execution of the deed. See *Colliss* v. *Hector*, L. R. 19 Eq. 334; *Milliken* v. *Pratt*, 125 Mass. 374. The defendant D. J. Rees is asking the Court to assist him in carrying out a fraud. He accepted the trust, and now he quarrels with the instrument. All the beneficiaries claiming under the document wish to have it upheld. If the wife cannot hold, cannot the children do so? According to our law, the instrument is binding out and out; according to what is shewn of Quebec law, it is valid as to the children. The stock was transferred, and this was delivery of it. Unless the law of this country is shaken to the ground by the evidence of the foreign law, it must govern. The evidence of the foreign law must be conclusive, and irrefragable. The promissory note was delivered as well as the bank stock. It is not clearly shewn that the law in Quebec as to acceptance is different to ours, but, according to the evidence and the code, the mother could and did accept. The property was community property, it had come from the wife, who could accept for the children the share of it afterwards given by the husband. We refer to the civil code of Lower Canada, secs. 776, 788.

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James Maclennan, Q. C., and *R. E. Kingsford*, for the defendant D. J. Rees. There is no ground on which the plaintiff should get any indemnity from D. J. Rees. If he paid more than he received, he was under no necessity to do so. This suit was brought without any good reason and officiously. The position taken by D. J. Rees, and which he was obliged to take is that the deed was a mistake; that it was entered into by the parties in ignorance of the law governing the matter. The question is simply what is the position of the property of the wife and children? It would have been much better to have brought this suit in Quebec. We submit the instrument is wholly void. The sum of it is merely a covenant between husband and wife. But the wife could not deal with the property, or covenant in respect to it, because it was not separate property. Then the husband joining makes no difference, because any attempt to interfere with the community property so as to change the relationship of the parties to it is void as shewn by the evidence. The husband and wife, living in Quebec, were bound by the law there, which is founded on a deep policy. They could not have dealt with the property in this manner at home; could the mere crossing the boundary, and coming into Ontario for a day or two enable them to do so? No case had been made of any misdealings by the husband with the property. All the circumstances surrounding the matter are in favour of Rees's contention. On the marriage both parties became domiciled in Quebec, and that has been their domicil ever since. On this part of the case we refer to *Udny* v. *Udny*, L. R. 1 Sc. App. pp. 441, 457; *Sottomayor* v. *De Barros*, L. R. 3 P. D. 5; *Van Grutten* v. *Digby*, 31 Beav. 561; *Hicks* v. *Powell*, L. R. 4 Ch. 741; *Martin* v. *Martin*, 2 R. and M. 507; *Waterhouse* v. *Stansfield*, 10 Ha. 254; *Cammell* v. *Sewell*, 5 H. and N. 728; *Story's* Conf. of Laws, 7th ed. secs. 130, 131, 138, 186, 187, 190–199 and 410; *Phil.* on International Law, 2nd ed. vol. 4, p. 313; *Wharton's* Conf. of Laws, 2nd ed. secs. 190-1; *Wheaton's* International Law, 2nd ed. p. 119;

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Westlake's International Law, 1880, secs. 30, 32. If the deed had been made in Quebec it would have been void for many reasons. Then though an infant can accept under the law in Quebec, nothing of the kind took place here. There was no acceptance by tutor or ancestor; and the wife could not accept for the minors because she was a donor; and no acceptance either by the husband or wife can be deduced from the deed. Then the promissory note in trust for Mrs. Rees is void on its face as all the witnesses agree. The transfer of shares again is void on its face as dealing with community property. The matter rests *in fieri*, and is only an agreement to do something contrary to the law of the domicil. The Court is asked to compel the defendant to do in Quebec what the law of Quebec forbids. As to the removal of the trustee, under the Lower Canada Law the father has the first right to be tutor. We refer to *Wheaton's* International Law, 2nd ed., pp. 125, 121; *Savigny's* Priv. Int. Law, sec. 19, p. 108: *Frelix* Priv. Int. Law, (ed. of 1866) p. 61; the Code, secs. 1308, 1309.

Donovan, for the defendants Anna M. Rees and Rachel Rees. We are indifferent whether the deed is maintained or avoided: but as to the removal of the trustee, if either is removed, it should be the plaintiff, and that we desire.

C. Moss, Q.C., for the infant defendants. The deed on its face is valid and binding according to our law. It is more than a contract; it is not *in fieri*. The thing is accomplished and done. See *Lewin* on Trusts, 7th ed., p. 72. Then was the property situated in Quebec? the bank stock was not. The case is one of a person out of his domicil, contracting about his property also out of his domicil, and in the same place as the owner. See the Banking Act 1871, sec. 19. As the stock can only be dealt with at a particular place; that is the place where it exists: *Attorney General* v. *Alexander*, L. R. 10 Ex. 20; see also Banking Act of 1871, sec. 25. Then the note representing money was made in Toronto, and not made payable in any particular place. Hence it was payable

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here. If the property and the parties to the transfer are in the jurisdiction, the transfer will be good anywhere: *Foote's* Priv. Int. Law, p. 182; *Peninsular and Oriental Steamship Co.* v. *Shand*, 3 Moo. P. C. N. S. pp. 272, 290. Then as to the Quebec law, the wife is the only one as to whom the husband is incapacitated from making a gift of the community property: Code sec. 1292. The gifts to himself and to his children are good, and the transaction could have been entered into in Quebec. *Foote's* Priv. Int. Law, at p. 275, shows that formalities not in themselves essential to the contract, need not have been complied with, when it is sought to enforce the contract in another country. Formal modes of evidencing the contract can be disregarded altogether. It is not correct to say the wife was the donor: the husband was donor, and his wife accepted for the infants: see Code L. C. sects, 760, 788. With us the communication of the trust to any of the *cestuis que trust* makes the document final: *Spooner* v. *Jones*, 3 Ch. Ch. 481. The transaction in question here, even if regarded as it would be regarded in Quebec Courts, must be considered to enure to the benefit of the infants, having regard to the fact that this is the *forum*. There is no question of specific performances in the case, but the defendant D. J. Rees undertakes to show the document is invalid; and as to the complaint that the question should have been litigated in Quebec, the answer is that he it was who has raised the question here. The property and fund are within the jurisdiction of this Court. D. J. Rees asks that the wards of this Court shall be deprived of the benefit of the trusts, when he has declared over his own seal that they are entitled to it, which declaration he made in this province. See *Grant* v. *Eddy*, 21 Gr. 45. There being a valid declaration of the trust, the Court can do nothing but execute it. As to costs, the infants costs must be paid, and in any event the costs should not be paid out of the *corpus* of the estate.

G. Morphy, who also appeared for the infants, as well as for the plaintiff. There is sufficient evidence of the trust,

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even if the deed were set aside. But if there is anything to enable the Court to see that this a trust in favour of the children it must be executed. The Court must take care of the infants. The defendant D. J. Rees has confirmed the matter by his acts and delay in coming to the Court. D. J. Rees shews no equity entitling him to relief from the deed. As to costs, the commission which has taken place was unnecessary, and as it was occasioned by D. J. Rees' answer, the costs of it should be paid by him. I refer to *Anderson* v. *Abbott*, 23 Beav. 457 ; *Bigelow* on Estoppel, 2nd ed., p. 433 (foot-note); *Story* on Eq. Pleading, 8th ed., sec. 892; *Dan.* Ch. Prac., 5th ed., pp. 345, 1272–6, 1281–2; *Story's* Eq. Jurisp., secs. 95, 1059, 1352 ; *Story's* Conf. of Laws, secs. 241, 273, 276, 278, 279, 282, 284, 327, 383, 384 ; *Wharton's* Conf. of Laws, secs. 297, 307, 340, 342, 345 359, 388, 429 ; *Westlake*, Intern. Law, 1858 ed., secs. 295, 229*a* ; *Chitty* on Cont., 8th ed., pp. 92, 364, 377 ; *Wheaton's* Intern. Law, 2nd ed., p. 121 ; *Parson's* on Cont., 7th ed., vol. 2, p. 507, 570, 571, 574 ; *Addison* on Cont., 7th ed., p. 240; *Bentley* v. *McKay*, 15 Beav., pp. 12, 20 ; *Lewin* on Trusts, 3rd ed., p. 47, 49.

J. Maclennan, Q.C., in reply to Mr. Moss and Mr, Morphy. The infants can get no more than they would get if of full age. There is no such acknowledged trust as would enable the Court to decree a trust existing. The deed is in *fieri*, because there was no vested delivery of the property under the trusts. The transfers of the stock are still in Montreal, and the $4,000 in the business is also in Montreal. The deed in question is voluntary, and D. J. Rees may revoke it.

S. H. Blake, Q.C., for the plaintiff, in reply, referred to Broom's Legal Maxims, 7th ed., p. 541 ; 1 Wh. & Tud. L. C. 5th ed., p. 492; *Hill* on Trustees, 4th ed., p. 612 ; *Hanchett* v. *Briscoe*, 22 Beav. 496; *In re Lush's Trusts*, L. R. 4 Ch. 591.

March 7th, 1883. FERGUSON, J.—The defendants Dan. John Rees and Anna Maria Rees were married in the City of Toronto in the month of February, 1859. The defendant D. J. Rees was then living and carrying on

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business as a merchant in the city of Montreal, in the Province of Quebec. The defendant A. M. Rees was, up to the time of the marriage, living in Toronto with her mother and the family. It is beyond all doubt that at the time of the marriage the intention was that the defendants D. J. Rees and A. M. Rees should go to Montreal immediately to reside, and have their home there. This they did, and lived together there until a comparatively recent period, when unhappy differences arose between them. There is a number of children of the marriage.

The plaintiff is a brother of the defendant A. M. Rees. At the time of her marriage the defendant A. M. Rees received in cash from her mother the sum of $4,000, which went into the commercial business of her husband. She afterwards received the respective sums of $4,000 and $2,000, which were laid out in the purchase of bank stock, the stock being held in the name of the defendant D. J. Rees in trust; and it appears that the defendant A. M. Rees received also household furniture, &c., amounting to or of the value of $2,000. Up to the time of the execution of the indenture to be mentioned hereafter the dividends upon the bank stock were accumulated by applying them in the purchase of more stock, and the amount of the stock is said to be, at par value, $9,000. The stock is stock of the Ontario Bank, the head office of which is in the city of Toronto. It was formerly at the town of Bowmanville, in Ontario, as I understand from the evidence.

At the time of the execution of the indenture mentioned before, the defendant A. M. Rees was temporarily residing at the Queen's Hotel, in Toronto. This was owing to some misunderstanding between her and her husband, and some other matters which I think need not be mentioned here. On March 3rd, 1875, an indenture was executed in the City of Toronto between the defendant Anna Maria Rees of the first part, and the plaintiff and the defendant D. J. Rees of the second part, whereby after shortly recit-

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ing the facts (relative to moneys) that I have referred to the three parties thereto *covenanted* that the Ontario Bank stock then standing in the name of the defendant D. J. Rees, in trust for the defendant A. M. Rees should be transferred in due form in the proper books of the bank into the names of the plaintiff and the defendant D. J. Rees, and that this stock as well as the said sum of $4000 (which was mentioned with its accumulation at $5000,) and the value of the furniture, $2000, should be held in trust by the plaintiff and Rees to invest the moneys in mortgages on real estate in the Dominion of Canada, or in public funds of the Dominion, or of any of the Provinces of the Dominion, or in the stock of any chartered bank in the Dominion, and to alter or vary the same as occasion should require, such investments to be made with the consent in writing of the defendant A. M. Rees, and to permit and suffer the defendant A. M. Rees during the term of her natural life to have, receive, and take to her own proper use and benefit all the dividends, interest, and other profits that should during her life accrue, arise, or be made by or from the several sums of money, or stocks, or any of them, and from and after the decease of the defendant A. M. Rees, in trust for the children of the defendants D. J. Rees and A. M. Rees, with a provision that in case of there being no son or daughter or issue of any living at the decease of the defendant, A. M. Rees, the trustees should stand, and be possessed of the trust moneys and securities in trust for the legal representatives of the defendant A. M. Rees. At or immediately after the execution of the deed the defendant D. J. Rees gave his promissory note to the plaintiff as trustee for the defendant A. M. Rees (by her maiden name, Hughes) for $7,000, being the $4,000 with interest—$5,000—and the $2,000, the value of the furniture. &c. At the time of the execution of this indenture the defendant D. J. Rees was only temporarily in Toronto, He has always, since his marriage, resided and carried on business in Montreal. The plaintiff has since long before the execution of this deed resided and carried on business

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in Toronto. The bank stock was, on February 8th, 1877, transferred to the plaintiff and the defendant D. J. Rees, in trust. It was 238 shares, amounting to $9,520. The plaintiff had made certain advances to his sister, the defendant A. M. Rees, expecting that he should be repaid out of the moneys going to her under the trusts. These advances were, or a great part of them was, to defray the expenses of a pilgrimage to Rome.

The suit is brought for the removal of the defendant D. J. Rees from the trusts, and the appointment of a new trustee in his stead, the plaintiff offering to resign his position as trustee, and to allow the appointment of a new trustee in his stead upon receiving indemnity in respect of his advances or payment of them (*a*).

The reasons for the removal of the defendant D. J. Rees, given by the plaintiff, are differences and misunderstandings between him and his wife, the defendant A. M. Rees, an alimony suit having been brought by her in the province of Quebec, and a judgment or decree in her favour, they, the husband and wife, being apart, and no probability of any arrangement or settlement of such differences; serious differences between the plaintiff and the defendant D. J. Rees, which materially interfere with the execution of the trusts; the facts that the defendant D. J. Rees gave notice to the bank not to pay the dividends upon the stock to the plaintiff or the defendant A. M.

(*a*) By his bill of complaint as originally filed, and prior to certain amendments made under this judgment of Ferguson, J., the plaintiff prayed: (1) the discharge of D. J. Rees, and the appointment of a new trustee in his place: (2) a reference to the Master to take an account of the dealings of the trustees with the trust properties, and an account of what might be due from D. J. Rees for principal and interest in respect of the loan and investment of $4,000 in his business as in the claim mentioned, and an order for payment; (3) an account of what might be due the plaintiff for advances made by him to or for the benefit of A. M. Rees; and that the amount of such advances might be paid out of the dividends payable on the Ontario Bank Stock in the claim mentioned; and that it might be declared that the plaintiff had a lien thereon: (4) an injunction restraining the withdrawal of the accumulated profits on the said stock: (5) costs of suit and further relief.

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Rees, the latter contending that she has the right to get these dividends directly from the bank, and that if she do get them she will not pay the plaintiff the amount of his advances to her; the fact that the plaintiff D. J. Rees has not paid into the trust fund or to the trustees the moneys mentioned in the deed of trust, though requested so to do; and that he does not intend to do so; and that the defendant D. J. Rees is endeavoring to obstruct and prevent the execution and carrying out of the trusts instead of executing the same. The plaintiff also asks to be reimbursed or indemnified against his advances made as aforesaid.

The defendant D. J. Rees says and contends that the trust deed was made only for the purpose of quieting the mental condition of his wife at the time, and that he had the promise of the plaintiff that the deed should not be carried into effect made at or about the time it was executed, and says that he did not pay much attention at the time to what the deed contained. But looking at the evidence, and especially the evidence of the solicitor who drew the deed, I do not think any effect can be given to these contentions.

The defendant D. J. Rees, however, says and contends that the deed is void, being in contravention of the laws of the province of Quebec, his contention being that all the property mentioned in the deed became, according to the laws of Quebec, what is called "community property," and that it was out of his power, and out of the power of his wife to deal with the property as this deed professes to do. Witnesses were called to prove the law of the Province of Quebec on the subject, and according to their evidence (though this did not exactly agree in all things,) when there is no ante-nuptial settlement, the law makes a settlement of the property of the parties upon their marriage, and also of property subsequently acquired. It is called "community property," and it is not in the power of the husband during the coverture to make a gift of this community property directly or indirectly to his wife, although he is the administrator of it, and may make gifts to the children if the gifts are properly accepted. There was no ante-nuptial

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settlement in this case. The settlement made by the law of Quebec takes effect whether the marriage ceremony takes place in the province or elsewhere, and whether the property of the wife happen to be in that province or elsewhere, provided the domicil of the husband is in that province, and (as in this case) the intention of the parties, husband and wife was to go to live and have their home immediately in Quebec; and the chief contention of counsel for the defendant D. J. Rees, to state it very shortly, was that the husband being domiciled in Montreal, and the parties intending at the time of the marriage to go there immediately to live and have their domicil, the whole of the property, the subject of the trust in the deed became community property, and there could not be, directly or indirectly, a gift of it to, or a settlement of it upon, the wife, and, there having been as counsel contended, no proper acceptance of the gift professedly made to the children by the deed, that (the deed) could not take effect, and that, the deed of trust was void *in toto*, and for this reason what is asked by the plaintiff could not be granted, and the action should be dismissed.

Mr. Kerr, a professional gentleman from Montreal, of high standing I believe, in his evidence, says: "When the donation out of community property is to the wife and children by the father, the gift to the wife is bad, but the gift to the children is good. And the wife being present, and signing the deed, would be a good acceptance of the gift to the children. Where there is a limited interest to the wife, and remainder to the children, the gift of the interest to the wife is void, but the gift to the children is good." The other professional witnesses (two in number), and also gentlemen of good standing, I believe, do not state the law quite as concisely or in the same words as Mr. Kerr. But I do not understand them, or either of them, to dissent directly from what he says in this part of his evidence, although there was much discussion as to acceptance of the gift on behalf of the children, and, I think the proper finding on the evidence as to this point of the foreign law is that it is as stated by Mr. Kerr. All the

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professional witnesses, as I understood them, agreed that no formal acceptance on behalf of the children was necessary; that the acceptance could be shown by circumstances; that the word "accept" had lost the sacramental meaning that it formerly had; but it was said that the party accepting—a parent or ascendant (ancestor)—should be present and sign the deed. The witnesses all seemed to agree that the gift, when made by deed in Quebec, should be by a notarial deed, but that if made by deed out of Quebec, it might be made by any deed good according to the law of the country where it is executed. Mr. Pagnuelo however, said that it was not competent to a stranger to accept a donation on behalf of a minor; a stranger is not qualified so to do: and the other witnesses did not dissent from this statement.

Mr. Kerr also says: "If the husband and wife were in the position of donors, she could not accept for the children," referring to Article 1308 of the code. He also says the "husband and wife may join in making a gift to the child; and if the gift is out of community, no question of compensation arises between them." He also says: "Where there is the presence of the donee and his signature to the deed, it is still a question for the Court as to whether or not there was an aceptance of the gift." And I do not understand that either of the other witnesses dissent from Mr. Kerr's statements of the law in any of these respects. The evidence shows that the laws of the province of Quebec did not, until two or three years ago, recognize a trust created by deed *inter vivos*; although, if the trust were created by will, it was otherwise.

On the evidence I think there is no doubt that all the property in question here became and was community property, and that the purchase of the bank stock by Rees, and holding it in trust for his wife, made no difference. It was, nevertheless, community property. He could not in Montreal make a gift of it directly or indirectly to her. Then, all the property being community property, and the defendant D. J. Rees and his wife being temporarily in Toronto,

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and having made, or attempted to make, a contract disposing of it, it was contended that the bank stock, at all events, being situated in Ontario, passed under the contract. Looking at the provisions of the Banking Act of 1871, and the evidence of Mr. Powell, I am of the opinion that the bank stock was, at the time of the execution of the deed in question, and of the formal transfer of it to the trustees under the deed, situate in Ontario, although the bank had, for convenience sake, made provisions for making transfers of the stock in Montreal, and a question is what effect had the deed as to the bank stock? Many authorities were cited by counsel, and these I have examined.

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In *Foote's* Private International Jurisprudence a summary of the law respecting the alienation of movable personal property by transfer *inter vivos* is given at pages 182 and 183, and it is stated in this way:

"When alienation of movable personal property is effected by transfer *inter vivos* the law regards not so much the person and domicil of the owner as the act or transfer by which the transfer is effected and the situation *in fact* of the property transferred.

"If the property to be transferred, and the parties to the transfer are all within the same jurisdiction, the transfer, according to the law of that jurisdiction, will confer a good title, valid everywhere, under the dominion of whatever law the property afterwards passes.

"But such a title will not be conferred if the property, at the moment of the transfer, be within another jurisdiction by the law of which the attempted transfer is invalid or imperfect.

If the transfer be valid according to the law of the place where the property is in fact situate, the title conferred by it should be recognized as good everywhere, though imperfect by the law of the former owner's domicil, and though the property be afterwards brought within the dominion of that law.

"The creation of a lien upon movable personal property

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is similarly referred to the law of the place where the property was in fact situate at the time when the lien was created."

And in the same work, at page 275, it is clearly laid down that the formalities and ceremonies which the law of the place where the contract is made, demands for its constitution are to be tested by that law alone. And if they satisfy it, no other law has a right to demand more, or in the other event to accept less.

In *Story's* Conflict of Laws, section 383, the author, in speaking of personal property, says: "It follows, as a natural consequence of the rule which we have been considering, that the laws of the owner's domicil should in all cases determine the validity of every tranfer alienation or disposition made by the owner, whether it be *inter vivos* or *post mortem*. And this is regularly true, unless there is some positive or customary law of the country where the property is situated, providing for special cases, (as is sometimes done), or, from the nature of the particular property, it has a necessarily implied locality. Lord Mansfield has mentioned, as among the latter cases, contracts respecting the public funds or stocks, the local nature of which requires them to be carried into execution according to the local law. The same rule may properly apply to all local stocks or funds, although of a personal nature, or so made by the local law, such as bank stock, insurance stock, &c., and other incorporeal property owing its existence to, or regulated by, peculiar local laws. No positive transfer can be made of such property except in the manner prescribed by the local regulations. But, nevertheless, contracts *to transfer* such property would be valid if made according to the *lex domicilii* of the owner or the *lex loci contractûs* unless such contracts were specially prohibited by the *lex rei sitae*; and the property would be treated as personal or as real, in the course of administration, according to the local law."

I have selected these two statements of law from amongst

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the large number of authorities cited, one apparently presenting a view favorable to the plaintiff's contention, and the other favouring the contention of the defendant Rees.

If the trust deed in question had on its face professed to be a complete and consummated transfer of the right of property in the stock, I should have been of the opinion that, as all the contracting parties were here, and as the property was personal property and also here, the rule stated in *Foote's* Private International Jurisprudence would have applied, but it will be observed that the deed is not of this kind. It contains only a covenant to transfer the stock, and the transaction was not consummated, while the parties were here. Rees went home to his own domicil and there, some two years afterwards, went through the form of transferring this stock to the trustees named in the deed. In doing this he was attempting to consummate a gift of community property, in part to his wife, and in part to his children. According to the evidence this act was so far as it related to his wife a nullity, and, so far as it had relation to his children wholly void for want of a proper acceptance on their behalf. Under these circumstances I am of the opinion that the alleged transfer of this stock does not fall within the rule stated by Mr. Foote in his work on Private International Jurisprudence, and that the case is left to fall under the law of the owner's domicil as to the validity of the alleged transfer or alienation, and applying that law as shown by the evidence, I am of the opinion that there was not a good transfer or alienation by the defendant Rees of the right of property in this stock.

Then as to the money (the $7000), that was not in this country at the time of the execution of the deed, and the rule stated by Mr. Foote could not apply to it at all, a transfer or alienation of this money must I think be judged of as to its validity by the laws of Quebec. The evidence shows that a deed of gift to the wife would be void, but that a deed of gift to the children would be good if properly accepted. The deed is not in my opinion a deed of gift, but only a covenant, and as I understand the evidence,

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the acceptance mentioned is an acceptance by which the gift becomes complete. Then, even if it were held that the presence of the wife, and her signing the deed would have been, if the deed had been one of gift, a good acceptance of the gift, yet I think the acceptance contended for here fails, because it could, at most, be only an acceptance of a promise, and not of a gift. I do not think that the fact of the promissory note having been made at the time, makes the case different. It was simply another promise. It was not payment. This other promise was not made to the trustees, plaintiff and the trust mentioned on the face of this but to the note is not the same trust as that contained in the deed I am, for the reasons I have stated, of opinion that no property passed into the hands of the trustees by the transactions set forth.

Then, as to the right or not of the trustees to enforce as against the defendant Rees a specific performance of the covenant in the deed. The case not falling, as I think and have said, under the rule stated by Mr. Foote, is governed by the laws of the domicil of the defendant Rees, and I think to enforce the covenant in this way would be quite contrary to the spirit of those laws as stated by the evidence. It was also urged that there was a valid declaration of trust of the property, and that this alone was quite sufficient. I was not referred to any authority that appeared to me to show that it was under the circumstances of the case, sufficient, when the case falls short of coming within the rule stated by Mr. Foote, and is governed by the law of the domicil of the defendant Rees. As I understand the evidence, a mere declaration of trust would, under that law, as it stood at the date of the execution of this deed, be considered a nullity.

It was also urged, that as the defendant Rees could not be heard to gainsay his own deed, and all the other parties to the deed were affirming it, that there was title in the trustees, as I understood the argument, by estoppel. Applying the principles stated by the Master of the Rolls in the

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case *General Finance Mortgage and Discount Co.* v. *The Liberator Permanent Benefit Building Society*, L. R. 10 Ch. D., p. 15, in which many of the authorities are collected and their effect given, to this deed and the circumstances of the case, I am quite unable to perceive how the trustees could make out a title by estoppel, even if the questions were to be governed wholly by our law.

It was also urged that there were infants concerned in the case, and that it was the duty of the Court to protect them. Very true; but, as I understand the law, the duty of the Court is to protect the rights and interests that infants have, not to give them rights and interests that they have not, and I think this contention fails.

I am of the opinion that there is not, nor has there been, any trust property in this case. The Court is asked to remove one who is said to be a trustee, and to appoint another in his place and stead. I think this cannot be done.

After the above judgment had been delivered, the plaintiff asked for, and obtained leave from his lordship, to argue on a future day, the question of the liability of the defendant D. J. Rees to reimburse the plaintiff for the advances made by him to Anna M. Rees.

On March 3rd, 1883, the matter came up for argument and the question, of costs was also argued.

S. H. Blake, Q. C., and *Morphy* for the plaintiff. The plaintiff should be declared entitled to hold the estate till he is paid all he is entitled to, that is all necessaries supplied to the wife or children. D. J. Rees must make good all that took place under the supposed trust. We ask a reference to ascertain what the plaintiff has advanced for the support and maintenance of the wife and children, a direction that whatever may have been so paid by the plaintiff be refunded to him, and that the fund be not given back till this is done, or else there must be an account of the trust fund, the master to allow the advances of the trustee in his discretion. The costs of the commission should be

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allowed us as between solicitor and client. We refer to *Griffith* v. *Paterson*, 20 Gr. 615; *Perry* on Trusts, 2nd. ed. see 908-10.

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J. Maclennan, Q.C., and *R. E. Kingsford* for the defendant D. J. Rees. The defendant D. J. Rees did not, nor does he now ask to have the fund delivered to him, or retransferred. The plaintiff says he is entitled to relief on the footing of a void instrument. Now whether community property can be made subject to allowances to a trustee under a void trust, is a question arising under the foreign law, and no evidence was given upon it. It was not raised in the case at all. No doubt the general law is that the husband is liable for such support as in question here, but the circumstances here are sufficient to refute the proposition, beside the plaintiff's bill shows that an action is pending for the maintenance claimed in Quebec. The pleadings make no such case against D. J. Rees, and he had no opportunity of meeting it; moreover the personal liability of Rees for maintenance depends upon the law of Quebec. As it is, a decree for alimony at the rate of $1,200 a year has been made in Quebec. This, which amounts to a second action for maintenance is vexatious.

FERGUSON, J.—It is now contended by the plaintiff that there should have been a reference to the Master to inquire and state whether or not the plaintiff has any valid claim against the defendant Rees for maintenance and support by the plaintiff of the wife and children of the defendant Rees, alleged maintenance having taken place whilst the trusts in the deed declared were supposed to be good and valid.

This contention is opposed on the grounds (1st) that no case for it is made upon the pleadings, and (2nd) that a suit for the same matter is pending in the province of Quebec.

As to the first, the plaintiff's pleading is certainly very meagre; yet the defendant appears by his answer to have understood the plaintiff to be suing for this cause, and looking at what took place between counsel at the trial to

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which attention is now called, I think the plaintiff is entitled to succeed against this ground of objection.

As to the second, the pendency of a suit in the Province of Quebec for the same cause does not appear to have been considered under the Chancery practice a good ground for a plea. The plea to be good must show that there is a former suit pending in the same country, and in a Court of Equity, and it has been held that the plea will not be good in England, where it alleges that the former suit is pending in Ireland or in the colonies: *Foster* v. *Vassall*, 3 Atk. 587; *Bayley* v. *Edwards*, 3 Swan. 703, and cases referred to in *Daniel's* Ch. Prac. 5th ed., at p. 546, and the cases cited in the second English edition of the same work, first American edition, at p. 722.

I was not referred to any authority showing that the pendency of a suit in a foreign country is a good plea in bar of a suit for the same cause in this country. The most that the defendant could claim, I think, is that the plaintiff be put to his election; and I am not to be understood as deciding any thing as to that, because what occurred at the trial seems to prevent the defendant from raising the objection.

It was also objected that there was a sufficient provision for the support of the defendant Rees's wife and children, because a decree in an alimony suit had been obtained in the province of Quebec, and the defendant ordered to pay, as alimony, $1,200 per annum. It was not, however, shown, or sufficiently shown, that this had been paid.

After having considered all the objections raised, I am of the opinion that the plaintiff is, under all the circumstances entitled to the reference to have it ascertained whether he has such a claim against the defendant Rees, and if so to have an account taken of the same.

A very slight verbal amendment of the plaintiff's pleading may be necessary, and if so considered, this is allowed.

As to the costs of the commission to take the evidence of the late Mr. Morphy in New York, I think it plain that they should be paid by the defendant Rees to the plaintiff;

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and, under the circumstances, that they should be costs as between solicitor and client. There will be no costs of suit, except the costs of the commission aforesaid, to and inclusive of the judgment, and excepting the costs of the infant and adult children, which the plaintiff will pay.

I have said that I think the deed in question is a void deed. In the case *Smith* v *Dresser*, L. R. 1 Eq. 651, the Master of the Rolls said that where the trusts of the deed are wholly void, the supposed trustees cannot claim any of the rights incidental to a trust, which, in truth, never existed. This expression is perhaps somewhat misleading. The question there seems to have been mainly one as to expenses, and, as stated in the judgment, the trustee had learned that the trusts were void in a former suit respecting the same trusts in which he was a defendant. The case of *Woods* v. *Axton*, W. N. 1866, p. 207, which I do not find in the regular series, but which is referred to in *Lewin* on Trusts 7th ed., p. 549 was decided the same year. In this the deed was held invalid, but the trustees having acted *bonâ fide* under it were allowed the amount they had paid, and the value of the materials they had supplied in accordance with the terms of the deed. At present I say nothing as to what may be the right of the plaintiff. But I think there should be also a reference as to what property and money came into the hands of the persons named as trustees or into the hands of any of them, and as to what disposition has been made of the same.

Further directions, costs of reference, &c., reserved till after report.

A. H. F. L.

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[COMMON PLEAS DIVISION.]

THE ONTARIO AND QUEBEC RAILWAY COMPANY v. PHILBRICK.

Railway—Tender of compensation for lands taken—Omission to offer crossing until arbitration—Costs.

By sec. 9, sub-sec. 19 of the Railway Act, 42 Vic. ch. 9, D., where the sum awarded by the arbitrators as compensation for land taken, and damages is not greater than that offered by the company, the costs of the arbitration shall be borne by the opposite party; but if otherwise, they shall be borne by the company; and in either case they may, if not agreed upon, be taxed by the Judge. On the 2nd August, 1883, the O. and Q. R. W. Co. served P. with the statutory notice of their intention to take three and forty-two hundreths acres of P.'s land, and tendered $3,635, as compensation therefor and for damages. This notice was abandoned and another notice given on the 23rd November, offering the same amount of money but reducing the quantity of land to one and fifty-four hundredth acres. The offer was refused and the arbitration proceeded with. The railway cut off P.'s land from the highway, and on the plan attached to the notice no crossing was shewn. The arbitrators met on the 27th December, when the company tendered a deed binding themselves to make and maintain a crossing. The arbitrators assessed the compensation and damages at $3,516, or $119 less than the amount tendered; but this was after taking into consideration the value to P. of the crossing.

Held, by reason of the offer to make the crossing after the arbitrators met, the tender then made was not the same as that made prior to the arbitration: and therefore the provisions of the section as to costs did not apply.

A rule for a mandamus to the county Judge to tax the costs to the company, and for a prohibition preventing him taxing P.'s costs, was refused.

Quære—whether the Judge has under the circumstances any power to decide as to costs at all.

G. T. Blackstock obtained an order *nisi* calling on John Boyd, Esquire, Judge of the County Court of the county of York, and the above named Philbrick, to shew cause why a writ of mandamus should not issue to the said John Boyd, Esquire, commanding him to tax the costs of the Ontario and Quebec Railway Company of and incidental to the arbitration and award herein, and also why a writ of prohibition or mandatory injunction should not issue to the said John Boyd restraining him from taxing the costs of the said Philbrick of and incidental to the said arbitration and award, and why the said Philbrick should not pay the costs of and incidental to this application.

On the 14th March, 1883, *Blackstock*, supported the order.

McMichael, Q.C., and *Shepley*, contra.

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March 21, 1884. GALT, J.—This railway company is authorized to construct a line of railway from Ottawa to Toronto, under the provisions of the Railway Act of 1879. Their line passes through the township of York, in which the lands of Philbrick are situate, and crosses his property. On the 2nd of August, 1883, they served him with a notice under the statute, stating their intention to appropriate three acres and $\frac{42}{100}$, and tendering him the sum of $3,635 as compensation for the land so taken, and all damages.

This notice was abandoned, and another notice, dated 23rd November, 1883, was served, offering the same amount of money, but reducing the quantity of land from 3 $\frac{42}{100}$ acres to 1 $\frac{54}{100}$. This offer was refused, and the arbitration out of which the present application arises was proceeded with.

The arbitration commenced on the 27th December, 1883. Attached to the notice there is a plan of the railway line as it crosses the respondent's land. This land consists of three lots of above five acres, each situate on the slope of a hill, and fronting on a road called "Summerhill Avenue," and the line of railway cuts off the lands from the said road. There is no crossing shewn on the plan, so that the owner of the land was entirely cut off from the road which formed the only access to his property.

On the day on which the arbitrators met for the first time, the company prepared and executed to the respondent a deed binding themselves to make and maintain an ordinary railway crossing, with cattle guards. A good deal of discussion took place before me as to the exact time when this instrument was brought to the notice of the respondent and his counsel; but this is of little consequence, as it was not disputed there was no crossing shewn or referred to in the offer, nor was the plan prepared or executed before the day on which the arbitration was to be held.

It is manifest that under the circumstances of this case

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a crossing such as that now undertaken by the company is of great value to the respondent, and no doubt entered largely into the consideration of the arbitrators when they were estimating the damages; in fact, in making their award they expressly refer to it as follows: "Depreciation of balance of property by reason of construction of road through property interfering with access or even with open crossing." They then assess the damages at $3,516, being $119 less than the sum offered.

By sub-sec. 19 of sec. 9 of The Consolidated Railway Act, 1879, 42 Vic. ch. 9, D.: "If in any case where three arbitrators have been appointed, the sum awarded is not greater than that offered, the cost of the arbitration shall be borne by the opposite party, and be deducted from the compensation, but if otherwise, they shall be borne by the company, and in either case they may, if not agreed upon, be taxed by the Judge."

It is under this clause the present application is made, as the amount awarded is less than the sum offered.

I am of opinion the first part of this application must be refused. The consideration offered by the company before the arbitrators was not the consideration previously offered to the respondent.

There is no proceeding under the Land Clauses Act in England precisely similar to those under our Act of 1879, so that the English cases are not exactly in point. The principle, however, is the same, that previous notice must be given by a company, and the right to costs is regulated thereby; and it has been expressly held "that there the offer must be made before the arbitration can be said to have begun—this is on the appointment of the arbitrators:" *Gray* v. *North-Eastern R. W. Co.*, 1 Q. B. D. 696, at p. 700.

In the present case no previous offer of the crossing was made, and as I have already shewn, such a crossing was taken into consideration by the arbitrators when they estimated the damages.

It was urged by Mr. Blackstock that the statute was

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imperative, and no doubt it is, but the proceedings to give it that effect should have been in accordance with it, and here they were not. In fact, this case seems to me not to come within the provisions as to costs. The company have succeeded in reducing the amount of money offered, and therefore they would be entitled to costs; but on the other hand the respondent has received an equivalent, probably of considerably greater value, but the money portion of which is less than such amount, and would therefore be liable to costs if the words of the statute are imperative, and this case is covered by them.

In my opinion this case does not come within the statute so far as the question of costs is concerned, and therefore this application must be refused, with costs.

If the learned Judge should be of opinion that he has the power to tax costs to the respondent, and should proceed to do so, another application can be made.

It appears to me very doubtful whether under the words of the statute the duties of the learned Judge are not ministerial only; I doubt extremely whether he has any authority to decide on the right to costs, which appears to me to have been settled by the statute in all cases coming within its provisions.

The order must be discharged, with costs.

Order discharged.

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[CHANCERY DIVISION.]

SORENSON v. SMART.

Res Judicata.

The plaintiff in this action having a contract with a township corporation for constructing drains, the defendant occasionally cashed checks or orders on the corporation for him, and was also in the habit of supplying him with goods, on account of which the plaintiff gave him two orders. The defendant having sued the plaintiff on the common counts, the plaintiff pleaded payment. By the particulars in that action the now defendant claimed for goods sold and money lent, and gave credit for one item of $300, received upon an order for that sum. He had a verdict for $920, and the now plaintiff afterwards brought this action against him to recover back a sum of $300, which he alleged had been received by the defendant on another order, but had not been credited in the former action.

Held, that the plaintiff was estopped by the former judgment.

Sedden v. *Tutop*, 6 T. R. 607; *Chisholm* v. *Morse*, 11 C. P. 589, distinguished.

THIS was an action brought by one Christian Sorenson against one James H. Smart, under the following circumstances.

It appeared that in the year 1880, Smart had brought an action at law against Sorenson, and had declared on the common counts, and Sorenson had among other pleas pleaded "payment."

Under this plea he attempted to prove that two orders, one for $300 and one for $475, which he had given Smart, had been given as payment of those sums. This Smart denied, and said that he was only to give credit for what he received on them, and that the first had been paid, but he had received nothing on the second. He gave credit for the $300 on the first in his particulars. At the trial a verdict was rendered for Smart and enforced.

Sorenson claimed that two days after the verdict he ascertained that Smart had received a second $300 which he did not credit him with. He did not move to reduce the verdict, but brought this action to recover the amount.

The case was tried before Proudfoot, J., at Sandwich, in April, 1883, when judgment was pronounced in favour of the plaintiff, with the understanding that the question of estoppel would be argued before the full Court.

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In this way the case came up before the Divisional Court by way of appeal by the defendant from that judgment on the 6th December, 1883, before Osler, J. A., and Ferguson, J.

Bethune, Q.C., with him *Jaffray*, for the appeal. There is no better remedy in equity than at law for the recovery of money: *Anderson* v. *Roberts*, 18 Johnson N. Y. R. 513; *Simpson* v. *Hart*, 14 Johnson, N. Y. R. 62; *Patch* v. *Ward*, L. R. 3 Ch. 203. The fraud on which a judgment can be set aside is fraud in the recovery of the judgment. If the two payments were made the account would be overpaid, which was very unlikely. The plaintiff is estopped by the plea of "payment" in the former action. There is an estoppel even if the defendant might have proved the $300. The order for the payment was dated later than the warrant, which plaintiff claims made the payment.

Hoyles, contra. The judgment is right on the facts. Sorenson did not know at the trial of the first action that any payment had been made on the second order. The matter now in dispute was not really in question in the former action. The plaintiff is not estopped by his plea of payment in the former action: *Bigelow* on Estoppel, 3rd ed., at pp. 29, 30, 140, and cases there referred to; *Johnston* v. *Provincial Ins. Co.*, 12 Mich. 216; *Spencer* v. *Vigneux*, 20 Cal. 442; *Seddon* v. *Tutop*, 6 T. R. 607; *Deacon* v. *Great Western R. W. Co.*, 6 C. P. 241; *Chisholm* v. *Morse*, 11 C. P. 589; *Beasly* v. *Beasly*, 10 U. C. R. 367.

Bethune, Q.C., in reply. The facts were the same in the former action as now. The issue was found in favour of the then plaintiff on the plea of payment, and there is an estoppel. This action is really an application to reduce the amount of the judgment.

February 21, 1884. OSLER, J. A.—This is a rehearing by the defendant of the judgment of Proudfoot, J., in favour of the plaintiff, at the trial at Sandwich in April, 1883.

The two questions argued before us are:

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1. Whether the plaintiff is estopped by the judgment recovered against him in a former action, at the suit of the now defendant, from recovering the moneys sued for in this action.

2. If not so estopped, whether on the evidence he has otherwise proved himself entitled to the amount claimed.

The learned Judge doubted whether the plaintiff was not estopped, but thinking it might appear that the moneys now sought to be recovered were not due or payable when the former action was brought, decided this question in his favour, leaving it to be further considered elsewhere.

On the facts in other respects he thought the plaintiff's claim was proved.

It appeared that in 1879, the plaintiff had a contract with the corporation of South Colchester for the construction of certain drains.

The defendant occasionally cashed or advanced money on cheques of the corporation, which the plaintiff had received on account of the work.

He had a store account against him for a considerable amount, on account of which the plaintiff gave him two orders on the Reeve of the township, who was acting as treasurer or sub-treasurer in connection with the work.

On the 26th June, 1880, Smart brought an action against Sorenson in the Queen's Bench, and declared on the common counts for goods sold, &c. Sorenson pleaded never indebted, payment before action, and set-off, on which pleas issue was joined.

The particulars of Smart's demand in that action consisted of an account for goods sold, money lent, &c., amounting to $1,528.13. Credit was given for the sum of $607.79, which included an item of $300 received: "— April, 1879," on an order upon J. C. Iler, the reeve of Colchester; the balance claimed was $920.34.

By his particulars of set-off Sorenson claimed, in addition to the several sums credited by Smart, among other items, the following: "For order on the township of Colchester, $475."

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The case was tried before Armour, J., on the 26th October 1880. Smart's account was admitted, and Sorenson then proved that he had given Smart an order, dated 3rd May, 1879, on J. C. Iler in these terms: "Please pay J. H. Smart the balance due me on my contract on 8th Con. Tap drain." He swore that there was then due to him on account of the contract, about $475; but that the work was not quite finished, nor the amount finally settled between him and the Council. He contended that he had given the order to Smart as payment on account. Smart, on the other hand, said that he was only to give credit for anything which might be paid to him on the order as soon as he received it, and that nothing had ever been paid to him thereon.

The plaintiff failed to prove that other payments had been made to Smart on an order in connection with a drain in another township.

Iler, the reeve, was not called. It was said he had been subpœnaed, but he did not arrive in time to give evidence, and Smart had a verdict, on which judgment was afterwards entered and enforced, for the full amount of his demand.

Sorenson now alleges that two days after the trial of the former action he discovered that Smart had in fact omitted to credit him therein with a further sum of $300, which he had received from the township of Colchester on one of the two orders he had given him, and had thus recovered a verdict for $300 too much. He, however, made no attempt to set aside the verdict, and now brings this action to recover back one of the sums thus received but not credited by the defendant.

It is important to notice the precise way in which the claim is put in the particulars. It is alleged that the plaintiff gave Smart an order upon Iler for $300, dated 15th January, 1879: that on this order, Iler, on the 18th March, 1879, issued a warrant to him which he endorsed to Smart, who on the same day received the amount of it from Iler: that he gave "another similar order, no date preserved" to

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pay Smart the balance which would be due to him, Sorenson, when the drain under contract was completed; and that on or about the 18th April, 1879, Iler issued a warrant to Smart, who obtained thereon from the township treasurer $300. "And in the suit of *Smart* v. *Sorenson*, only one item of $300 was credited for and on account of the above mentioned orders and warrants, and therefore the plaintiff claims $300 from the defendant."

That was the way in which the case was presented for the plaintiff at the trial before Proudfoot, J. The plaintiff proved that he had given the defendant an order on Iler about the middle of January, 1879, for $300, and he swore that on the 18th March, 1879, they were both present at Iler's house, on which occasion Iler gave him a check or warrant for $300, payable to his order, which he then endorsed and handed to the defendant, and that this warrant was given for the January order. This warrant is not endorsed by the defendant, nor is there any receipt from him for the amount thereof, but Iler swore that he paid it to him on the same day just after the plaintiff had left the house. The plaintiff also swore that he had given the defendant another order, the date of which he could not remember, for the balance coming to him on the contract, on which order the defendant afterwards received $300 on the 10th or 11th April, 1879. Iler also swore that the second payment was made upon this order, which is described as a conditional order, and it is clear that a payment of $300 was made on the 10th or 11th April, proved as it is by Iler's warrant or check in his favour endorsed by him, and by his receipt for the amount. The defendant, however, said, and to my mind with much appearance of reason, that he never received a payment on the 18th March, that the payment of the 10th April was made on account of the order of the 15th January, and that he had never been paid anything on account of the conditional order at all. I do not however here discuss the evidence on this point further than to observe that while both parties agree that

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there were but two orders, the payment of the 10th or 11th April, could not have been made on the conditional order, which was not given until the 3rd May, a fact the existence or importance of which was, I strongly suspect, overlooked or forgotten by both the plaintiff and Iler, when they swore that the above payment was made on the second or conditional order.

It appears to me on this state of facts that the defendant is entitled to our judgment on the defence of *res judicata*, a defence which applies "not only to points, upon which the Court was actually required by the parties to form an opinion and pronounce judgment; but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time": *Henderson* v. *Henderson*, 3 Hare 115.

The only issue in the former action which need be considered is that on the plea of payment, a plea which according to the practice is to be taken distributively, and "if issue is taken thereon and so much thereof as is a sufficient answer to part of the cause of action is proved and found true on trial, a verdict shall pass for the defendant in respect of so much of the causes of action as are answered, and for the plaintiff in respect of so much thereof as are not answered:" C. L. P. Act, sec. 113.

I say the plea of payment is the important one, because if these two sums of $300 were received by Smart they were payments by Sorenson, having been paid by his order out of moneys of his in Iler's hands. Then the question on that plea being, whether the whole or any part of Smart's demand had been paid, the judgment thereon was and is that it had not been paid. True, Sorenson did not then apply his evidence to prove a payment on the 18th March, as he now seeks to do, but that, to use the language of the Vice-Chancellor in *Henderson* v. *Henderson*, *supra*, was only because from negligence, inadvertence, or even accident, he omitted to do so. I think myself that his reason for not doing so was, that he knew there had been no such payment, but that is not material.

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To permit him to prove it in this action, is to permit him to contradict the record in the former action, by shewing that the judgment therein should have been for $620 only, instead of $920, which, in the plain language of Lawrence, J., in *Marriott* v. *Hampton*, 2 Sm. L. C. 406, "is too preposterous to be stated."

Such cases as *Seddon* v. *Tutop*, 6 T. R. 607; *Chisholm* v. *Morse*, 11 C. P. 589, and others of that class, have no application to the present. They are cases where a plaintiff having two distinct unconnected demands, sued for and provable in the same action, confines his evidence to and has judgment in respect of one of them only, it may be by inadvertence as in *Seddon* v. *Tutop*, or because the action has been prematurely brought, as in *Palmer* v. *Temple*, 9 A. & E. 508. The judgment so recovered is no bar to another action for the other demand. Here the question was the single one of payment, and it has been adjudicated upon: *Markham* v. *Middleton*, cited in *Seddon* v. *Tutop*, 6 T. R. 609. The case of *Brunsden* v. *Humphrey*, 11 Q. B. D. 712, may be referred to as the last authority on the subject.

I do not see the slightest foundation for the contention that the plaintiff was prevented by the fraud of the defendant from proving the payment now in question in the former suit, and the learned Judge's finding is in the defendant's favour on this point. He gave credit in his particulars of demand for a payment of $300, in April, 1879, and that should have been sufficient notice to the plaintiff that he was not receiving credit for a payment which, if he is to be believed, he knew Iler had made for him in the March previous.

In my opinion the judgment should be reversed, and the action dismissed, with costs.

FERGUSON, J.—After going over the records and the evidence in both suits, I am of the opinion that the defendant is estopped by the finding and judgment on the issue raised on the plea of payment in the former suit.

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This plea was a distributive plea, and the finding and judgment were against him. To permit the plaintiff to recover for the sum now sued for would, I think, most certainly contradict the record in the former suit.

I think the charge of fraud against the now defendant not supported by the evidence.

I am of the opinion that the judgment should be reversed, and the action dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

GUNN V. BURGESS.

Bills of sale act—R. S. O,. ch. 119—Indivisible chattels—Possession of co-owner—Sheriff's sale.

A. having purchased from B. a half interest in a celebrated brood mare, paid in his purchase money $50 more than the half interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was that they were to keep her for breeding purposes and share the profits equally.

During the year, and while in B.'s possession, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was *in gremio* at the time of the sale.

In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act, R. S. O. ch. 119, avoided the plaintiff's title as against the execution, it was,

Held, that the Act was intended to apply to personal chattels susceptible of specific ascertainment and of accurate description, and capable of being transferred and possessed *in specie*, and did not apply to an indivisible chattel, like that in the present case. That A. & B. were tenants in common of the mare; that B.'s possession of the mare was not his sole or exclusive possession, but the possession of both; that the sheriff's sale passed only B.'s interest in the mare, and C. by his purchase became a co-owner with A.; and that the property in the colt followed that of its dam, and that A. was an owner of an undivided moiety in both.

THIS was an action brought by William Gunn against Samuel G. Burgess, to establish his right to a half interest in a celebrated brood mare called "Simoon," and her colt.

The case was tried at the sittings held at Woodstock, before Boyd, C., on the 19th April, 1884.

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At the trial it appeared that the plaintiff had on the 25th May, 1882, purchased a half interest in the mare from the then owner, one Garthwaite, the intention being to use her for breeding purposes and divide the profits equally. The mare was left in possession of Garthwaite, and while in his possession was sold by the sheriff under an execution against him, notice of his claim having been given by the plaintiff to the sheriff, and also publicly at the sale.

The defendant contended that he had purchased the mare for value and that as there had been no change of possession when the plaintiff purchased from Garthwaite, the Bills of Sale Act, R. S. O. c. 119, avoided the plaintiff's title as against the execution. The other facts appear in the judgment of the learned Chancellor.

Moss, Q.C., for the plaintiff. The plaintiff's right to a half interest in the mare is proved. The Bills of Sale Act does not apply to a case like this where only a half interest is disposed of. A change in possession of a half interest was impossible: *Burton* v. *Bellhouse*, 20 U. C. R. 60; *Gildersleeve* v. *Ault*, 16 U. C. R. 401; *Carlisle* v. *Tait*, 7 A. R. 10 and 19. The mare being partnership property, Garthwaite himself had no power to sell her, and a sheriff under an execution is in no better position: *Crossman* v. *Shears*, 3 A. R. 583,

Cassels Q.C., for the defendant. Section 5 of the Act applies to just such a case as this one, the execution must prevail over the plaintiffs title: *McMartin* v. *McDougall*, 10 U. C. R. 399. There should have been "an actual and continued change of possession" when Garthwaite sold the half interest to the plaintiff: *Barron*, on Bills of Sale 121 and 122.

Moss, Q. C. in reply.

May 7th, 1884. BOYD, C.—On the 25th May, 1882, the plaintiff bought a one half interest in the mare "Simoon" from the then owner, Garthwaite, and paid him down the price $250. The bargain was, that they were to keep her

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for breeding purposes, and to divide the profits equally. The plaintiff paid $50 more than the half interest was worth in consideration of which Garthwaite was to take care of her until 1st April, 1883, then the plaintiff was to have her, and thereafter they were to share expenses equally.

While in the possession of Garthwaite she was seized by the sheriff under executions against him on January, 1883, and was sold on 26th January to the plaintiff. Notice of the plaintiff's claim was given to the sheriff and also publicly at the time of the sale. Since then the mare has had a colt which was *in gremio* at the date of the sheriff's sale.

I disposed of all questions of fact in the plaintiff's favor at the hearing. The sole point reserved was one of law, viz., the defendants contention that the Bills of Sale Act avoids the plaintiff's title as against the execution.

The mischief intended to be remedied by this Act is to prevent a secret transfer of movable property which can be at once removed, and the apparent possession of which is suffered to remain in a person who has parted with the ownership. That is the reason substantially given by Cockburn, C. J., in *Brantom* v. *Griffits*, L. R. 1 C. P. D. 349, and by Burton, J. in *McMaster* v. *Garland*, 8 A. R. 12.

The principle of construction applicable generally to this class of acts is referred to in *Brantom* v. *Griffits*, L. R. 1, C. P. D. 356 in this manner. The Bills of Sale Act is one which, "however salutary, may have the effect of taking away rights of property honestly acquired, and therefore must be construed strictly." Mr. Justice Archibald there intimates that the application of the English Act must be limited, to articles of which possession could have been given to the vendee, and which are capable of removal. Growing crops were therefore held to be excluded from its operation. That Act is in *pari materia* with the Ontario Act, R. S. O. c. 119. And the views of the English Judges as to the scope and construction of the act were adopted and followed as applicable to our act in *Hamilton* v. *Harrison*, 46 U. C. R. 127. Under the English Act 17, 18 Vict., cap. 36, goods and

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chattels are defined to be such articles as are "capable of complete transfer by delivery."

It was held in *Re Bambridge*, L. R. 8, Ch. D. 218, that a mortgage of tenant and trade fixtures by one partner was not within the act, on the ground that the extent of the partners interest therein depended on the state of the plaintiff's accounts, and that in this view the security was but a mortgage of a chose in action.

The intrinsic evidence afforded by the Ontario Act manifests that it was intended to apply to personal chattels susceptible of specific ascertainment, and of accurate description, capable therefore of being actually and manually transferred and possessed *in specie*. In my opinion it does not apply to the present case.

The legal result of the plaintiff's purchase was that he and Garthwaite became tenants in common of the mare. Though not partners in the mare they would probably be partners in the profits resulting from the mode of user for breeding purposes subsequently contemplated according to the view of Cockburn, C. J., in *French* v. *Styring*, 2 C. B. N. S. 357.

Now the ownership and property of tenants in common like that of all tenants who hold *pro indiviso*, is *per mie et per tout*: *Daniel* v. *Camplin*, 7 M. & Gr. 172. Each in this case had an undivided moiety of the mare, and while Garthwaite had the actual custody of her, he was not solely nor exclusively in possession. The possession of one was the possession of both. The physical possession of one with the assent of the other, was constructively the actual possession of both: *Holliday* v. *Camsell*, 1 T. R. 658; *Brown* v. *Hedges*, 1 Salk 290; *Webster* v. *Overseers*, L. R. 8 C. P. 306; *Gladstone* v. *Padwick*, L. R. 6, Ex. 204. The essential unity which characterizes a tenancy in common is that of possession: such tenants with respect to all persons other than themselves occupy the position of one single owner: *Williams* on Personal Property, 2nd Am. ed. 318.

What was *the thing* sold here? It was a one-half interest in a horse, a thing incapable of separation and

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delivery *in specie*. The animal was in the technical phrase of the old law an entire chattel personal, and by the purchase of one-half the plaintiff acquired not a specific chattel but only an undivided moiety of an indivisible piece of personal property. The chattel itself was not sold nor was any separate or ascertained share therein sold because, as Blackstone puts it, in Littleton's language, in a tenancy in common: "No man can certainly tell which part is his own," 2 *Kerr's* Blackstone, 4th ed., 165. The text of the old law referred to in *Coke* on Littleton, 197 *a* is pertinent to the case in hand. He says if the tenants in common of land make a lease, reserving as rent a hawk or a horse, they cannot sever and claim separately but "they shall joyne in an assize, * * for one of them cannot make his plaint in assize of the moitie of a hawke, or of a horse, for the law will never suffer any man to demand anything against the order of nature or reason." Also the author proceeds: "The law will never enforce a man to demand that which he cannot recover, and a man cannot recover the moytie of a hawke, horse, or of any other entire thing."

The mischief contemplated by the Act does not arise here The vendor Garthwaite did not cease to be the owner; as part owner he was rightfully in possession, and to the ex tent of his interest, his creditors have a right to enforce execution. His visible possession cannot be deemed colourable or collusive, but on the contrary, is entirely consistent with the co-ordinate rights and property of his companion in the chattel. The possible prejudice to creditors arising from the actual visible holding of property, is not in the case of co-owners curable by this Act. Had the plaintiff taken the custody of the animal no registration of the property would have been requisite, upon any construction of the Act ; yet creditors of the plaintiff might then complain, that fictitious credit was given to him by the actual possession of this famous brood mare, though in fact he owned but a half.

My judgment then, in view of these considerations, is, that the sheriff's sale passed only Garthwaite's interest in the

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mare, and that the defendant by his purchase became co-owner with the plaintiff. The property in the colt will follow that of its dam, and as to both the plaintiff is owner of an undivided moiety. Costs will follow the result.

G. A. B.

[CHANCERY DIVISION.]

SMITH v. SMITH.

Married woman—Will—Estoppel—Possession—Slip in pleading—Amendment

L. a married woman, about the year 1830, assumed to devise certain land to her daughter P. and her husband O., for their lives and thereafter to their children. T. (one of the children) went into possession of part of it at the instance of O. about 1855, and built thereon and remained in undisturbed possession for over 28 years. Those who were entitled in remainder under the will (the life estates having expired) brought an action to have the land partitioned or sold, and T. claimed his part by length of possession.

Held, (reversing the judgment of Ferguson, J.,) that although T. might be estopped from denying the title of L., still he was not estopped from denying that L. had transferred her title to those now claiming, and that as they claimed under the will of L. (a married woman) made in 1828, before there was power to devise, and so void on its face, they had no title and T must succeed.

Board v. *Board*, L. R. 9 Q. B. 48, *et al.*, and *Paine* v. *Jones*, L. R. 18 Eq. 320, *et al.*, distinguished.

THIS was an action brought by one Charles Wesley Smith against his brother Thomas John Smith and fourteen other defendants, who were brothers and sisters (and their husbands) and the infant children of deceased sisters, for the partition of the west half and the northerly three acres of the east half of lot No. 7 in the 8th concession of the township of South Dorchester in the county of Elgin.

The plaintiff's statement of claim alleged that one Lydia Loder (his grandmother) died about the year 1840, having by her will devised the said lands to Permelia Smith, wife of Oliver Smith, and to the said Oliver Smith (his mother and father) for their joint lives and for the life of the sur-

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vivor, with remainder to the issue of the body of the said Permelia Smith their heirs and assigns forever.

That the said Permelia Smith and Oliver Smith were dead: and that he and the defendants (except the husbands who were joined for conformity) were the only heirs-at-law of the said Permelia and Oliver Smith: and asked for a sale of the lands and a division of the proceeds.

The statement of defence of the three sisters and their husbands alleged that the said Lydia Loder was seized in fee of the whole of lot 7 in the 8th concession of South Dorchester and devised it as in the statement of claim mentioned; and asked that the whole lot (except 47 acres of the north-east ¼ which had been sold for taxes) be brought into this action and partitioned or sold, and the proceeds divided amongst those entitled.

The statement of defence of the defendant Thomas John Smith alleged that said lot No. 7 in the 8th concession of South Dorchester *was devised* by Lydia Loder in the words following (setting out the devise) and he claimed title to the south-east quarter of the lot by 20 years possession under the Statute of Limitations.

On the motion for judgment Proudfoot, J., directed that the issue raised between the defendants as to the south-east ¼ should be tried at the autumn sittings for 1883 at London.

This issue thereupon came on for trial at London on the 23rd day of November, 1883, before Ferguson, J.

Macbeth, for plaintiff.
Ermatinger & Robinson, for defendant T. J. Smith.
McDougall, for other adult defendants.
Meredith, Q. C., for infants.

At the trial the evidence showed that T. J. Smith had gone into possession of the south-east 50 acres of the lot about 28 years ago with the consent and under the direction of his father, and that he had retained control of it ever since, leasing it from time to time, sometimes to his

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own brothers; that it had been assessed to him as owner and that he had always dealt with it as his own, and that he so went into possession knowing that the will was his father's only title and relying upon it.

A copy of a document purporting to be a memorial of the will of Lydia Loder was put in, appearing on its face to have been made by a married woman in the year 1828, and Mr. Ermatinger on behalf of the defendant T. J. Smith applied for leave to amend the statement of defence by alleging that lot 7 in the 8th concession of South Dorchester *was pretended to be devised* instead of *was devised*, and that the will was void, which was refused. The learned Judge commenting on the fact that the defendant had in his examination sworn the opposite of what he desired to state by way of amendment. The following judgment was then given:

November 23, 1883. FERGUSON, J.—The will, after giving the life estate, goes on: "and after the deaths of my said daughter and her said husband I give and bequeath the said lot of land and premises *unto their children* the issue of the body of my said daughter Permelia their heirs and assigns forever." In the case of *Buffar* v. *Bradford*, 2 Atk. 222, Lord Hardwick said: "It must be allowed that the word 'children' in its natural import is a word of purchase and not of limitation, unless it is to comply with the intention of a testator, where the word cannot take effect in any other way." In *Webb* v. *Byng*, 2 K. & J. 669, Sir W. P. Wood said, "'children' may be construed as a word of limitation when the general scope and object of the will necessarily requires such a construction." In the argument stress was laid upon the word 'issue,' the cases of *Lees* v. *Mosley*, 1 Y. & C. Ex. 589, and *Roddy* v. *Fitzgerald*, 6 H. L. 823, shew how much more readily this word or the words 'issue of the body' yield to words of modification than do the words 'heirs' or 'heirs of the body'. I do not see any necessity here for construing the word 'children' as a word of limitation, and I think that the

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words that follow it in the will were employed by the testatrix for the purpose only of pointing out what children should take; there was a child living at the date of the will, and at the time of the death; and after looking at a large number of cases, including the authorities cited excepting one, I am of opinion the rule in *Shelley's Case* does not apply.

I think the entry of Thomas John Smith was an entry under his father who claimed under the will, and I think it is shown that he understood the matter in this way; he cannot therefore, under the authorities referred to by counsel, be permitted to say that the will is bad.

It is then plain that the partition should be of the whole of the lands. The defendant Thomas John Smith will pay his co-defendants' costs of the contention raised by him, of which contention the plaintiff will have no costs. The statute settles the matter of the costs of the partition.

Judgment accordingly,

From this judgment the defendant Thomas John Smith appealed and the appeal came on for argument at the sittings of the Divisional Court on December 12th, 1883, before Boyd, C., and Proudfoot, J.

Ermatinger, for defendant Thomas John Smith. The learned Judge was wrong in refusing the amendment. Amendments of a slip in pleading should always be allowed, and the refusal is a proper ground of appeal: *Laird* v. *Briggs*, 19 Ch. D. 22; *Clarke* v. *Yorke*, 31 W. R. 62; *Lefroy & Cassels*, 81. The words "was devised by Lydia Loder" were used as introductory to the quotation from the will and not as admitting its validity. The will on its face is invalid. Thomas J. Smith denies there is such a will and relies upon his possession, which gives him a title. He did not enter under the will, and the evidence does not show that he did. *Board* v. *Board*, 9 Q.B. 48, and that line of cases only establish that, where a person without any title or with a defective title attempts to devise

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property by a valid will, his devisee is estopped from denying his title: but where the devisor has a good title, but the will which purports to pass the title is void, no such estoppel arises as against the person entering under the void instrument: *Paine* v. *Jones*, L. R. 18 Eq. 320; *Re Stringer's Estate*, 6 Ch. D. 10.

J. Hoskin, Q. C., for infants. The amendment was properly refused at the trial. The defendant Thomas J. Smith is estopped from denying the validity of the will. He has no title except under the will. *Board* v. *Board*, L. R. 9 Q. B. 48; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Anstee* v. *Nelms*, 1 H. & N. 232. He was further estopped as he has accepted a quit claim deed from the plaintiff of his interest in the 50 acres now claimed by possession. Estoppel should prevail now, as he did not set up his title when the issue was first ordered. There was only a life interest taken by the parents. There were children at the date of the will. "Children" is not a word of limitation: *Theobald* on Wills, 2nd Ed. 334, 343; *Byng* v. *Byng*, 10 H. L. C. 171; *Oates* v. *Jackson*, 2 Strange, 1172; *Jeffery* v. *Honywood*, 4 Mad. 398; *Lees* v. *Mosley*, 1 Y. & C. Ex. 589.

Macbeth, for other adult defendants. The amendment cannot be made even under O. J. A., *Newby* v. *Sharpe*, 8 Ch. D. 39; *Tildesley* v. *Harper*, 10 Ch. D. 393; *Pyatt* v. *McKee*, 3 O. R. 151. Permelia and Oliver Smith were estopped from denying as they registered and adopted it. Oliver put Thomas J. in possession under it and Thomas J. must be estopped too, and cannot oppose their title. *Re Stringer's Estate*, 6 Ch. D., 10, shows this.

Ermatinger, in reply, cited *Keffer* v. *Keffer*, 27 C. P. 257; *Day* v. *Day*, L. R. 3, P. C. 751; *Ryan* v. *Ryan*, 4 A. R. 563; *Schenck.* v. *Stumpf*, 6 Miss. App. 381; *Prindle* v. *Beveridge*, 7 Lans (N. Y.) 225.

[BOYD, C.—*Keffer* v. *Keffer* went to Appeal, and *Ryan* v. *Ryan* went to the Supreme Court.]

February 21st, 1884. BOYD, C.—Lydia Loder, a married woman, and the owner of this land, at her death, in or

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about 1830, assumed to devise it to her daughter Permelia Smith and Oliver Smith her husband for each of their lives, and thereafter to their children.

The defendant Thomas J. Smith went into possession of this land at the instance of Oliver Smith his father about 1855, built thereon, and has been in undisturbed possession for over 28 years.

Permelia his mother died in 1869 and his father Oliver in 1882.

Those who claim in remainder under the will (who are co-defendants) now ask that the land be partitioned among them, the life-tenancy having expired.

Thomas J. Smith asserts his ownership by length of possession. They assert that he is to be regarded as having entered under the will and is therefore bound to give effect to all the provisions of the will, and is estopped from denying their rights as remaindermen.

The will on its face purports to be that of a married woman, and being made in 1828, before there was power to devise, it is absolutely void.

Those in remainder rely upon a line of decisions based upon grounds of estoppel which end with *Board* v. *Board*, L. 9 Q. B. 48.

The tenant in possession relies upon the subsequent cases of *Paine* v. *Jones*, L. R. 18 Eq. 320, and *Re Stringer's Estate; Shaw* v. *Jones-Ford*, 6 Ch. D. 1.

There is great verbal confusion and contradiction between the two lines of authority invoked by the contending parties. But the decisions may be almost satisfactorily harmonized by bearing in mind that one set relates to cases of defect in title, and the other to cases of defective instruments of title.

The broad general rule is, that a person taking possession of land under another is estopped from denying that other's title to the land while the possession continues. Admitting that the defendant in possession obtained that possession under a belief that the will of the owner was valid: that would estop him from denying that the title was in Lydia

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Loder; but it would not estop him from denying that she had transferred her title to those who now claim in remainder.

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Those who seek to divide this property are obliged to recover on the strength of their own title. That title depends on whether they have any valid instrument of transfer from the acknowledged owner whose title is not in dispute. To shew title they have to rely upon the alleged will, and that on its face is void. In such a case there is no opening for the doctrine of estoppel. An illegal instrument, which is void in law cannot be set up by the aid of estoppel. The truth appears upon its face, and the Court must recognize it as worthless, *Saunders* v. *Merryweather*, 3 H. & C. 902; *Blaiklock* v. *Grindle*, L. R. 7 Eq. 215; *Gillman* v. *Murphy*, Ir. R. 6 C. L. 34, followed in *Doody* v. *Nolan*, Ir. R. 11 C. L. 23.

In *Board* v. *Board*, and other like cases, there was a defect or an absence of title in the testator and the devisee having no title, except by virtue of the will (valid on its face) enters under it. As against all who claim the same property in remainder under that will, the first taker is estopped from denying that the devisor actually had such an estate as he assumed to devise and cannot set up the Statute of Limitations against those claiming in remainder under the same instrument.

But the same principle of estoppel has not been extended to cases where the defect was not in the devisor's title but in the will itself—that being invalid or illegal. The precise point arose before the M. R. in *Re Stringer's Estate, Shaw* v. *Jones-Ford*, 6 Ch. D. 1, and he thus deals with it at pp. 10, 11. "A man enters under a will which contains an invalid devise. It is alleged that by claiming under that will and getting possession he affirms the invalid devise. Now, I cannot see the distinction suggested between the case where the remainder is invalid as well as the tenancy for life, and the case where the remainder alone is invalid. If he enters rightfully as tenant for life, and the next remain-

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der is invalid, it is admitted that will not make the remainder valid, because he had only a right to his tenancy for life; but he only claims as tenant for life; he admits throughout that he is tenant for life, and he pays charges as tenant for life. He enters, not upon the ground that he admits the title of the remainderman, but upon the ground that he claims as tenant for life.

But if he himself enters without title, it is said that because he has no title himself his entry gives a new title to the remainderman. I cannot see it. Suppose the defect in the tenancy for life is a different defect from that of the remainderman: suppose the gift to him was void for remoteness, and the gift to the remainderman was void as being to a charity, or *vice versâ*. How can it be said that his entry, though wrongful as tenant for life, estops him from doing anything? Why cannot he set up the defect against the remainderman? Can it make any difference if it happens to be the same defect? Why can he not admit the defect, and say, "I find now I have no claim to the property"? It does not appear to me to be within the doctrine of estoppel at all; neither within the principle of the doctrine, nor within the authorities which establish the doctrine."

This part of his judgment is not affected by the reversal of his holding on another branch of the case by the Judges in Appeal. This case and *Paine* v. *Jones*, L. R. 18 Eq. 320, were not cited to Ferguson, J. That was a case where the testator was supposed to have effectively devised after-acquired lands, and his widow took possession of them under that belief as tenant for life. After the lapse of a sufficient time to give her a parliamentary title, she claimed the absolute ownership and to this claim effect was given as against the remainderman under the will. Malins, V. C., said that though the widow thought she was entering into possession under the will, she was in fact entitled to treat herself as being in adverse possession: p. 326.

As I regard the case now in hand the question of the Statute of Limitations has no application. It is the same as

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if T. J. Smith had gone into possession as a squatter, and being there, he was called on to relinquish possession by those now claiming under the alleged will. His sufficient answer would be, "you have no title to turn me out." In the circumstances I do not see that he is estopped from denying the validity of the devise on which they rely, and if so they cannot succeed : See *Doe* v. *Moore*, 9 Q. B. 555, 562.

In view of the law applicable to this case leave to amend should have been granted. By a slip in pleading the legality of the alleged will was admitted, but the appellant should not lose his land by a blunder of that kind.

The Judge, upon the cases cited at the trial, thought that the appellant was estopped from contesting the will, so that it was needless on that account to permit the desired amendment.

The result is, the amendment should be made and judgment should be in favour of T. J. Smith as to the 50 acres in dispute. As to costs perhaps the best plan will be to award none, except that the extra costs of the infant occasioned by the appellant's failure to have his pleadings right should be paid by him to the guardian.

PROUDFOOT, J., concurred.

G. A. B.

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[CHANCERY DIVISION.]

ARKELL V. ROACH.

Will—Construction—Married woman—Statute of Distributions—R. S. O., ch. 125, sec. 25.

A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one, when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to be invested, and the income arising from each share, was to be accumulated until the remaining three children respectively attained twenty-one, when they were each to receive the annual income thereof, until the youngest (son) F. attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid equally to the two daughters C. and J., until one of them should die, and then one share was to be paid to the person or persons who would be entitled thereto under the Statute of Distributions in case such share was the the property of the daughter so dying. C. attained twenty-one, married, and died before F. attained twenty-one, having made her will and left all her property to her husband for her children.

Held, that the proper effect of the will of A. was to vest in C.'s husband and children, the one fourth share that she was to draw the income of for life, and that they were the persons entitled under the Statute of Distributions pertaining to the personal estate of married women who die intestate: R. S. O., ch. 125, sec. 25.

THIS was an action brought by Henry Arkell, the only surviving executor of Ann Elizabeth Arkell, deceased, for the construction of her will.

Ann Elizabeth Arkell died on the 25th May, 1877, leaving her surviving four children, viz.: Charles Merriman Arkell, Clara Winewood Arkell, Ida Mary Arkell, and Frederick William Arkell; and the will in question after providing for the realization of certain assets of her estate and giving directions as to the nature of the investments to be made contained the following clauses: "2nd. To invest and keep invested upon the aforesaid security or securities the annual income derivable from time to time from the moneys so invested or to be invested until my son Charles Merriman shall attain the age of twenty-one years, and then to divide the moneys so invested, together with the accumulated interest, into four equal shares and pay to my son Charles Merriman from thenceforth the annual income derivable from time to time from one of such one-fourth shares, until my said son Charles Merriman shall attain the

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age of thirty years; and then upon his attaining the age of thirty years to pay to him such one-fourth share of the moneys so divided and set apart for him. 3rd. To invest and keep invested on the securities aforesaid the annual income derivable from time to time from the remaining three shares, adding the same annually to each of such shares respectively until my remaining three children, Clara Winewood, Ida Mary, and Frederick William shall attain respectively the age of twenty-one years; and then to pay to each child respectively, as she or he attains the age of twenty-one years, the annual income derivable from one of such increased or accumulated shares until my son Frederick William shall attain the age of thirty years; and then to pay to him one of such shares or one-third part of the remainder of such principal or accumulated principal 4th. And thereafter to pay and divide the annual income of the remaining two shares to and between my said other two children Clara Winewood and Ida Mary in equal payments to each respectively, until one or the other of them shall die; and thereupon to pay one of such shares or one-half of the remainder of such accumulated principal, to the person or persons who would be entitled thereto *under the Statute of Distributions*, in case such principal moneys so to be paid were the property of the said child so dying, and thereafter to pay the annual income of the remaining share or portion of such principal moneys to the surviving daughter or child during her lifetime, and at her death to pay such principal moneys to the person or persons who would be entitled thereto *under the Statute of Distributions* in case such principal moneys were the property of such remaining child. 5th. * * * ."

The said Clara Winewood Arkell attained the age of twenty-one years, and married one Milton C. Roach in the year 1879, and died on the 28th December, 1883, leaving her surviving her husband, the said Milton C. Roach, and two infant children, Kathleen Lucille Roach and Harry Hunter Roach, all three of whom were made parties defendant to this action, together with her two brothers and

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sister, the said Charles Merriman Arkell, Ida Mary Arkell, and Frederick William Arkell, the latter of whom is still an infant under the age of twenty-one years.

The said Clara Winewood Roach in her lifetime duly made and published her will, (probate of which has been granted,) dated on the 28th December, 1883, whereby she appointed the said Milton C. Roach her executor and trustee, and devised all her real and personal estate to him upon certain trusts in favor of her children.

The action came on for argument by way of motion for judgment on the 16th April, 1884, before Boyd, C.

Street, Q. C., for plaintiff. The fourth clause of the will is the one in which the principal question arises. Clara died before Frederick attained the age of twenty-one, but before she died she had married, and thus a contingency has arisen which evidently was not anticipated when her mother's will was drawn. She left her husband and two infant children surviving her, and the question now is, who takes her fourth share under her mother's will. The Statute of Distributions does not affect the property of married women; so at the time of her death no one was entitled under that statute.

Maclennan, Q. C., for the infant defendant, Frederick William Arkell. There is no disposition of the corpus of the share by the will on Mrs. Roach's death, the property goes as if she died intestate. Frederick William thus takes one-fourth now, as next of kin of his mother and he has other contingent chances. The will is clearly expressed, the only omission being to provide for the corpus of the shares to the daughters while it provides for those to the sons. The sons take their shares absolutely subject to their being divested if either of them do not attain the age of thirty years.

[BOYD, C. What becomes of the shares of the daughters?]

Maclennan, Q. C. The will provides that after Frederick William attains the age of thirty years the interest on their shares is to be paid to the daughters for their lives, but

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Mrs. Roach married, and left her husband surviving when she died. The Statute of Distributions is therefore out of the question in her case. The will should have contained the words "unmarried and intestate" in it: *Bullock* v. *Downes*, 9 H. L. C. 1; *Mortimer* v. *Slater*, 7 Ch. D. 322; in App. *Mortimore* v. *Mortimore* (*sic.*,) 4 App. Cas. 448; *Sturge* v. *Great Western R. W. Co.*, 19 Ch. D. 444.

Coyne, for infant children of Mrs. Roach. The effect of the bequest is, that the income for eleven years, or until Frederick William attains the age of thirty (he being nineteen now) is bequeathed to Mrs. Roach, and her husband takes it as her executor. *Laxton* v. *Eedle*, 19 Beav. 323; *Re Ord, Dickinson* v. *Dickinson*, 12 Ch. D. 22. As to the question of the division of the corpus of Mrs. Roach's share, it is true the Statute of Frauds declares that the Statute of Distributions shall not apply to property or estates of married women, but English cases on this point do not apply to the Province of Ontario: see *R. S. O.* c. 125 s. 25. The case of *Bullock* v. *Downes*, 9 H. L. C. 1, does not decide who are to take, but only what proportions they are to take.

Maclennan, Q.C., in reply, referred to *Milne* v. *Gilbart*, 2 DeG. McN. & G. 715, 722, S. C. in App. 5 DeG. McN. & G., which case, he said, although it appeared to be against his contention was a case that the Court should be referred to.

April 30, 1884. BOYD, C.—The testatrix directed that the property in question should be invested until her son Charles should attain twenty-one, and then the whole accumulation was to be divided into four equal shares. From thenceforth the son Charles was to get the income from one share until he was thirty years of age, and then he was to get that share out and out. All this has been carried out.

The remaining three shares were to be kept invested and accumulated until her other three children respectively should attain twenty-one, but each child after attaining twenty-one was to have the income of one of such increased

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shares until the youngest son Frederick attained thirty years, and then he was to get one of such shares out and out.

After Frederick attained thirty, the income of the other two shares was to be paid as before to the two daughters until one or the other should die, and thereupon one share was to be paid to the person or persons who would be entitled thereto under the Statute of Distributions in case such principal moneys so to be paid were the property of the child so dying.

The scheme of the will is, to give the income of one-fourth to each child that attained twenty-one, and to give the corpus of one-fourth to each son that attained thirty. The daughters after attaining twenty-one continue through life to get the income, and no more than the income.

The eldest son attained thirty, and received his share, and while the youngest child Frederick was yet under twenty-one, the daughter Clara died, of age and married, leaving a husband and two children surviving her.

Clara made a will in which she directed in substance that her estate should be divided between her two children. Practically it is the same to these infants whether they take directly under the will of their grandmother, or (as to the income until the youngest son attains thirty) immediately through the will of their mother.

I think, however, that the proper effect of their grandmother's will is, to vest in them and their father forthwith the one-fourth share of which their mother was to draw the income during her life.

These two infants and their father are the persons who would be entitled to one-third each under the Statute of Distributions pertaining to the personal estate of married women who die intestate: R. S. O., c. 125, s. 25; *Milne* v. *Gilbart*, 2 DeG. M. G. 715, and *S. C.*, 5 ib. 510.

No reason exists, nor is there any language in the will necessitating a postponement of the vesting of the *corpus* until Frederick attains thirty. When Clara, the mother,

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attained twenty-one, she was to enjoy for life the income of the one-fourth in question, and her death thereafter would cast that share upon those entitled to succeed to her as under the Statute of Distributions: *Lomax* v. *Holmeden*, 3 P. Wms. 175.

Costs out of the estate.

G. A. B.

[CHANCERY DIVISION.]

COTTINGHAM v. COTTINGHAM.

Property sold by the acre—Misdescription in the acreage—Payment for the overplus—Improvements.

Property described in the advertisement and conditions of sale as "the east part of lot No. 9, in the 5th concession of Fenelon, 100 acres, &c., &c.," was sold at $31 per acre. and in the conveyance to the purchaser, was described as "100 acres more or less." The east part of the lot really contained 124 $\frac{68}{100}$ acres, which neither party knew at the time of sale, but the purchaser became aware of it just after the sale and before he got his conveyance, while the vendors did not find it out until long after.

Held, that the purchaser must pay for the overplus at the same rate per acre that he purchased the rest with interest, or deliver up possession of the same, but that if he should elect to deliver up possession, he was entitled to be paid for any permanent improvements.

THIS was a petition by the parties who were interested in the proceeds of the sale of the property in this suit for payment by one McAdam, the purchaser, for the surplus of land in one of the parcels which had been sold at auction at so much per acre.

The evidence was taken, and the case was argued at at Lindsay before Ferguson, J., on the 9thand 10th November, 1882.

The evidence showed that the property was described in the advertisement and conditions of sale, and was sold as "the east part of Lot No. 9, in the 5th concession, Fenelon, *one hundred acres*, leased, etc.," at $31.00 per acre, but in the conveyance to the purchaser it was described as 100

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acres *more or less*. That the whole lot originally contained $224\frac{88}{100}$ acres, of which the west part 100 acres had been sold off.

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That, at the time of the auction sale neither the vendors nor the purchaser nor their solicitors were aware of the overplus, but that the purchaser became aware of it on the day of the sale, and before he got his conveyance while the vendors did not ascertain the fact until about the 23rd October, 1879, and that as soon as the vendor's solicitor did become aware of it, he applied for payment for the overplus.

S. H. Blake, Q. C., with him *Hudspeth Q., C.*, for the petitioners.

The petitioners are entitled to be paid for the overplus: *Leslie* v. *Tompson*, 9 Hare 268. There was no standing by, on the part of the petitioners: *Kitchen* v. *Boon*, 24 Gr. 195, is a case in point on the question of land sold by the acre. *Tarbell* v. *Bowman*, 103 Mass. 341, and *Kitchen* v. *Boon* would carry the petitioners case through. *McDonald* v. *Garrett* not indexed but reported in 7 Gr. 606, bears on the question of delay. Petitioners should have the price of the land at the option of the respondent.

Hopkins, for the respondent. The whole interest was intended to be sold. The parties had a right to assume that the deed was to operate as it was expressed: *Campbell* v. *Edwards*, 24 Gr. 152. The conditions of sale show that the sale was not at so much per acre. The petitioners are not entitled to additional purchase money when the estate exceeds the amount mentioned in the particulars: *Dart* on Vendors and Purchasers, 5 Ed. 645, 742; *Hill* v. *Buckley* 17 Ves. 394. The bidding was for the whole property, and a piece cannot be cut off now, or the purchaser compelled to pay 25 per cent. more than he contracted to do. Both parties supposed "100 acres" covered all, and that $3,100 was the total price. The mention of "100 acres more or less" cannot alter the meaning of "the east part." In *Kitchen* v. *Boon*, 24 Gr. 195, there was a distinct bargain as to the surplus. He also referred to the following

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cases: *Booth* v. *Girdwood*, 32 U. C. R. 23; *Okill* v. *Whittaker*, 1 De. G. & S. 83, 2 Phillips 338; *Howkins* v. *Jackson*, 2 Mc. N. & G. 372; *Dart* on Vendors and Purchasers, 5th ed. 140, 142; *McCall* v. *Faithorne*, 10 Gr. 324; *Allen* v. *Richardson*, 13 Ch. D. 524; *Besley* v. *Besley* 9 Ch. D. 103; *Cooper* v. *Phibs*, L. R. 2, H. L. C. 149; *Jones* v. *Clifford*, Ch. D. 779.

Blake, Q. C., in reply. Even if the description was bad it makes no difference as the purchaser has taken the deed and the property. The advertisement and the agreement say 100 acres exactly: *Booth* v. *Girdwood*, 32 U. C. R. 32. The description is good under the Statute of Frauds, but that is beside the question altogether.

March 4th, 1884. FERGUSON, J.—This apparently was originally a suit for the partition of the real estate of the late William Cottingham. It appears that instead of partition, a sale of the lands or some of them took place.

One of the parcels offered for sale, and sold, was parcel No. 26, and was in the advertisement for sale, settled by the Master, described as follows:—"Parcel No. 26, the east part of Lot No. 9, in the 5th concession, Fenelon, 100 acres, leased to James Bryson until the 1st of October 1878, at the rental of $150. Frame house, log barn, nearly all cleared, some hardwood, situated eight miles from Lindsay and same distance from Fenelon Falls."

This parcel was purchased by Thomas R. Adam, who answers the petition.

The petitioners are the infants and others representatives of the late William Cottingham, and entitled to his estate. The lands were in the advertisement, and in the conditions of sale, described as 100 acres. In the conveyance to the purchaser the lands are described as 100 acres, more or less.

The whole Lot contained $224\frac{68}{100}$ acres. The west part had been sold off long before this sale by the late Wm. Cottingham himself, but only 100 acres, so that there remained the quantity $124\frac{68}{100}$ acres. There was litigation between the purchaser (the owner) of the west 100 acres and the present

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respondent, Adam, as to a part of this intervening $24\frac{68}{100}$ acres of land, in which Adam was successful, claiming title under the deed to him pursuant to the sale. The petitioners were not parties to that litigation. The respondent, Adam, is in possession of the whole $124\frac{68}{100}$ acres. The petitioners say that they were not aware until long after the sale that there was more land than the 100 acres, although the late William Cottingham was well aware of the fact of the larger quantity. The price at which the lands were sold was $31 per acre.

The petitioners ask that Adam the purchaser may be ordered to pay them for the excess of acreage, viz: $24\frac{68}{100}$ acres, at the same rate per acre, as he paid for the 100 acres and interest thereon, or that he may be ordered to deliver up to them or to whom they may appoint possession of the said $24\frac{68}{100}$ acres, and to pay a proper occupation rent for the same during the time he has been in occupation. They also ask for a reformation, if necessary, of the deed of conveyance to Adam, and of the mortgage given back by him for part of the purchase money.

At the trial of the petition I found as facts:

1. That the lands were sold and purchased at $31 per acre, each party thinking at that time that there were only 100 acres in the parcel, and that the biddings and the price or purchase money were so much per acre, and not so much for the parcel of land, and that the evidence to show that the lands were "knocked down" at $3,100 failed.

2. That on the day of the sale, but after the sale had taken place the purchaser learned and knew that there was an excess of land, but that the vendors did not, nor did the vendor's solicitor then, or for a long time afterwards, know this, and that the first knowledge of it the vendors or their solicitor had was at or soon before the 23rd October, 1879.

3. That the excess above referred to exists, and, I decided that the delay was not under the circumstances too great.

Counsel for Adam the purchaser rested his argument mainly upon the fact that the words "more or less" occurred

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in the description in the conveyance to his client, and that, what was sold and purchased was the "east part" of the lot.

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The peculiarity of this case is, that both parties were at the time of the sale ignorant of the existence of the excess in quantity of the lands, but before taking his conveyance, the purchaser was aware of it and the vendor was not, nor was the vendor's solicitor, and in this conveyance the words "more or less" occur for the first time. All the descriptions prior to this in the conveyance say "the east part 100 acres," without any further expression in this respect. In *Dart* on Vendors and Purchasers, p. 645, 5th ed., it is said: "Where there is no express agreement on the subject, and the contract in general terms includes property which it was not proposed to sell, equity would not enforce it against the vendor, without at least giving him compensation; but we are not aware of any case establishing this general right to additional purchase money, merely because the estate exceeds the quantity stated in the particulars, since, however, if it were sold professedly by the acre, the excess, if taken, must, it is conceived, clearly be paid for, it seems to follow from the doctrine laid down in *Hill* v. *Buckley*, 17 Ves. 394, 401, (viz.: that where the quantity is stated the price must be considered as fixed with reference thereto), that if called upon to fulfil the contract, he might, independently of agreement, refuse to complete unless he were allowed compensation; and this, at any rate as regards cases where the excess is considerable, is in accordance with modern decisions." In the same work at page 742 and 743, it is said that: "The vendor, after conveyance, has no remedy, if the property prove to be, as respects either quantity or quality, more valuable than was imagined: and the rule laid down by Lord Cottenham affirming the decree of V. C. K. Bruce in the case of *Okill* v. *Whittaker*, 2 Ph. 338, is referred to where it is said, "And whether the additional value consists in a longer term or larger acreage is immaterial." Then, what occasions the difference between the positions of the vendor before and after conveyance executed?

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In the case *Tarbell* v. *Bowman*, 103 Mass. at p, 344, Justice Colt says: "The question in cases of this description, has usually been, whether the sale was by estimation or by measurement. If the former, and the sale was fair, there is no hardship in applying the rule that the buyer takes the risk. If the latter, then the exact quantity becomes an essential element, and the plaintiff will be entitled to relief, unless it appears from the terms of the conveyance to him, or otherwise, that he has waived the precise quantity called for by the contract, such waiver has been held to have been made, when the description in the deed was by metes and bounds, with the words containing by estimation or 'more or less' added."

The sale in the present case was by measurement. It was $31 per acre for the 100 acres, mentioned in the advertisement. If the purchaser had been obliged to bring a suit for specific performance of his agreement it seems to me clear that he could have got only the 100 acres. Then, did the vendors waive any of their rights when the words "more or less" were inserted in the conveyance under the circumstances that I have stated? Can they be held to have done an act of waiver, they or their solicitor not having at the time any knowledge of the material fact? I certainly think not, and I am of the opinion that the petitioners are entitled to relief.

I think there should be an order upon Adam, the purchaser, to pay to the petitioners for the excess of acreage viz.: $24\frac{68}{100}$ acres at the same rate per acre, as he paid for the 100 acres, and interest.

Or that there should be an order for the delivery of possession of this $24\frac{68}{100}$ acres of land to the plaintiffs or the plaintiffs and others as the case may be, who were entitled to the estate before the sale and conveyance to Adam.

Adam should have a reasonable time, say one month, to elect as to which of these orders should be made against him.

In the event of Adam electing not to take and pay for the land, if he has made permanent improvements he should

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not, I think, be placed in a worse position than a fraudulent grantee, and should be allowed for such improvements, but if so, he will be charged with rents and profits; I do not at present see my way to ordering a rectification of the conveyance, or the directing of the payment of an occupation rent by the purchaser, Adam. The petitioners costs should I think be paid by the purchaser Adam. Reference if any to the Master at Lindsay.

G. A. B.

[CHANCERY DIVISION.]

RE BARWICK AND LOT THREE ON THE NORTH SIDE ON KING STREET IN THE CITY OF TORONTO ON THE PLAN OF THE JAIL AND COURT HOUSE BLOCK.

Vendors and Purchasers Act, R. S. O., c. 109—*Power to invest—Exchange —Power to sell.*

A., on his marriage, having conveyed a certain farm (which was then under contract of sale) to the trustee of his marriage settlement, provided that the purchase money, if the sale was carried out, and the land itself, if the sale was not carried out, was to be held subject to the trusts of the settlement, as follows: "And it is hereby agreed by and between the parties hereto, that on the payments of principal being made from time to time by the said J. J. V., (purchaser,) the said S. B H. (trustee), or any other trustee or trustees to be appointed as hereinafter mentioned, shall invest the same in such estate or securities, whether real or personal, and of what nature or kind soever as to him or them shall seem best, and most advantageous to the interest of the trust hereby created, and on such investments being from time to time realized the same to reinvest in like manner." The settlement also provided that if the said J. J. V. forfeited any right he had to the said real estate it should vest in the trustee for the purposes and uses of the said trusts therein before mentioned as regards the purchase money *with full power to lease or sell* the same, etc.

The purchaser, J. J. V., having failed to carry out his purchase, and having relinquished any claim he had to the farm, the trustee subsequently exchanged the farm for a city lot.

On an agreement for a sale of the city lot, the purchaser declined to carry out the purchase on the ground that the trustee had no power under the settlement to sell and convey. On an application by the trustee under the Vendors and Purchasers Act, R. S. O., ch. 109. It was

Held, that there was a direction to invest in real estate, and following *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 139, that "investing in" means the "actual purchase," and the purchaser's objections were overruled, with costs.

THIS was an application under the Vendors and Purchasers Act (R. S. O. ch. 109) by Frederick Drew Barwick as trustee under the marriage settlement of Huson William Munro Murray and Eliza Mary Ann Murray his wife.

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The petition set out that the trust property, contained in the settlement at the time it was made, was lot No. 5 east of Yonge street in the first concession in the township of York in the county of York, which was then under contract of sale to one James J. Vance.

That in the said settlement it was provided as follows: "And it is hereby agreed by and between the parties hereto that on the payments of principal being made from time to time by the said James J. Vance, the said Samuel Bickerton Harman (the then trustee under the settlement), or any other trustee or trustees to be appointed as hereinafter mentioned, shall invest the same in such estate or securities whether real or personal, and of what nature or kind soever as to him or them shall seem best, and most advantageous to the interest of the trusts hereby created and on such investments being from time to time realized the same to reinvest in like manner. And it is hereby further agreed by and between the parties hereto that in the event of the said James J. Vance failing to meet his payments or forfeiting or abandoning or surrendering his right to the real estate in the said recited indenture mentioned, then that the said real estate already vested in the said Samuel Bickerton Harman as aforesaid shall remain and be vested in him and his heirs for the purposes and uses of the said trusts hereinbefore mentioned as regards the investment of the said sum of £4500 if duly paid by the said James J. Vance, with full power to lease or sell the same in the whole or in parcels on such terms as to him shall seem most expedient, and as to the sale thereof, either for ready money or upon credit for the whole or any part of the purchase money as to him shall seem meet, and the rental from such leases or the interest on all purchase money or sales shall be deemed income to be paid as aforesaid, and the principal moneys arising from such sales so made shall be from time to time invested and reinvested as aforesaid."

That the said James J. Vance failed to carry out his agreement for purchase and forfeited and surrendered any right he had to the said land.

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That on the 29th August, 1861, the said Harman, with the consent of the said Murray and his wife, sold and conveyed the said land to one James Metcalf for $8000, and at the same time, and in the same manner, purchased from the said Metcalf the lot in question herein, but no money was paid by either of the parties.

That on or about the 30th April, 1884, the said Frederick Drew Barwick, (the present trustee) with the consent of the said Murray and his wife, agreed to sell the said lands to one George W. Wood, who declines to carry out the purchase, on the ground that the said Barwick, as such trustee, has no power or right under the said settlement, to sell and convey the said lands.

The petition was argued before Boyd, C., on May 14th, 1884.

Robinson, Q.C., for the petitioner. The vendee is willing to take the property if fortified by the opinion of the Court. There is no doubt there was an exchange years ago of the Yonge street farm for the King street lot; and if there was an exchange then the lot takes the place of the farm. There is a specific power of sale in the settlement applicable to the farm which must now apply to the lot. If it was a purchase then it comes under the other power of the settlement, viz., "To invest in such estate or securities whether real or personal, &c." The words "invest in" mean "to buy" or "to purchase" real estate, and the two kinds of securities "real" or "personal" are both specially mentioned and distinguished. If A gives B $10,000 to invest in real estate he means him to purchase real estate, that is the common acceptation of the word "invest." The settlement evidently intended that the trustee should have a power of sale, *Tait* v. *Lathbury*, L. R. 1 Eq. 175; *Smith* v. *Smith*, 23 Gr. 114; *Wood* v. *White*, 4 Myl. & C. 481; *Farwell* on Powers, 29. No property was intended to be vested in the trustee over which he was not to have a power of sale.

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McMichael, Q.C., for the purchaser. While the application is not hostile the premises are very valuable, and a large sum of money is intended to be expended upon them, so that it would not be safe for the purchaser to take a conveyance without the opinion of the Court, and he must shew what he thinks are objections. If it had been the case of a will, the Yonge street farm being under contract of sale would be deemed to be personalty, and if Vance failed to carry out his agreement the farm could be turned into personalty afterwards, but there it must end and the trust estate must be retained in that form. If the word "invest" could be read to mean "buy" then the trustee might speculate in real estate. If there had been a loss on the King street property the trustee would have had to make it up. The words "investing and reinvesting" if applied to purchasing real estate must mean speculating, and it should be confined to investing in mortgages. There is a great difference in the margin or safety of an investment by purchase in real estate or the investment by loan on a mortgage. It must be admitted that the trustee has not wasted the estate, but rather has largely increased it, and now proposes to turn it into personalty.

Robinson, Q.C., in reply. There never was any idea of such a thing as speculating, and this sale is a most advantageous one, and must turn out very beneficial for the infants who will ultimately become entitled: *Master* v. *DeCroismar*, 11 Beav. 184, was also referred to.

May 16, 1884. BOYD, C.—So far as the word "invest" is concerned, in connection with money, I am satisfied that it may well apply to the case of a purchase of land as distinguished from a mortgage of land. It has been of long and familiar legal use in this sense as in the old cases: *Winchelsea* v. *Norcliffe*, 1 Vern. 435, and *Audley* v. *Audley*, 2 Vern. 192; and in more modern as *Webb* v. *Shaftesbury*, 6 Mad. & G. 100, and *Ousseley* v. *Anstruther*, 10 Beav. 458.

In the last case the question turned on the limited

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terms of the instrument, which gave an option to invest on mortgages or in the funds; but instead of doing either the trustee invested in the purchase of real estate.

The terms of the present trust are however explicitly to invest in such estate or securities whether real or personal, and of what nature and kind soever, as to the trustee shall seem best and most advantageous to the interest of the beneficiaries. That is to say, there is literally a direction to invest in real estate and "investing in" as interpreted by Wood, V. C., in *Joint Stock Discount Co.* v. *Brown*, L. R. 3 Eq. 193, means the actual purchase.

If this manner of investment was not so productive of regular annual income as might be in other kinds of investment, that (especially if the adults who receive the income do not complain) would not invalidate the right of the trustee to make such a choice if he exercised his best discretion, as is here unquestioned.

If the language of the settlement had restricted the discretion of the trustee to investments in real security, that would not justify an out and out purchase.

The Court of Appeal construed the term "*invest*" in *Smith* v. *Smith*, 23 Gr. 114, as wide enough to cover a case of purchase of land, which from its proximity to other parts of the estate was likely to add to the value of the whole. In that will there was nothing to indicate the manner or kind of investment, but here we find words directing an investment in real estate as well as in real securities: *Cookson* v. *Reay*, 5 Beav. 22 in Appeal *sub nom. Cookson* v. *Cookson*, 12 Cl. & Fin. 121, and *Hereford* v. *Ravenhill*, 5 Beav. 51. A discretion to invest in real estate was held to be properly executed by the purchase of dwelling houses in *Parsons* v. *Winslow*, 16 Mass. 361.

No difficulty arises as to the disposition made of the land first in settlement. It is set forth in the petition that that was sold and the present property purchased with the proceeds. But it appearsthat no money actually passed, and the transaction was rather one of exchange than of sale. There is no power of exchange given in terms in

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the settlement, but it is stated in the books that a power to sell will include a power to exchange: *McQueen* v. *Farquher*, 11 Ves. 473. It is certainly the case that by the indirect process of selling one estate and purchasing the other you can practically work out an exchange under a power of sale: *Abel* v. *Heathcote*, 2 Ves. 101; *Watson*, Comp. of Eq. vol. ii. p. 795.

But the point is not of much importance in the present case, because if the adults concur in the sale now contemplated it is plain that the *corpus* of the original trust fund is preserved intact, and will be more than realized out of the proceeds of the present sale. If that increased principal is put in settlement for the infant beneficiaries they cannot insist upon reverting to the original land which was directed to be converted and was in fact converted at the date of the settlement.

I find therefore against the objections raised by the purchaser and direct him (for the sake of the title) to pay the petitioners costs.

G. A. B.

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[QUEEN'S BENCH DIVISION.]

SCHAFFER v. DUMBLE.

Replevin—Detention—Conversion—Evidence—Married woman—Gift by husband—Separate estate, R. S. O. ch. 125.

The plaintiff was executor of H. D., widow of T. D., whose executor the defendant was. The plaintiff claimed a piano in the house lately occupied by the widow, of which the defendant had the key. At an interview between the plaintiff and defendant the latter claimed the piano, but said he was willing to leave the question of the ownership to a person to be named. The plaintiff left him, promising to write, and afterwards did write, saying he had decided to bring the matter before the proper Court. Subsequently the plaintiff's solicitor wrote the defendant offering te release all demands upon the defendant giving up all claim to the piano, to which the defendant's solicitor answerd that he could not comply with the the demand. The defendant commenced an action in which the title to the piano would come in question. The plaintiff's solicitor having again written to ask whether possession of the piano would be given; the defendant's solicitor wrote that it was perfectly safe where it was, and that the action commenced would decide the question. He also wrote that the plaintiff would not have to put the law in motion.

Held, in an action of replevin, assuming the piano to be the plaintiff's, that there was no evidence of trespass or conversion to support the affirmative of the issue, that the defendant did not take or detain the piano.

The evidence shewed that the husband had purchased the piano, and had made a present of it to his wife by putting it in the house where they lived, and subsequently recognizing her right to it.

Held, that the piano did not form part of the wife's separate estate, as the husband could not at common law make a gift *inter vivos* of this description of property, so as to prevent its passing to his personal representatives; and that there was no evidence of intention on his part to constitute himself a trustee of the piano for his wife.

THIS was an action of replevin for a piano, tried before Cameron, J., at Cobourg, without a jury.

Riddell, for the plaintiff.

J. W. Kerr, contra.

The plaintiff claimed the piano as the executor of the last will and testament of Harriet Dumble.

The defendant, in his statement of defence, denied that he took or detained the piano, that the piano was the plaintiffs, and alleged that the piano was his as against the plaintiff.

It appeared by the evidence that the defendant was the executor of the last will and testament of Thomas Dumble, the husband of Harriet Dumble: that the said Thomas Dumble bought the piano in question, and made a present of it to his wife, the said Harriet Dumble: that they lived

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together, and the piano was in the house of Thomas Dumble, where they both lived: that after the piano was bought he declared to a number of persons that he bought it for, and had given it to Hatty, which was the way he designated his wife; that his wife was present on many of these occasions, and claimed the piano as her own: that on one occasion he spoke of disposing of it after he had given it to her, and she said that he should not do so—that it was hers, and he had no right to interfere with it.

Harriet by her husband's will was devisee of the house and furniture, and had a monthly allowance of $40, which the defendant increased to $60. She survived her husband only a very short time. At her death the piano and furniture remained in the house, and the defendant did not interfere with the piano; but the key of the house, after the plaintiff had removed all the things he claimed, as executor of Harriet Dumble's will, except the piano, was sent to him. The plaintiff, before the key was delivered to the defendant and before he removed any of the property of the testator, went to see the defendant about the effects belonging to the testator. The defendant told him that he could take all the effects that belonged to Mrs. Dumble, but that the piano belonged to the estate of Thomas Dumble, and that he was willing to leave the question of the ownership of that to either of the Judges of the County Court of the County of Northumberland, or to any Queen's Counsel in Toronto the plaintiff would name, and the plaintiff left him, promising to write from Paris, where he resided, what he would do. He made no formal demand of the piano, and the defendant did not refuse to let him take it. After the plaintiff went to Paris he wrote to defendant, under date 18th June, 1883, to the effect that having promised to write as soon as he could to let the defendant know what steps he would take, he accordingly did so, adding: "I said to you the day I was leaving Cobourg I would look into the case when getting home and I done so. I have decided to bring it before a proper court to say which of the property is yours and which is ours. The friends of the deceased can even claim more yet, as wills are often set aside by law."

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On the 23rd June the plaintiff's attorney wrote to the defendant as follows:—

"DEAR SIR,—I, for the executors of the estate of the late Mrs. Harriet Dumble, offer you a release in full of all demands, you giving up all claim to the piano and other property mentioned in the will, and paying the sum of $20, being the balance of her last month's allowance.

"Yours truly,
"W. R. RIDDELL."

The defendant's attorney, J. W. Kerr, on the 26th June replied:—

"DEAR SIR,—In answer to your favour of the 23rd inst. to Mr. J. H. Dumble, I am instructed to say that if your client really claims the sum of $20 he will pay it, though there is not a shadow of right to found such a claim upon. But as to the piano and other property claimed in your letter Mr. Dumble cannot comply with your request or demand.

"Yours truly,
"J. W. KERR."

On the same day the plaintiff's attorney replied:—

"I am sorry that Mr. Dumble obliges us to put the law in motion to obtain the piano. Kindly send me cheque for $20, which we claim, and which your client has promised through you to give."

On the 27th June the defendant's attorney answered:—

"You will not require to put the law in motion for the piano in question, nor to have the will of the late Mr. Dumble declared invalid. I have issued a writ for Mr. J. H. Dumble to have a judicial declaration to the ownership of and right of property in the piano, and also of the validity of the will if your client still persists in asserting that the will of the late Mr. Dumble is invalid.

"Will you kindly let me know if Mr. Schaffer intends to persist in denying the validity of the will, as if he do I will proceed with the action, and ask judgment with costs against Mr. Schaffer on both grounds.

"Yours truly,
"J. W. KERR."

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To this letter the plaintiff's attorney replied on the same date:—

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"I have no instructions from Mr. Schaffer as to the will of Mr. Thomas Dumble, but wait now for instructions. Kindly inform me whether you propose to allow us to remove our piano (which is in question) and to keep possession of it during the proposed application to the Court.

"Yours, &c.,
"W. R. RIDDELL."

On the 27th June the defendant's attorney answered the letter as follows:—

"The piano is perfectly safe where it is and will remain so I presume. The action I have commenced will decide the question of possession until the hearing of the case. I am instructed that some of your friends, I mean some of those in whose interest I understand you are acting, have frequently threatened to blow the piano up with dynamite if they could get it into their possession. Under the circumstances do you not think you had better let it remain where it is without putting us to the cost of a motion for an *interim* injunction in the action."

There was no reply to this letter.

The defendant in his evidence swore that the possession of the piano was never directly demanded from him: that the plaintiff might have removed it and he (defendant) would not have prevented him, but would have sued him to recover the piano. He also stated that he had not interfered with the piano and he had no possession of it except by having the key of the house, which was unoccupied.

May 7, 1884. CAMERON, J.—The case presents two questions: first, whether under the defence that the defendant did not take or detain the piano, replevin would lie against him on the facts above set out; and secondly, if it would, did the piano belong to the estate of the late Harriet Dumble, or was it the property of the estate of the late Thomas Dumble, her husband?

The case was very ably presented on both sides. Mr. Riddell, for the plaintiff, referred to the following author-

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ities on the point that replevin would lie against the defendant on the facts found: *Deal* v. *Potter et ux.* 26 U. C. R. 578; and as to the right of property, *Lewin* on Trusts, 61; *Grant* v. *Grant*, 34 Beav. 623; *Jones* v. *Lock*, L. R. 1 Ch. Ap. 28; *McEdwards* v. *Ross*, 6 Gr. 373; *Adams* v. *Loomis*, 22 Gr. 99, in Appeal 24 Gr. 242; *Baddeley* v. *Baddeley*, L. R. 9 Ch. D. 113; *Parker* v. *Lechmere*, L. R. 12 Ch. D. 256; *Fox* v. *Hawks*, L. R. 13 Ch. D. 822; *In re Murray*, 29 Gr. 443, reversed in Appeal 23 Jan. 1884, 4 C. L. T. 79; *Breton* v. *Woollven*, L. R. 17 Ch. D. 416, which he contended was distinguishable.

Mr. Kerr, on the first point, relied on *Tuffts* v. *Mottashed*, 29 C. P. 539, and on *Breton* v. *Woollven*, L. R. 17 Chy. D. 416, as directly in point and undistinguishable on the merits.

I do not think if this had been an action of trespass or trover, that a case against the defendant would be established by the evidence. He is certainly not shown to have committed a trespass. The property, assuming it to have been Mrs. Dumble's at the time of his death, was left in a house belonging to the defendant; the key of the house after the funeral was sent to the defendant by some one representing the estate of Mrs. Dumble, and he received it, but did not, as far as disclosed by the evidence, interfere with the piano except in so far as retaining the key of the house constitutes an interference, and it certainly is not an interference amounting to an act of trespass.

The only other question under this head is, was there a conversion?

To constitute a conversion under such circumstances there must be evidence of a demand and actual refusal. I am of opinion there was neither. What took place between the plaintiff and the defendant at the latter's office did not amount to a demand. The parties were discussing their respective rights, and the plaintiff left with the intention of afterwards communicating with the defendant what course he would pursue with a view of having these rights determined. At that time the piano was more in the plaintiff's possession than in the defendant's, and there could

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not therefore then have been a conversion of it by the defendant. The correspondence that afterwards took place also falls short of an actual or positive demand, and of a like refusal.

By the letter of the plaintiff's attorney to the defendant of the 23rd June, the former does not demand possession of the piano, but proposes to give defendant a release of all the plaintiff's claims, if the defendant will give up all claim to the piano. A request to give up all claim to a thing is a very different thing from demanding possession of such thing, it did not of itself imply that the defendant had possession of it.

The reply of the defendant's attorney that as to the piano and other property claimed by the plaintiff, the defendant would not comply with the request or demand of the plaintiff, did not amount to a refusal to give up possession of the piano, but to give up the defendant's claim whatever it might be to it.

The letter of the plaintiff's attorney in reply, while it assumes that it will be necessary to put the law in motion to obtain the piano, if the plaintiff's assumption would be of any consequence, does not unequivocally mean more than that to establish the plaintiff's right of property in the piano the law would have to be put in motion.

The defendant's attorney would seem to have regarded it in that light, as he replied: "You will not require to put the law in motion for the piano in question. I have issued a writ to have a judicial declaration as to the ownership and right of property in the piano;" and when the plaintiff's attorney in answer enquired, "Will you kindly inform me whether you propose to allow us to remove our piano and keep possession of it during the application to the Courts," the defendant's attorney replied not by a refusal, but by the assertion that the piano was perfectly safe where it was; that is, where it was at the death of Mrs. Dumble, and that he presumed it would remain so, and the action he had commenced would decide the question of possession until the hearing of the case, it being part

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of the object of the intended action to obtain an injunction to prevent the plaintiff removing the piano till the right was decided. Then, after referring to a report that some persons had threatened to destroy the piano if they could get possession, he asked the plaintiff's attorney, "Under the circumstances do you not think you had better let it remain where it is without putting us to the cost of a motion for an *interim* injunction?" This letter implies that the defendant was not withholding possession, but if the defendant threatened to take possession to remove it from where it was, the defendant would by legal process, but not by his own act, endeavour to prevent the removal. This falls far short, in my opinion, of a conversion of the piano by refusal to give possession to the plaintiff after demand made.

The plaintiff, at the time of his conversation with the defendant, before the plaintiff wrote the letter of the 23rd June, had not obtained probate of the will, and was not legally entitled to demand possession; and then, as I have already stated, the defendant had not taken possession of the piano; so, if the demand had been positive and made by one having the right to make it, it would have amounted to nothing. See the language of Gwynne, J. in *Smally* v. *Gallagher*, 26 C. P. 536, where he says: "The demand is valueless unless the defendant had the goods then in his possession."

The plaintiff then had free access to the piano, and the defendant had not assumed, though he had the legal right to it, dominion over the house; and if he had, that, according to *Thoragood* v. *Robinson*, 6 Q. B. 769, would not have amounted to a conversion. Nor will the mere assertion of right to goods, or to prevent their removal, constitute a conversion: *England* v. *Cowley*, L. R. 8 Ex. 126, in which Bramwell, B., at page 129, says: "The gist of the action (trover) is the conversion; as, for example, by consuming the goods or by refusing the true owner possession, the wrong doer having himself at the time a physical control over the goods." In that case the plaintiff was entitled to the goods

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under a bill of sale by way of mortgage of one M. Default having been made in payment of the money secured, he put a man in possession and was removing the goods, when defendant, his landlord, told plaintiff there was rent in arrear, and until it was paid the goods should not be removed, and measures were taken by defendant to use force, if necessary, to prevent their removal. It was then after sunset and therefore too late to distrain that day, and the defendant's object in interfering was to prevent the removal, so that he would be able to distrain the next day. The plaintiff remained in possession, but did not attempt to remove the things.

Bramwell, B., further said at the same page: "I think no action is maintainable, because the defendant did no act, but only threatened in a certain event he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to have stopped him at his peril, when there might have been a cause of action of some sort."

The difference between that case and this is, that there the defendant did not assert any right or ownership over the property, except by assertion of a right to rent and to prevent a removal till the rent was paid, and admitted the goods were not his: while in the present case the defendant was asserting a right of property in the goods, in his representative character of executor of the last will and testament of Thomas Dumble. Still, this difference does not make what was done here amount to a conversion, and I must find, both as matter of fact and law, that the defendant did not convert the piano to his own use; and therefore, in accordance with the decision of the case of *Tuffts* v. *Mottashed*, 29 C. P. 537, relied on by the defendant, I must hold the plaintiff fails upon the issue raised by the defendant that he did not take or detain the plaintiff's goods. This, however, is not decisive of the right of property, and unless that is decided in favor of the defendant he is not entitled to a return of the piano.

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There is no doubt, at common law, a husband cannot give personal property to his wife, not coming within the description of paraphernalia, so as to prevent his retaking it, or its being made liable to his judgment creditors, or its passing to his legal personal representatives. The difficulty is presented by the equitable doctrine which it is contended makes the husband, in cases where he has manifested a clear intention of divesting himself of property, and giving it to his wife, a trustee for his wife. For this doctrine no doubt some of the cases cited by Mr. Riddell furnish direct authority. But unfortunately for the plaintiff there are decisions of the most positive character the other way.

Looking at the question from a common sense stand point, it would seem most irrational to hold that a husband cannot in law divest himself of property in a chattel by giving it to his wife, and yet enable him to do it by holding that, by keeping that of which he could not divest himself in the manner he desires, he becomes that which he never intended to become, namely, a trustee for his wife; in other words, holding him to have effectuated his intention of divesting himself of his property, by forcing him to assume a position he never intended to assume.

If equity had declared, owing to the rule of the common law, vesting in the husband absolutely all the wife's property reduced into his possession, such rule should not apply to property given by the husband to the wife, as far as he or his personal representatives were concerned, leaving the rights of creditors of the husband unaffected, it would have made a modification of the common law that would commend itself to one's sense of natural justice, and would give to the husband the power and right, which in this instance the common law invades, of doing what he pleases, and in the manner he pleases, with his own; but to thrust upon him the character of a trust with its attendant burdens, duties and obligations, is to involve him, by an act of grace on his part, in possible difficulties that he never contemplated, and might not willingly assume.

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Reason, in my opinion, is on the side of those authorities which deny that by the mere gift of a chattel by a husband to his wife he becomes, without expression of intention on his part so to become in respect of such chattel, a trustee for his wife. But that such is the effect of a positive and unqualified gift is, as I have said, supported by authority. In *Baddeley* v. *Baddeley*, L. R. 9 Chy. D. 113. Vice-Chancellor Malins thus states his opinion in support of such contention: "No one can doubt that the husband's intention here was to give his wife the leasehold property; but it is contended that the deed was intended to be an assignment, and is therefore inoperative as between husband and wife.

No doubt a voluntary gift by way of assignment is invalid unless it is perfected by a transfer; the voluntary settlor must do all that he can do to transfer the property, and a husband cannot transfer to his wife. But this is in my opinion a case where the husband has declared himself a trustee for his wife, and she entered into possession, an act which I construe not as an attempt to take possession adversely to her husband, which could not be done, as is shown by *Roe* v. *Wilkins*, but as a taking possession of her separate property under the trust.

The husband was no doubt mistaken in thinking he could make this gift by way of assignment; but there is enough in the deed to make it operate as a declaration of trust, which the Court ought to carry into effect. The law on this subject is correctly stated in *Grant* v. *Grant*, 34 Beav. 623, and I am not disposed to disagree with *Richardson* v. *Richardson*, L. R. 3 Eq. 686, and *Morgan* v. *Malleson*, L. R. 10 Eq. 475, notwithstanding the remarks of Sir G. Jessel in *Richardson* v. *Delbridge*, L. R 18 Eq 11.

The language of the husband from which the learned Vice-Chancellor draws the conclusion there was enough to make the assignment operate as a declaration of trust was as follows: "Whereas I am beneficially possessed of the ground rents hereby intended to be settled, now, in consideration of my love and affection for my wife, I do hereby settle,

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assign, transfer, and set over unto my said wife Eliza Baddeley, as though she were a single woman, all that my share in certain specified houses and ground rents."

The cases of *Grant* v. *Grant*, *Richardson* v. *Richardson*, *Morgan* v. *Malleson*, fully support the conclusion of Vice-Chancellor Malins. But on the other hand that conclusion is at variance and cannot stand with the judgment of the Court of Appeal in *Milroy* v. *Lord*, 4 D. F. & J. 264, nor with the decision in *Warriner* v. *Rogers*, L. R. 16 Eq. 340, on the principle there enunciated for determining when a trust is created; and the case of *Breton* v *Woollven*, L. R. 17, Chy. D. 416, which is the latest English case to which my attention has been called, raising the question now being considered, and which is undistinguishable in its facts, is quite opposed to the plaintiff's right to maintain this action.

In *Warriner* v. *Royers* Sir James Bacon, V. C., says at page 348: "Now the rule of law upon this subject I take to be very clear, and with the exception of two cases, which have been referred to, the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest." And in reference to the opinion of Lord Justice Turner, in *Milroy* v. *Lord*, 4 D. F. & J. at page 274, he said, after reading that part of that opinion which follows: "Nothing can be more clear and distinct than the exposition of the law contained in the sentences I have read, and to my judgment nothing more satisfactory if I were at liberty (which I am not) to pronounce a critical opinion upon it." The language thus approved was as follows:— "I take the law of this Court to be well settled, that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which according to the nature of the property comprised in the settlement

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was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the person for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purpose of a settlement, or declares that he himself holds it in trust for those purposes, and if the property be personal the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to; for there is no law in this Court to perfect an imperfect gift."

In *Breton* v. *Woollven*, which I have said is undistinguisable in its facts from the present, the facts were, after by separate writings declaring that he gave certain articles of furniture to his wife, Frederick Breton, the husband, then living with his wife, wrote her as follows: "My Dearest Wife,—Having previously made over to you, for your sole use and benefit, a certain amount of furniture, plate, &c., I now present you with everything, furniture, linen, &c., plate, china and glass, and all jewellery now belonging to me at No. 1 Dulwich Villas, Devonshire Road, Forest Hill; all this to be yours and yours only from this date, June 18th, 1868. This gift from your ever affectionate husband, Frederick Breton." The executors and trustees of the husband's will claimed the property so given to the wife, and she brought her action to have it ascertained and declared whether the same or any part thereof belonged to her or formed part of the testator's estate. Vice Chancellor Hall gave judgment against the widow's claims, expressing sorrow for it, because in his opinion it was a monstrous state of the law which prevented effect being given to such gifts. He fully reviews the several authorities, beginning with *Grant* v. *Grant* down to *Richards* v. *Delbridge*, and specially alludes to the language of Lord Justice Turner, in *Milroy* v. *Lord*, as being a very clear and elaborate statement of the law, and

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cites passages to show that to constitute the husband his wife's trustee in respect of his gift, it must be plainly shewn that it was the purpose of the settlement or the intention of the settlor to constitute himself a trustee. The Vice Chancellor then adds at page 421: "It was not the purpose or meaning of the husband in writing these letters to constitute himself a trustee for his wife. I can well understand in such a case a husband saying to his wife, 'I mean to give you this as your own, but when you ask me to be a trustee for you I must respectfully decline. I do not want to be involved in a trust of that kind, or in any trust.'"

The latest decision in the Courts of this Province bearing upon the question is that of *Re Murray, Purdon* v. *Murray*, in appeal from the decision of Vice Chancellor Blake, reported 29 Grant 443, reversing the judgment of the Vice Chancellor in that case. The case in appeal has not yet been reported, (*a*) and the learned Judges did not concur in their reasons for reversal. I have had an opportunity of perusing their judgments in manuscript, and find that the learned Chief Justice thought the facts declared a good and valid gift *inter vivos*. Mr. Justice Burton was of opinion the gift could not be upheld as a gift *inter vivos*, but the evidence disclosed sufficient to make the husband a trustee for his wife. Mr. Justice Patterson concurred in this view, and refrained from expressing an opinion as to whether the gift was valid or not as a gift *inter vivos*. The facts were that one Parke was a debtor of the husband on a promissory note given by him to the husband. This note became barred by the Statute of Limitations, but apparently before it was outlawed the husband had given it to his wife. The husband told his debtor that he had given the note to his wife, and expressed the hope that the debtor would pay her as soon as he could, and when the husband got the note renewed by the debtor he took it for his wife, though in his own name, and delivered it to her. These facts, as I understand the judgment, constituted the husband a trustee for his wife in the opinion of Mr. Justice

(*a*) See 9 A. R. 369.

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Burton and Mr. Justice Patterson. Mr. Justice Morrison, who concurred in reversing the judgment of the learned Vice Chancellor, assigned no reasons for his conclusion. The case therefore cannot be taken as having established or adopted a rule that can be applied to and govern the present case. The fact that the debtor who gave the note gave it at a time when he was not bound in law for the amount of the debt, after the representation was made to him by the husband that the old note had been given to his wife and the new one would be hers, may have been quite sufficient to constitute the husband a trustee for his wife, and to distinguish the case in principle from the present.

I cannot say that the case is in principle opposed to the decision of Vice Chancellor Hall in *Breton* v. *Woollven*, L. R. 17 Ch. D. 416. If it were I would follow it as the judgment of a Court whose decisions are binding upon me, whether I agree with them or not, and believing that Vice Chancellor Hall's opinion contains a true exposition of the law, though I regret that it is so, I must follow it and consequently dismiss the plaintiff's action, with costs.

It was conceded, and properly so, by Mr. Riddell, that he could not contend, in face of the authority of *O'Doherty* v. *The Ontario Bank*, 32 C. P. 285, that the Married Womans Act, R. S. O. chap. 125, affected the rights of the parties. That Act, according to that decision, leaves transactions between the husband and wife, in respect of the property of the husband, exactly on the same footing as before the Act. But where the interests of creditors are not involved, it appears to me that Act forms a strong ground for relaxing the common law rule, which prevents a wife acquiring without the aid of trustees property from her husband. When this Act gives to a married woman personal property acquired from or through strangers, and thus deprives the husband of that which, at common law, would be his, it seems to me almost absurd to say that he shall not be allowed, as against himself and his personal representatives, not claiming in the interests of creditors, to give his

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property to his wife as well as to a stranger. But as a statute only changes the common law to the extent it assumes by its language to do, I can only again express my regret that I cannot decide in favour of the plaintiff, and thus effectuate the intention of the husband of the testator, Harriet Dumble, to give her the piano absolutely as her sole and separate property.

Action dismissed, with costs.

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[CHANCERY DIVISION.]

BEATTY V. O'CONNOR.

Mortgage—Power of sale—Taking security for purchase money—Multiplicity of actions—Costs—R. S. O. c. 103.

After default made in a mortgage, the mortgagee took proceedings under the power of sale and brought an action of ejectment and an action on the covenant. He died during the progress of these proceedings. In the two actions judgments were recovered against the mortgagor and the lands were sold under the power of sale; the purchase money being paid partly in cash and partly by a mortgage for the balance. This mortgage was subsequently turned into cash at a less amount than its face value, and in addition solicitors costs for doing so were charged.

In an action for an account by the mortgagor against the mortgagee's executors, who had continued the proceedings. It was,

Held, (reversing the judgment of PROUDFOOT, J.) That the defendants were entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but that they must account for the purchase money as cash at the time of the sale, and that they could not charge the mortgagor with the discount on the mortgage or the costs of turning it into cash; and that they were entitled to all three sets of costs: those of the two actions being given to them by the judgments they had obtained; and those of exercising the power of sale under the statutory form of mortgage as a matter of contract, they being made a first charge upon the proceeds of the sale: R. S. O. c. 103.

THIS was an action by Benjamin Beatty (a mortgagor) against Richard Alphonsus O'Connor and Peter Kearns, who were the executors of John McFarlane (the mortgagee) for an account of the proceeds of the mortgaged premises, which had been sold under the power of sale in the mortgage.

The plaintiff's statement of claim alleged that he mortgaged the premises to the said McFarlane for $600: that he duly paid two instalments of $100 each, as they respectively became due, but failed to pay the balance $400 and interest remaining due on the mortgage: that the said McFarlane proceeded to sell the mortgaged premises under the power of sale contained in the mortgage; brought an action of ejectment to recover possession thereof, and commenced an action for the breach of the covenant to pay, simultaneously: that during the progress of these proceedings McFarlane had died, and the defendants, who were his

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executors, had revived and proceeded therewith: that the lands had been sold and had realized $1,380 cash: that the defendants had retained the whole of the proceeds and refused to account therefor, pretending that the whole of it had been used in payment of the mortgage debt and costs, and the claim of a subsequent mortgagee. The plaintiff further alleged that there was a large balance due him and asked for an account.

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The defendants, in their statement of defence, set up that the lands were sold part for cash and a mortgage taken for the balance of the purchase money; the cash being $688.88, and the mortgage $690: that the cash was applied on account of the principal, interest, and costs due the defendants; and in order to satisfy a subsequent mortgagee they were obliged to sell and turn into cash the said mortgage; that they only received $650 for it, which was its full marketable value, and that they retained the balance of the amount due them, and paid the excess to the subsequent mortgagee: that without admitting the right of the plaintiff to an account, the defendants did furnish a statement of how the proceeds of sale had been appropriated and paid.

The action was tried at Orangeville, before Burton, J., at the Spring Assizes of 1882, when a judgment was given referring it to the Master at Barrie to take the account.

The Master found that $40, the amount of the discount on the mortgage when turned into cash, and the costs of turning it into cash $24.80, and the costs of the proceedings under the power of sale, as well as the actions of ejectment and on the covenant were all properly chargeable against the plaintiff.

An appeal from his report was had and was heard before Proudfoot, J., on the 19th November, 1883, when a number of grounds of appeal were argued, the principal of which were; whether the plaintiff was entitled to the three sets of costs, and to charge the plaintiff with the costs of turning the mortgage into cash.

The learned Judge decided that the sale on credit was

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with the assent of the mortgagor, and the mortgagee was only chargeable with what he actually received, and disallowed the costs of exercising the power of sale.

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On the 13th December, 1883, the defendants and the plaintiff moved by way of appeal and cross-appeal to the Divisional Court, before Boyd, C., and Ferguson, J., and the case was heard on the consent of both parties under Rule 471, O. J. A.

Lennox, for the plaintiff. Unless the plaintiff consented to part of the purchase money remaining on mortgage, the whole of it must be credited as cash: *Fisher* on Mortgages, 3rd ed. ss. 810, 814; *Lewin* on Trusts, 6th ed. c. 18. s. 1. ss. 46; *Sugden* on Vendors and Purchasers, 14th ed. c. 1, s. 5, ss. 31; *Davey* v. *Durrant*, 1 DeG. & J. 535; R. S. O. ch. 104, pp. 996, 997. The evidence did not sufficiently shew that such consent was given, and the evidence of Mr. Lount on that point was weakened on cross-examination, when it appeared that it was only hearsay, and such cross-examination was not pointed out to the learned Judge. All parties interested in the equity of redemption should consent, and the subsequent mortgagee did not do so. Even if the plaintiff had consented to part of the purchase money remaining on mortgage, he is not chargeable with the discount on the sale of the mortgage, or the costs of selling it, without his explicit consent. The disallowance of the costs of exercising the power of sale was proper, such proceedings being unnecessary as the lands could have been sold under the judgment in the action on the covenant. The defendants should not get the costs under the power of sale and in the two actions, as one suit in equity would have given the defendants all the relief they obtained. *Gildersleeve* v. *Cowan*, 25 Gr. 460; *Weir* v. *Taylor*, 1 Ch. 371; *Hay* v. *McArthur*, 8 O. P. R. 321; R. & J. Dig. 2387; *Marshall* on Costs, p. 6, s. 6, ss. 1, 2; *Fisher's* Dig. Vol. 3, p. 5994; 2 White & T., L. C. 4th Am. ed. pt. 2, p. 1966; *Fisher* on Mortgages, p. 1002, 1003; *Re* F. & J. attys, 17 U. C. L. J. 48; *Bensusan* v. *Nehemais*, 4 DeG. & S. 381.

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G. W. Lount, for the defendants. The defendants had the right to sell on time if they wished, and to take a mortgage for the purchase money, or a part of it, and the way in which it was done in this case was the best way to get a good price for the lands, and the plaintiff was properly chargeable with the discount on the mortgage, which had to be sold to satisfy the subsequent mortgagee. As to the costs there was a defect in the title to the lands, and the defendants thought that the plaintiff was good for the amount, and so brought an action on the covenant, and they had to bring the action of ejectment to get possession. It was not until after the execution in the action on the covenant had been returned *nulla bona*, that the sale under the power took place, and the defendants were not obliged to wait a year until the execution against lands in in that action was ripe. Had they done so they would have been obliged to pay a large sum for sheriff's fees. The learned Judge disallowed the costs of the proceedings under the power of sale; but the defendants are entitled to and should get them. The costs of the other two actions are found in the defendants favour by the Court of Appeal, *O'Connor* v. *Beatty*, 2 A. R. 497.

Lennox, in reply. Even if the title were defective that would be no justification for the actions of ejectment and covenant as the title could receive no benefit therefrom.

Lount, in reply. The authorities cited by my learned friend all apply to cases in Court where the Judge had control. Here they have been already disposed of except those under the power of sale, and that was only exercised after exhausting the other remedy of execution against goods.

February 21, 1884. BOYD, C.—We have conferred with Proudfoot, J., whose judgment is in appeal, and learn that his attention was not called to the cross-examination of Mr. Lount, which takes from the effect of his evidence in in chief; although even that evidence is not very explicit as to their being an arrangement between mortgagor and

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mortgagee that time should be given for payment of part of the purchase money upon the exercise of the power of sale.

We cannot say that such an agreement is proved, taking the evidence as a whole, and it lay upon the mortgagee to establish that, if it will benefit him, but in my view that *per se* would not assist his present contention.

The title was defective and the security was deemed scanty, and this is assigned as the reason for bringing the action at law upon the covenant. That being so, it was for the mortgagee's interest to sell the property in the most advantageous way, and giving time for part of the price was a course likely to enhance the price. He did sell in that way and was bound to charge himself with the full amount of the purchase money, treating the mortgage securing the balance as cash: *Davey* v. *Durrant*, 1 DeG. & J. 553, and *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97.

The cases cited shew that the mortgagee can sell on time under a statutory power of sale without the mortgagor's consent, provided he credits the price as cash. The reason is that he can deal as he pleases about giving time on his own debt, and if as to any surplus he accounts forthwith to the mortgagor and pays him cash, that removes any objection on the part of the latter that the sale should have been a cash sale. If the mortgagor consents to a sale on these terms, he is precluded from claiming the surplus in cash. Both parties thus agree to receive their money in due course out of the purchaser's mortgage, and when the mortgagee is paid thereout he will hold the balance in trust for the mortgagor.

If a mortgagee exercises the power of sale, agreeing with the mortgagor to take security for part of the price, and if afterwards when the sale has been completed he seeks to turn that mortgage into cash at the mortgagor's expense, and so to give credit on his mortgage for something less than the face value of the security; he should make a distinct bargain to that effect with the mortgagor before the sale has taken place. Failing that, he cannot

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cash such a security and charge the mortgagor with the expenses and discount.

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The only effect which could be attributed to the alleged consent to sell, securing part of the price by the purchaser's mortgage, in this case, would be to preclude the mortgagor from claiming a cash payment of any surplus that might arise after applying the amount realized *pro tanto* on the defendant's mortgage.

It is not pretended that any arrangement was made here as to the rights of the parties with respect to the purchaser's mortgage, and in the absence of any such arrangement the defendants had no right to turn it into cash at the expense of the mortgagor.

As against Kidd, the second mortgagee, who did not assent to a sale on time, the first mortgage is chargeable on a cash basis.

The defendants might have avoided all complications if they had applied the money received as part of the price to pay Kidd and kept the purchaser's mortgage in satisfaction of their own debt, interest, and costs.

The judgment will be reversed as to this ground of appeal, and the account will be taken on the footing of there being cash realized at the sale of the mortgaged premises.

As to the next question, this is not a case in which the Court has any discretion to give or to withhold costs. The bill was filed for an account of the mortgagee's dealing with the proceeds of sale, and the costs in question are costs at law in two actions of ejectment and covenant which went to judgment, and in which costs were awarded by the judgment to the mortgagee; and also costs of the exercise of the power of sale which have been disallowed by the judgment now in appeal.

By the terms of the mortgage, which was in the statutory form, the expenses of exercising the power of sale are made a first charge upon the proceeds of sale (R. S. O. p. 997) so that the mortgagee is entitled to recover these as a matter of contract. See *Blackford* v. *Davis*, L. R. 4 Ch.

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304. He is entitled to recover the costs at law by the judgment of that Court, which cannot be interfered with in this action. G. O. 465 does not apply to this case, for there has been no proceeding at equity as to these costs of sale which could give this Court jurisdiction to put the mortgagee to his election or to warrant a disallowance of any of these bills.

The judgment will be reversed in this respect, and as each party has succeeded on one ground, there will be no costs of appeal to the Divisional Court.

I may mention that we would have had no jurisdiction to entertain this appeal from the decision of a Judge in Court, but for the consent which both parties gave under R. 471, O. J. A., that the same should be heard before the Divisional Court.

FERGUSON, J., concurred.

G. A. B.

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[CHANCERY DIVISION.]

RE QUIMBY—QUIMBY V. QUIMBY.

Will—Construction—Annuity—Residue—Dower—Election.

A testator, by his will and codicils, devising his real estate, &c., to G. H. M. and B. M. trustees, and the survivor of them, and the heirs of such survivor, gave his widow an annuity and provided that, when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject however, to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions." The last codicil appointed G. E. T. & G. R. and the survivor of them, and the heirs, executors, administrators *and assigns* of such survivor new trustees and executors in place of G. H. M. and B. M. with the same powers.

The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue.

Held, that the widow was entitled to her annuity as well as her share under the Statute of Distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower.

THIS was an action brought by one Rebecca Quimby, widow of one Alfred Campbell Quimby deceased, for the construction of his will. The brother and the nephews and nieces of the testator, with the executor who proved the will, were all made parties defendants.

The statement of claim of the plaintiff alleged: That "the said testator, in and by his said last will and testament and codicils thereto, willed and directed that his said executors and trustees should pay unto the plaintiff the clear yearly annuity or sum of $500, so long as she should remain his widow, and in the event of her marrying again then the yearly sum of $300 from the time of such marriage: and the said testator, in and by his said will, further directed that the said trustees should allow the plaintiff the use of certain pictures, plate, &c., * * so long as she should remain his widow." And the plaintiff claimed the said annuity as well as dower in the testator's real estate.

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The statement of claim also alleged that, "the said testator in and by his said will further willed and directed that his said executors and trustees should, subject to the said provision in favour of the plaintiff, have and hold all the real and personal estate of the said testator, and collect the rents and profits thereof, and manage the same until Albert B. Quimby, the only son and child of the said testator, should attain the age of twenty-one years; and that upon his said son attaining the age of twenty-one years then to make over to him, the testator's said son, one half of all the said testator's estate, for his own absolute use and benefit, in such manner as said trustees or trustee should deem most expedient: and afterwards that the said trustees or trustee should remain interested in the residue of the real and personal estate, of the said testator's moneys and securities, and in the income thereof, in trust, after the payment of all expenses, to invest the principal and interest until the testator's said son should attain the age of thirty years, when they should make over, assign, and transfer unto him the whole of such residue: subject however to the said provision in favour of the plaintiff. And the said testator, in and by his said will, further provided, that if his said son should not be living at the time of the death of the said testator, or if he should die before attaining the age of twenty-one years or thirty years respectively, then that his said trustees or trustee should hold the said real and personal estate, moneys, and securities, or so much thereof as should then remain in their hands, in trust to distribute the same according to the Statute of Distributions."

The testator's son Albert B. Quimby attained the age of twenty-one years, received half of the estate from the trustee, and died unmarried and without issue, before attaining the age of thirty years.

The plaintiff claimed, that under these circumstances she was entitled to her annuity, to dower in the real estate, and to half the residue under the Statute of Distributions.

The probate of the will was produced, and showed the

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devise to the executors to be as follows: "I devise all the real estate lands and tenements of which I die possessed, or which, at the time of my death, I have power to dispose of by will, unto and to the use of George Hamilton Mills, of the City of Hamilton, Esq., and Benjamin Morton, of the same place, banker, and the survivor of them, and the heirs of such survivor upon the trusts hereinafter declared of and concerning the same."

And the last codicil was worded as follows: "I, Alfred Campbell Quimby, of * * hereby appoint and make George E. Tuckett, of * * and George Rutherford, of * * and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, sole executors of my said will and sole trustees of all the trusts, property, and matters therein mentioned, and with all the powers originally given by such will to the trustees and executors therein named, for whom said George E. Tuckett and George Rutherford are hereby in all respects substituted as if their names had been originally inserted in such will, &c."

The case came on by way of motion for judgment on March 5th, 1884, before Boyd, C.

Moss, Q. C., with him *Carscallen*, for plaintiff. The plaintiff is entitled to the annuity and to half the residue under the Statute of Distributions. It is admitted that if she takes anything under the statute she takes half. If the will had directed it to be distributed among "the next of kin" she would not be entitled, as she is not one; but the will distinctly says that it is to be distributed as under the Statute of Distributions: *Jenkins* v. *Gower*, 2 Coll. 537; *Ash* v. *Ash*, 33 Beav. 187; *Starr* v. *Newberry*, 23 Beav. 436; *Holloway* v. *Radcliffe*, 23 Beav. 163. She is also entitled to her dower, and is not put to her election. The annuity is all she got by the will except the pictures, plate, &c. The words of the will, when directing the trustee to pay the residue to the son, are "subject however to the said provision in favor of the plaintiff." This applies to the whole estate until the son attained twenty-one, and afterwards

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until he attained thirty. See the line of cases founded on *Parker* v. *Sowerby*, 4 DeG. M. & G. 321; *Laidlaw* v. *Jackes*, 25 Gr. 297, 298: *Patrick* v. *Shaver*, 21 Gr. 123, power to lease does not exclude the wife's right to dower; *S. C.*, in App. 27 Gr. 101. When the testator says half of all my estate he means his own estate, not his wife's.

W. A. Reeve, with him *Teetzel*, for the next of kin. We do not dispute plaintiff's right to half the residue under the statute, but she is not entitled to that and her annuity as well, and must elect which she will take. The testator provided for his widow under two different contingencies; if the son lived she took the annuity; if he died she took the other provision under the statute. It was never intended that the trustee would have to continue paying the annuity in case of the son's death; and if the son had lived to attain 30 he would have got the estate and become the trustee himself. The trust to pay the wife lasts only while the fund is in the hands of the trustee, and is not preserved by an express direction afterwards when it is to be distributed. As to the question of dower, her right to that is inconsistent with the other provisions in the will. The real and personal estate is placed together by the will, and is to be distributed as if it was all personal. In *Laidlaw* v. *Jackes*, 25 Gr. 293, no estate in the land was given to the trustees. In this case the estate is absolutely given by the terms of the will. The words "income thereof," as applied by the will to the period between the son's attaining 21 and 30, mean that the rents were to go to the trustee: *Armstrong* v. *Armstrong*, 21 Gr. 351. When dower and the provisions of the will are inconsistent, the widow is put to her election: *Theobald* on Wills, 2nd Ed., 88, and cases there cited.

Hoyles, for the trustee, submitted to the direction of the Court.

Moss, *Q. C.*, in reply. The plaintiff does not claim the half of the *whole* estate and the annuity, but that the whole estate should bear the burden of the annuity, and then she should get half of the residue. The

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will gives her certain rights, and the subsequent language takes nothing from her. The will provides that the estate should go to the son, subject to the charge. The estate was very large, and the wife only got a small annuity: *Murphy* v. *Murphy*, 25 Gr. 81; *Coleman* v. *Glanville*, 18 Gr. 42; *Cameron* on Dower, 462.

March 12th, 1884. BOYD, C.—By the will the trustees of the testator are directed to pay to his wife, so long as she may remain his widow, the clear yearly sum of $500; and in the event of her marrying again the yearly sum of $300 only, from the time of such marriage.

This standing alone would manifestly import an annuity for life of the larger or smaller sum according to circumstances.

The next trust in order is a direction, that when his son shall attain twenty-one years of age the trustees are to make over to him one-half of the estate. Nothing is there said as to this being subject to the wife's annuity; but it is admitted that the remaining half of his estate in the hands of the trustees would be, and was, at the death of the testator well able to answer that demand.

The next trust is that upon the son attaining the age of thirty years, the trustees are to make over to him the whole of the residue of the estate; subject, however, to the payment to his wife as aforesaid.

The next trust, and the one which is now of importance in the events which have happened, is, that if the son should die before attaining the age of thirty years, then the trustees were to hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions."

The son, and only child, received one-half of the estate and died after his majority, and before attaining the age of thirty.

It is admitted that the widow is entitled to the half the residue by virtue of that provision in favour of widows

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under the Statute of Distributions; but it is contended that if she takes this share of the residue her annuity ceases; or, rather, that in any event the annuity ceases at this point of distribution, and she can only have her share of the residue thereafter.

The argument is, that by the will the trustees were only constituted trustees for the payment of the annuity up to these alternative periods; that is, in the one case, the transfer to the son if he should reach thirty, when he would take subject to the payment of the annuity; and, in the other case, the distribution of the residue upon his death under thirty, in which event there is no provision made for a further continuation of the annuity. And some force is lent to this contention by the fact that the will itself limits the trusteeship to the persons named and their heirs. But the last codicil to the will, changing the trustees, constitutes them, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, trustees of all the property in the will mentioned, and with all the powers originally given by such will to the trustees.

The use of the word *assigns* would point to the inference that the distributees, in the event which has happened, would be practically trustees, so far as was required to secure payment of the annuity to the widow. The use of that word detracts, to some extent, from the doubts which would be raised by the manner of directing the distribution in the will, and to a corresponding extent fortifies the unmistakable meaning of the first part of the will providing for the maintenance of his wife.

My conclusion is, that the distributory clause in the will is not sufficiently explicit to annul the earlier provision in favour of the widow. While the canon of construction sometimes employed, which gives effect to a later as against an earlier testamentary clause, is a convenient judicial expedient to get at the meaning of the testator, it is never to be employed unless where these clauses are in irreconcilable conflict. I think all parts of this will may be harmoniously construed as I have indicated.

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Another question discussed was, whether or not the widow could take under the will, and also claim dower in the real estate.

I think the widow is put to her election. The testator deals with his whole estate real and personal, in the residue now in question as a blended fund, which is to be distributed after the manner of personalty.

In *Chalmers* v. *Storil*, 2 Ves. & Bea. 222, Sir Wm. Grant held, in a similar case, that the claim of dower was inconsistent with the disposition of the will. He said, at page 224: "the testator directing all his real and personal estate to be equally divided, &c., the same equality is intended to take place in the division of the real as of the personal estate; which cannot be, if the widow first takes out of it her dower, and then a third of the remaining two-thirds."

That case was followed in *Roberts* v. *Smith*, 1 Sim. & Stu. 513, and in *Dickson* v. *Robinson*, Jac. 503, where Sir Thomas Plumer said: "The substance of the will is, that there should be an equal division of the property, which cannot take place if the widow is to have a third. The real and personal estate are united together; the personal estate is not subject to any antecedent claim; and is not the real estate intended to be given in the same manner?"

There is a recognition of the same principle and manner of construction, in *Reynolds* v. *Torin*, 1 Russ. 129.

Though *Chalmers* v. *Storil*, has been unfavourably commented on by some text writers, and some Judges, and is so referred to by Strong, V. C., in *Travers* v. *Gustin*, 20 Gr. 114, it is nevertheless a case which has been too long followed to be now disregarded as a binding authority upon the two points which it decides. It is thus viewed and followed with approval by my predecessor. Spragge, C., in *McGregor* v. *McGregor*, 20 Gr. 451.

In *Gibson* v. *Gibson*, 1 Drew. 60, Kindersley, V. C., said that the authority of *Chalmers* v. *Storil* must be confined to cases where the Court can come to the conclusion that the testator intended to give to his wife, and the other objects of his bounty, all that he himself possessed and enjoyed in equal shares and proportions.

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In *Bending* v. *Bending*, 3 K. & J. Wood, V. C., at p. 261, casts doubt upon the accuracy and fullness of the report of the facts in *Chalmers* v. *Storil*, and is disposed to limit the decision to cases where the testator in terms directs the very land itself to be equally divided, which could not be done consistently with the widow's claim. That is no doubt one ground of Sir Wm. Grant's decision, but he also proceeds upon another ground; that the manner of division which was directed as to the personalty, *i. e.*, dividing the *corpus*, was also the manner of division which the testator contemplated and directed as to the land, though he might mention it as "his real estate."

Mr. Roper in commenting on *Chalmers* v. *Storil*, emphasises the words "equally divided" to be found in the will, and says "*that* direction is inconsistent with the title to dower, 'for that equality would be defeated if she was allowed in the first place to take a third of the real estates as dower and then one-third of the two remaining thirds. This case therefore, he proceeds, seems to be an authority, that if the husband devise his freehold estates to his widow and other persons, as *tenants in common*, without expressing that his wife's share should be in lieu or satisfaction of her dower, she must elect between the devise to her and her legal title." *Roper's* Husband and Wife, vol. I, 580.

Mr. Bishop also understands the decision in much the same way. He says: "If the husband devise to the wife an estate in his lands of such a nature and quality, and so mixed up with estates given to others, that none of the estates can be enjoyed as they are given should the widow's claim to dower be allowed to intervene, it will be presumed that the estate given to the wife was intended to be in satisfaction of dower." *Bishop's* Law of Married Women, I, sec. 378, p. 266.

So, more briefly, but with the precision which distinguishes Mr. Spence, that author says: "where the testator gives to his wife and children all his estates whatsoever, real and personal, to be equally divided amongst

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them, the wife ought to be put to her election, on the ground that her claim of dower would disturb the equality of division which is contemplated by the will," 2 Eq. Juris. p. 596.

By reference to the Statute of Distributions, the testator has virtually incorporated into his will the provisions of that act applicable to the circumstances; and he thus himself indicates that the beneficiaries are to take as tenants in common, and prescribes that equality of division in respect of the *corpus* of both kinds of property which is the controlling element in *Chalmers* v. *Storil.* See *Re Ranking's Trusts,* L. R. 6 Eq. 601.

It is my duty to follow that case and *McGregor* v. *McGregor,* 20 Gr. 451; and I hold, that the widow must elect between the distributive share, *i. e.,* the moiety given to her by the will, and her dower.

Nothing was said as to costs. If no arrangement has been made out of Court, it is a proper case to charge the costs of all parties upon the fund.

G. A. B.

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[CHANCERY DIVISION.]

BEATTY V. O'CONNOR.

Action for account—Small balance—Costs.

In an action for an account by a mortgagor, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of $10 was found in his favour. Plaintiff having made certain charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him; and certain special matter pleaded by the defendants being found against them.

Held, neither party entitled to costs.

THIS case (reported ante p. 731) came up for further directions and as to costs before Boyd, C., on May 14, 1884.

Lennox, for plaintiff. The account has been taken by the Master as directed by the order of the Divisional Court, and the plaintiff is now found to be entitled to the sum of $9.75 and a small sum for costs, $2.62. The plaintiff is therefore entitled to his costs of suit, the defendants having refused to give him an account before action brought, and this Court being the only one that was open to him for his remedy. The plaintiff's claim being about $1,600, this Court alone had jurisdiction: *McGillicuddy* v. *Griffin*, 20 Gr. 81.

Moss, Q. C., and *G. W. Lount*, for defendants. The plaintiff made serious charges against and claimed a large sum from the defendants, and the Master has found nearly all his charges disproved. The most of the costs were incurred by reason of the plaintiff's vexatious defences, he refused to leave the premises, and caused the litigation himself. Trustees are entitled to their costs, and mortgagees are in the same position: *Turner* v. *Handcock*, 20 Ch. D. 303, 307; *Cotterell* v. *Stratton*, L. R. 8 Ch. 302; *Re Watts—Smith* v. *Watts*, 22 Ch. D. 5. If a mortgagee makes a *bond fide* claim and fails he will not be deprived of his costs. Unless a mortgagee has been guilty of misconduct he will get his costs, and no misconduct has been proved here, although the plaintiff undertook to prove it.

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[BOYD, C. In *Warner* v. *Jacob*, 20 Ch. D. 220, it was held that the mortgagee in exercising his power of sale is not (except as to the balance of the purchase money after a sale) a trustee for the mortgagor, and *Boulton* v. *Rowland*, in the current number of 4 O. R. 720, just published, is in point.]

Moss, Q. C. *Boulton* v. *Rowland* shews a substantial sum, $136 due, not like this case where the amount is a paltry $9. The rule laid down in *Re Woodhall—Garbutt* v. *Hewson*, 2 O. R. 456, should be applied. The plaintiff having failed in his contention should pay the costs.

Lennox, in reply, referred to R. & J. Dig. 809.

May 16, 1884. BOYD, C.—Though a mortgagee who has exercised the power of sale and has realized a surplus is in some sense a trustee of that surplus, he is not so to all intents and purposes.

The reasons which apply for the protection and encouragement of the volunteer who accepts an honorary trusteeship, out of which he can make no profit, do not require to be extended to the case of a mortgagee who, having made his debt, interest, and costs out of the estate, holds possession of a surplus. He is not so much a trustee within the meaning of *Turner* v. *Handcock*, 20 Ch. D. 303, as he is a person who has received money for the use of another, as put by Ferguson, J., in *Boulton* v. *Rowland*, 4 O. R. 720. His position is, perhaps, succinctly expressed by Jessel, M. R., in *Talbot* v. *Frere*, 9 Ch. D. 568, 572, as that of a "bare trustee." It is no hardship to require him to account for the funds in his hands fully, promptly, and accurately.

I do not consider the state of the authorities to be such as to compel me to give the defendants their costs in this case, where there is no fund out of which to pay costs and when the balance on the accounts has been found against them, small though that balance may be.

This I say after referring to the following cases: *Cornwall* v. *Brown*, 3 Gr. 663; *Long* v. *Glencoe*, 5 Gr. 208;

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McGillicuddy v. *Griffin*, 20 Gr. 81; *Little* v. *Brunker*, 28 Gr. 191; *Western Co.* v. *Court*, 25 Gr. 151; *Cassidy* v. *Sullivan*, L. R. 1 Ir. 313; *Warner* v. *Jacob*, 20 Ch. D. 220; *Re Watts*, 22 Ch. D. 5; *Re Hoskins Trusts*, 6 Ch. D. 281; and *Banner* v. *Berridge*, 29 W. R. 844.

My impression during the argument was, that this was a proper case in which to withhold costs entirely, and that I still think to be the right way to dispose of what is now practically the whole matter in controversy.

The plaintiff has not substantiated the claims preferred in his statement of claim, though he is found entitled to a balance of $9, and he has not proved that accounts were demanded and withheld from him. Nor can it be said on the other hand that the defendants have succeeded, for the special matter pleaded in their defence has been found against them, and they are found as the result of the whole investigation to be indebted to the plaintiff.

The plaintiff may have judgment for the balance due to him, without costs.

G. A. B.

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General Orders

OF THE

SUPREME COURT OF JUDICATURE.

Monday, 17th December, 1883.

539 Ordered that the Taxing Officers shall have power to allow increased Counsel fees in Chambers, to an amount not exceeding $10.00.

This order shall be substituted for item 166 in the Order of the 10th September, 1881, respecting the Tariff of Charges (*a*).

540 Ordered that Rule 459 of the Judicature Act be hereby rescinded, and the following substituted.

Unless otherwise specially ordered in the particular case, service of pleadings, notices, summonses, orders, rules, and other proceedings shall be effected before the hour of four o'clock in the afternoon; except on Saturday, when it shall be effected before the hour of two o'clock in the afternoon. Service effected after four o'clock in the afternoon on any week day except Saturday, shall be deemed to have been effected on the following day. Service effected after two o'clock on Saturday shall be deemed to have been effected on the following Monday.

This Order shall take effect on and after the second day of January next.

Saturday, 15th March, 1884.

541 (*a*) The Master in Ordinary shall have the same power, authority, and jurisdiction as the Master in Chambers in respect of all causes and matters referred to him or which may arise in his office.

(*b*) Any official Referee upon the request of the Master in Ordinary, or of a Judge of the High Court may sit with or for the Master; and while sitting for him shall have all the authority and power of such Master, but shall not be entitled to any fees.

(*a*) This has been rescinded by Rule 544 clause 18, p. 754.

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542 Ordered that Rule 324*a* be rescinded, and the following substituted therefor: "Upon hearing of such motion the Court may grant the application on such terms and conditions as may be thought proper, or may refuse the same: or instead of either granting or refusing the same may give such directions for the examination of either parties or witnesses or for the making of further enquiries or with respect to the further prosecution of the suit as the circumstances of the case may require; and upon such terms as to costs as the Court thinks right.

543 In actions in the High Court of Justice no reference to arbitration or other reference, or examination for the purpose of discovery or examination of a judgment debtor on which fees may be payable otherwise than in law stamps, shall be taken before the Judge of the County Court or Local Judge of the High Court, or Local Master being also a Judge of the County Court, by whom the order for such reference or examination has been made. References in administration matters under General Order 638 of the Court of Chancery, and in partition matters under General Order 648 of the Court of Chancery; and other like references in mortgage actions are excepted from the operation of this Rule.

Saturday, 29th March, 1884.

544 It is Ordered that the Tariff of Fees made by the Judges of the Supreme Court of Judicature of Ontario on the 10th day of September, 1881, be amended as follows:

1. There may be an appeal by appointment without other notice from the Taxing Officer in Toronto to the Master in Chambers or to the Master in Ordinary pending the Taxation, in all cases.

2. Item 12 in the said Tariff is struck out.

3. Item 23 in the said Tariff is struck out, and the following is substituted therefor:

"23. To amend any pleading when the amendment is proper..... $2.00."

4. Under the heading "Drawing Pleadings," &c., after item 46 and as applicable to items 36 to 46 inclusive, add "In special

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or contested actions or matters to be increased to such sum as the Taxing Officer in Toronto may think fit."

5. Item 83 in the said Tariff is struck out, and the following substituted therefor :

"83. Notice of Motion in Court or Chambers, engrossing and copy to serve per folio.... $0.30."

6. Under the heading "Perusals," item 91 in the said Tariff is struck out, and the following substituted therefor :

"91. Of each of the pleadings as defined by the Act..... $1.00."

7. Item 93 in the said Tariff is struck out, and the following substituted therefor :

"93. And in special or contested actions or matters or of interrogatories and cross-interrogatories on commission such sum as the Taxing Officer in Toronto thinks fit."

8. Under the heading "Attendances," item 96 in the said tariff is struck out, and the following substituted therefor :

"96. Necessary attendances consequent on the service of a notice to produce or admit, or an inspection of documents when produced under order including making admission altogether.. $1.00."

9. Item 100 in the said Tariff is struck out.

10. Item 111 in the said Tariff is struck out, and the following substituted therefor :

"111. Attendance on warrant or appointment of Master, Registrar, Examiner, or Referee, per hour..... $1.00."

11. Item 115 in the said Tariff is struck out, and the following substituted therefor :

"115. On important points and matters requiring the attendance of Counsel, the Master or Examiner or Referee, Judgment Clerk, or Inspector of Titles may certify the amount of Counsel fee proper to be allowed (to be noted at the time), for the guidance of the Taxing Officer in Toronto, who may allow the same in lieu of fees for attendance."

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12. Under the heading "Court Fees (Term Fees)," item 120 in the said Tariff is struck out, and the following substituted therefor:

"120. Fee after statement or where statement dispensed with after filing writ, on defence, joinder of issue, trial, or argument before Courts, or any other step in the cause, and on judgments other than præcipe judgments in mortgage cases. No two fees to be allowed either party when such proceedings are taken or had between the first day of any sittings of the Courts fixed by Rule 480, and the first day of the following sittings so fixed ..... $1.00."

13. Item 122 in the said Tariff is hereby struck out, and the following substituted therefor:

"122. On every order or judgment.....$1.00."

14. Under the heading "Judgment, Rules, or Orders," item 133 in the said Tariff is struck out, and the following substituted therefor:

"133. Drawing minutes of judgment or order per folio, when prepared by Solicitor under directions of Registrar or Judgment Clerk, $0.20."

15. Item 135 in the said Tariff is struck out, and the following substituted therefor:

"135. Attending for appointment to settle or pass judgment or order of Court, copy and service..... $1.30."

16. Under heading "Sales by Master or Auctioneer," after item 145 add:

"145½. Each necessary attendance on printer, $0.50."

17. Under heading "Miscellaneous," after item 153 add:

"In special matters to be increased in the discretion of the Taxing Officer in Toronto."

18. Under the heading "Counsel Fees," Items 165 and 166 in the said Tariff are struck out; and Order 539 is rescinded, and the following is substituted therefor:

"165. On argument in Chambers in cases proper for the attendance of Counsel, (to be increased in the discretion of the Master in Chambers or the Master in Ordinary) ..... $2.00."

19. The necessary letters and attendances incurred in obtaining the decision of the Taxing Officer in Toronto, shall be allowed as part of the costs of the cause.

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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.

ACTION.

See INSPECTORS.

APPEAL.

Appeal bond — Discontinuance— Liability of surety.]—The condition of an appeal bond in which the defendant was a surety was that the appellant would effectually prosecute his appeal and pay such costs and damage as might be awarded in case the judgment appealed from was affirmed. The appellant discontinued the appeal, pursuant to R. S. O. ch. 35, sec. 41, which enacts that "thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the Court below, and may take all further proceedings in that Court as if no appeal had been brought." The Registrar, to whom the matter was referred, assessed the damages at the respondent's costs of opposing the appeal.

Held, affirming his finding, that the judgment had been affirmed by the discontinuance, and that these costs had been awarded to the respondent by virtue of section 41.

Quære, as to the meaning of the expression "effectually prosecute."—*Hughes et al.*, v. *Boyle et al.*, 395.

ARBITRATION AND AWARD.

Award — Joint execution of.] — Three arbitrators on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them, but not signed, and it was understood that nothing further was to be done but have a formal award drawn up and executed. Next day the award was drawn up and executed by two of the arbitrators in the presence of each other, but in the absence of the third arbi-

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trator, who a couple of days afterwards executed it in the presence of one of the other arbitrators. In an action on such award,

Held, that the award should have been executed by the three arbitrators together, and that it was invalid. *Nott* v. *Nott*, 283.

See INSPECTORS—MUNICIPAL CORPORATIONS, 1—RAILWAYS AND RAILWAY COMPANIES, 1, 4.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1 — BANKRUPTCY AND INSOLVENCY, 2.

ATTORNEY AND SOLICITOR.

1. *Misconduct — Striking off the Rolls.*]—It was charged against T., a solicitor, that one W. being about to be tried for a criminal offence, was induced by T., as her solicitor, to pay him $200 for the purpose of influencing the jury.

The Court, upon the facts stated below, being satisfied that the charge was proved, an order was made striking him off the rolls.

The petitioner having made a *prima facie* case, and being unable from want of means to proceed with the application, a solicitor was appointed by the Court to take the matter up. *Re L. U. C. Titus, a Solicitor*, 87.

2. *Action, settlement of—Rights of third persons—Solicitors' costs—Collusion.*]—A Montreal firm of solicitors brought an action for one C. against H., the plaintiff, which was settled for $3,700, of which H. paid $3,000, and gave the solicitors a note for $5,500, made and endorsed respectively by the defendants Griffith and Gimson, and held by H. as endorsee, out of which they were to take the $700 and their costs. They sent a clerk to Toronto, where defendants lived, to effect a settlement, but being unable to do so, he left the note for collection with M. & Co., a Toronto firm of solicitors. After legal proceedings had been instituted plaintiff paid C. the $700. A settlement was discussed between the solicitors, which M. & Co. agreed to, provided their costs and the charges for the clerk's expenses to Toronto were paid. Negotiation for a settlement had been going on between the parties themselves, and on the 2nd December an agreement was entered into that defendants should pay $5,000, clear of everything, to the plaintiff. On 4th December defendants' solicitors were informed by M. & Co. of other parties, besides the plaintiff, being interested in the note. On 6th December the parties met and effected a settlement, by plaintiff accepting $5,000 in full of all claims under the action. The note, which was held by M. & Co., was never delivered up to the defendants.

Held, that the action was not the plaintiff's, but that of C., or for his benefit, and that M. & Co. could proceed therewith, as C.'s solicitors, to enforce payment of their costs and the Montreal solicitors' charges: that the settlement of a claim under a negotiable security without the security being delivered up, subjected the defendants to such charges as were a specific lien thereon, of which they had notice; or, *Semble*, even without notice: that the effect of the agreement of the 2nd December was that the defendants should

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pay M. & Co.'s costs; and defendants afterwards, on the settlement made, not providing therefor, and leaving the note outstanding, was some evidence of collusion to deprive M. & Co. of their costs, and that the notice given not to settle without providing for M. & Co.'s costs, etc., gave M. & Co. an equitable claim to the interposition of the Court. *Hall* v. *Griffith et al.*, 478.

See ARBITRATION AND AWARD.

BANKRUPTCY AND INSOLVENCY.

1. *Dissolution of partnership — Assignment of interest by one partner to continuing partner—Priority of partnership and separate creditors.*] — W. M. J., dissolved partnership with L. A. M., and assigned all his interest in the business to him, taking a covenant that he would pay off the creditors of the firm. L. A. M. subsequently became insolvent and made an assignment of all his estate and effects to the defendants in trust for creditors. L. A. M. never made himself separately or exclusively liable to the creditors of the partnership, nor did they in any way agree to look to him alone. Defendant being about to distribute the estate ratably between both partnership and separate creditors, the plaintiff, a separate creditor, on behalf of himself and the other separate creditors, brought this action to compel the defendant to give priority to the separate creditors.

Held, that the assignment by W. J. M. to L. A. M. of his interest in the business, without the consent of the partnership creditors, or without their agreeing to look to L. A. M. for payment, or his making himself separately liable to pay them, made such business his separate estate, and that his separate creditors were entitled to priority over the partnership creditors, and only the surplus after payment of the separate creditors should go towards paying the partnership creditors. *Moorehouse* v. *Bostwick*, 104.

2. *Assignment in trust for creditors—Partnership and separate creditors — Execution of assignment — Omission of goods therefrom—Preference — Voluntary judgment.*] — Under an assignment by a firm in trust for creditors the assignee was directed to distribute the proceeds of the property assigned "ratably and proportionably among all the creditors of the assignors in payment and satisfaction as far as possible of their just debts, having due regard to the rights of partnership and private creditors, and distributing the same as between them according to law."

Held, that the assignment was valid, that it provided for the payment, both of the partnership and separate creditors out of their respective estates appointed for that purpose according to law, the meaning of which is well known.

The assignment was executed by one of the partners for a co-partner under verbal instructions from the co-partner before leaving for England to sign for him, if an assignment became necessary; and also under a cablegram, received from him while in England, to the same intent.

Held, that though authority to execute a deed must be by deed, this would not affect goods of which the assignee took actual possession, namely, the stock-in-trade in the assignee's store; nor goods warehoused for and held by a bank, where the bank were notified and agreed to

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hold the surplus, after paying the bank's claim, for the assignee, which was equivalent to taking possession, and which were the only goods in question here.

Held, also, that the omission of some part of the assignors' estate from the assignment, or the postponing the making of the assignment until certain favoured creditors had obtained judgment and execution, did not invalidate it. *Nelles* v. *Maltby et al.*, 263.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Chattel mortgage unregistered —Assignment by mortgagor—Right of assignee to dispute mortgage—Adding creditor as party.*] — The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor, and before any creditor had been informed of the assignment the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the Master in Chambers ordered M. to be added as a party defendant, in order to test the validity of the plaintiff's mortgage.

Held, affirming the order of GALT, J., who rescinded the Master's order, that the defendant was not entitled to the order, for when the plaintiff demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment. *Hyman* v. *Bourne*, 430.

2. *Bills of Sale Act—R.S.O. ch.* 119 *—Indivisible chattels—Possession of co-owner—Sheriff's sale.*]—A. having purchased from B. a half interest in a celebrated brood mare, paid on his purchase money $50 more than the half interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was that they were to keep her for breeding purposes and share the profits equally.

During the year, and while in B.'s possession, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was *in gremio* at the time of the sale.

In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act, R. S. O. ch. 119, avoided the plaintiff's title as against the execution, it was

Held, that the Act was intended to apply to personal chattels susceptible of specific ascertainment and of accurate description, and capable of being transferred and possessed *in specie*, and did not apply to an indivisible chattel, like that in the present case: that A. & B. were tenants in common of the mare: that B.'s possession of the mare was not his sole or exclusive possession, but the possession of both: that the sheriff's sale passed only B.'s interest in the mare, and C. by his purchase became a co-owner with A.; and that the property in the colt followed that of its dam, and

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that A. was an owner of an undivided moiety in both. *Gunn v. Burgess*, 685.

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BILLS AND NOTES.

See FRAUD AND MISREPRESENTATION, 1.—CHAMPERTY AND MAINTENANCE.

BROKERS.

See PLEDGE OF STOCK.

BUILDING.

See WALL.

CHAMPERTY AND MAINTENANCE.

Assignment of judgment—Champerty and Maintenance—Principal and surety—Sale under mortgage—Payment over of surplus—Owner of equity of redemption—Voidable instrument—27 Eliz., ch. 4—R. S. O. ch. 116, sec. 3].—Where one, having obtained an assignment of a judgment against a mortgagor, brought an action in his own name against the mortgagee, who had sold under the power of sale, to make him account for certain surplus moneys left in his hand after such sale:

Held, that the plaintiff was entitled so to sue, and that such assignment of judgment was not in contravention of the law respecting champerty and maintenance.

Where one brought action against the maker of a note and an endorser thereon, and recovered judgment with costs, which the endorser paid and took an assignment of the judgment:

Held, that the latter was entitled, under R. S. O., ch. 116, sec. 3, to recover from the principal debtor the whole of the judgment, including the the costs.

Where a mortgagee, who had sold under the power in the mortgage, paid over the surplus on the order of I. J., the apparent owner of the equity of redemption,

Held, that even if the deed under which I. J. claimed was voidable, nevertheless the mortgagee was entitled to act on her order, especially as he had served a notice of sale on those who now impeached his conduct, while they had done nothing to assert their claim until after the surplus was so paid over, and as also a suit which had been theretofore commenced to set aside the deed from I. J. as void had been abandoned.

A voluntary or covinous conveyance under 27 Eliz., ch. 4, is voidable only, and is good and valid until avoided. *Harper* v. *Culbert et al.*, 152.

CHARITY.

See WILL, 4-7.

CHURCH.

See WILL, 4.

COMMISSION TO TAKE EVIDENCE.

See PARLIAMENT.

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CONSTITUTIONAL LAW.

See EXECUTORS AND ADMINISTRATORS.

CONTRACT.

See SALE OF GOODS.

CONVICTION.

Conviction—Depriving of the use of property—32-33 Vic. cap. 21, sec. 100 — Jurisdiction of magistrate.] The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half-interest to C. The horse-power had been hired from one M., and at the time of the sale the term of hiring had not expired. At its expiry, M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept, and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32-33 Vic. c. 21, sec. 110, D.

Held, that the conviction was bad, there being no offence against that section, and no jurisdiction in the police magistrate to try summarily; and that it was bad also in not showing the time and place of the commission of the offence.

Remarks upon the improper use of the criminal law in aid of civil rights.

The conviction was quashed, with costs. *Regina* v. *Young*, 400.

See TAVERNS AND SHOPS—MUNICIPAL CORPORATIONS, 3—JUSTICE OF PEACE.

COPYRIGHT.

See INJUNCTION.

CORPORATION.

Company — Action by judgment creditor of company for defendant's unpaid stock—Set off—Payment.]—After plaintiff had commenced an action against the defendant to recover from him in respect of his unpaid stock in a joint stock company the sum of $442.29, being the amount of an unsatisfied judgment recovered by the plaintiff against the company for $4,333.08, and assigned it to one G., who assigned part of the money recovered to the extent of $500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim.

Held, that the procuring of such assignment by defendant being for such purpose, and being a voluntary act on defendant's part, and with notice of plaintiff's claim, did not constitute a defence to it; but *Semble*, if the set off had accrued to the defendant in his own right, although after action brought, it would have been otherwise.

G. assigned the remainder of his judgment to M., who after the commencement of the plaintiff's action, and with knowledge thereof, recovered a judgment against defendant for $526.21 without defence, and to give M. a preference in respect of his unpaid stock, which defendant paid to M., who released the company from their liability in the judgment so re covered against them to the extent of $500.

Held, that the judgment so recovered, and the payment thereunder

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constituted a good defence to the plaintiff's claim; and that the prior commencement of the plaintiff's action was immaterial. *Field* v. *Galloway*, 502.

COSTS.

1. *Claim — Counter claim — Balance in favour of defendant—Costs.*] An action on an unsettled account, to which there was a counterclaim also on an unsettled account, was referred. The referee found that there was a sum of $148.81 due the plaintiff on his claim, and 164.50 due the defendant on his counterclaim, leaving a balance due defendant of $15.69, and he certified to entitle the defendant to full costs. The Statute of Limitations was pleaded respectively to the claim and counter claim, and the items barred by the statute were in consequence disallowed; but apart from the statute the balance would have been in the plaintiff's favour.

Held, that the plaintiff and defendant were entitled to recover the costs of and relating to the claim and counter-claim and proof thereof, respectively, including the reference and subsequent proceedings; the defendant being also entitled to recover the sum of $15.69; the taxing officer to divide items in common, and judgment entered for the party in whose favour the balance should be found. *Coughlin* v. *Hollingsworth*, 207.

2. *Verdict of jury—Costs withheld —"Good cause shewn"—Rule 428.*] —In an action of seduction, it appeared that the wrong complained of was partly attributable to the culpable conduct of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get costs, whereupon judgment was directed to be entered for him, without costs.

Held, that good cause was shewn why costs should not be given to the defendant within Rule 428, which declares that where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge or Court shall otherwise order. *Walmsley* v. *Mitchell*, 427.

See APPEAL—ATTORNEY AND SOLICITOR, 2—RAILWAYS AND RAILWAY COMPANIES, 4 — MORTGAGE, 2, 3.

COUNTER-CLAIM.

See COSTS, 1.

CRIMINAL LAW.

See CONVICTION—EXTRADITION—JUSTICE OF PEACE.

CROPS.

Interpleader — Right to growing crops—Mortgagee—Execution creditor — Recovery in ejectment.] —The plaintiffs were mortgagees of land on which the crops were grown. On the 15th April, 1882, the mortgagor being in default, the plaintiffs, in consideration of the mortgagor giving them a chattel mortgage on some of his goods, agreed that he should remain in possession as if there had been no default. In June the plaintiffs took proceedings in ejectment against the mortgagor, recovered judgment by default on 30th September, and on the same day placed

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a writ of *hab. fac. poss.* in the hands of the sheriff, who took possession thereunder. On 2nd July possession of the land had been taken under the mortgage on behalf of the plaintiffs, but it did not appear that they continued in actual possession. On 11th July the defendant obtained a judgment against the mortgagor for $860, and on the 17th July execution was placed in the hands of the sheriff, who, on the same day, seized the growing crops thereunder. In an interpleader issue, to determine the title to the crops at the time of seizure,

Held, that by virtue of the agreement of the 15th April the mortgagor was entitled to the possession of the crops as against the p aintiffs, and so, therefore, was the defendant; and that the plaintiffs' recovery of judgment on the 30th September did not relate back to the 15th June, the date of the issue of the writ of ejectment, so as to estop the defendant from shewing his right to the crops on the said 17th July. *Hamilton Provident and Loan Co.* v. *Campbell*, 371.

DAMAGES.

See EVIDENCE, 1—WALL.

DEED.

Conveyance—Reservation of timber—Construction.]—C. conveyed to H. certain land by a deed which contained the following reservation and covenant: "And the said party of the first part reserves to himself all the standing timber upon the said lands, excepting that which measures eight inches through, and the said party of the second part covenants with the said party of the first part to give him five years from the date hereof to take the said timber off the said lands, with the right of entry upon said lands for the purpose of removing said timber."

Held, that C. was entitled to all the timber over eight inches in diameter. *Corbett* v. *Harper*, 93.

See ESTATE—FRAUD AND MISREPRESENTATION, 2, 3.

DEFAMATION.

Libel — Privileged communication —New trial.]—The defendants and others signed a petition to the license commissioners of the city of Hamilton, praying that a license might not be granted to the plaintiff, and stating that his tavern was one of the worst drinking holes in the county: that it was kept very disorderly: that there was no suitable accommodation, and that the landlord was very much given to drinking:

Held, that the occasion of the presentation or publication of the petition was not absolutely privileged, but that the onus lay upon the plaintiff to prove express malice, and that the defendants used the occasion for some indirect or wrong motive.

The jury gave a verdict for the plaintiff for $1000, and the Court was of opinion on the evidence, verdict, and general merits, that there should be a new trial, CAMERON, J., before whom the case was tried, dissenting. *Wilcocks* v. *Howell*, 360.

See EVIDENCE, 2.

DESCRIPTION OF LAND.

See WILL, 5—SALE OF LAND, 2.

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DOMICILE.

See HUSBAND AND WIFE, 3.

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DOWER.

See WILL, 6, 9.

DRAINAGE.

See MUNICIPAL CORPORATIONS, 1—WAY, 1.

EASEMENTS.

See WAY, 2.

EJECTMENT.

See CROPS.

ELECTION.

See PARLIAMENT. — MUNICIPAL CORPORATIONS, 2.

ESCHEAT.

See EXECUTORS AND ADMINISTRATORS.

ESTATE.

Conveyance—Limitations in deed—Trusts—Statute of Uses—Vendors and Purchasers Act—27 Hen. VIII. ch. 10—R. S. O ch. 109.]—A. by deed sold and assigned certain lands to B., his heirs, executors, administrators, and assigns, "to have and to hold the same unto B. his heirs, executors, administrators, and assigns, in trust, for the sole and separate use of A. for life, and after A.'s decease, in trust for C. for her life; and after C.'s decease, in trust for the heirs of A., and in the event of A. surviving C., then in trust to convey and revest the said premises in A., his heirs, executors, administrators, and assigns, for their own proper use and benefit for ever. But should C. survive A., then and in that event, and in the further event of the decease of C., in trust to convey the said premises to such persons and in such manner as A. shall by his last will and testament order, designate, and appoint. But in the event of A. dying intestate, then in trust to sell and convey the said premises for A.'s heirs, executors, administrators, and assigns."

Held, that A took an estate in fee simple, subject to the intervening life estate of C.; for no such special trust was created as took the case out of the Statute of Uses.

Semble, applications under the Vendor and Purchaser Act should not be made for the mere purpose of settling questions of title when the existence and validity of the contract are not disputed. *Re Bingham and Wrigglesworth*, 611.

See WILL.

ESTOPPEL.

1. *Injunction — Ratepayer — Estoppel—Parties.*]—On a motion for injunction by W., a ratepayer, against a town corporation, to restrain them from paying for a site for a post-office, it was shown that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by one McA.) should be chosen, that W. had taken an active part in support of the one owned by the corporation, and the majority of ratepayers had voted for

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the other. It was contended that W. was estopped by his conduct from maintaining the suit, and that McA. and the individual members of the corporation should have been made parties. W. having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given,

Held, that he was not estopped, and, for the purposes of the motion, that although McA. and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties, and the injunction was granted. *Wallace* v. *The Corporation of the Town of Orangeville*, 37.

2. *Married woman—Will—Estoppel—Possession—Slip in pleading—Amendment.*]—L., a married woman, about the year 1830 assumed to devise certain land to her daughter P. and her husband O. for their lives, and thereafter to their children. T. (one of the children) went into possession of part of it, at the instance of O., about 1855, and built thereon and remained in undisturbed possession for over 28 years Those who were entitled in remainder under the will (the life estate having expired) brought an action to have the land partitioned or sold, and T. claimed his part by length of possession.

Held, (reversing the judgment of Ferguson, J.,) that although T. might be estopped from denying the title of L., still he was not estopped from denying that L. had transferred her title to those now claiming, and that as they claimed under the will of L. (a married woman), made in 1828, before there was power to devise, and so void on its face, they had no title and T. must succeed. *Board* v. *Board*, L. R. 9 Q. B. 48, and *Paine* v. *Jones*, L. R., 18 Eq. 320, distinguished. *Smith* v. *Smith*, 690.

See HUSBAND AND WIFE, 3 — JUDGMENT—PARLIAMENT—WAY, 3.

EVIDENCE.

1. *General indemnity — Damages —Judgment recovered—Measure of damages — Evidence — Appeal from Master's report*]—The plaintiff company having brought an action against I. on a mortgage, and claiming damages for having made a distress on F., the tenant of the premises, at the request of I., on the reference to ascertain what damage the company had properly sustained by reason of such distress, the Master held that the amount of a judgment recovered by F. against the company was the proper measure, and was *conclusive evidence* of the amount, although it was proved before him that an offer had been made by I. to the company to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined shewed that their evidence might materially have affected the verdict.

Held, that the ruling of the Master was erroneous, and that the case must go back to him to revise his report. *Peterborough Real Estate Investment Co.* v. *Ireton*, 47.

2. *Libel and slander—Privileged documents relating to public service —New trial.*]—In an action for libel and slander the plaintiff's counsel insisted on the production of a certain anonymous letter written by the defendant to the Ontario Government, relating to the licensing of the plain-

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tiff's hotel. The head of the department attended and declined to produce the letter on the ground that its production would be injurious to the public service, and it was therefore privileged. The learned Judge at the trial, on plaintiff's counsel insisting on its production, ordered it to be produced, but stated if the Court should hold that the production was not compellable, any verdict recovered would go for nothing. The letter was then produced and read. The learned Judge told the jury that the letter was not evidence of libel, as it was privileged, but that it could be looked at as evidence of malice on the slander count. The jury found for the plaintiff.

Held, that the question whether the production of such a document was injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper, and the production of the document ought not to have been compelled.

Under the circumstances the Court granted a new trial without costs. *Bradley* v. *McIntosh*, 227.

3. *Agreement—Foreign document—Impossibility of production—Secondary evidence — Admission at a former trial—Evidence of a witness taken before an examiner in shorthand—R. S. O. ch. 50, secs. 165, 166, 41 Vic. ch. 8, sec. 8, O; O. J. Act, Rules 282, 285, 311—Evidence in reply—Right of reply—Interrupting Judge's charge—Misdirection.*]—In an action on an agreement for the sale of land in Winnipeg, Manitoba, the agreement, which was registered by defendants, was produced by the Registrar of Winnipeg, in whose official custody it was, on his examination under a commission. The Registrar refused to part with it, but left a copy certified under his hand and official seal to be a true copy, which was attached to the commission, and produced at the trial. One M., who was examined under the commission, and also at the trial, proved that the agreement produced by the Registrar was the original, and that it was signed by the defendants, and that the copy attached to the commission was a true copy.

Held, that the Registrar's certificate as to the copy was sufficient under O. J. Act, Rule 203, and that a certificate by the commissioner was not required; that the absence of the original was sufficiently accounted for to enable secondary evidence to be received by means of the copy.

At a former trial a copy of the agreement was admitted in place of the original:

Held, that the admission so made was good for the subsequent trial.

Evidence given by one F., a witness, was taken before an examiner in shorthand by question and answer. That evidence was duly certified by the examiner and an office copy put in at the trial.

Held, under R. S. O. ch. 50, secs. 165, 166, as amended by 41 Vict. ch. 8, sec. 8. O., and O. J. Act, Rules 282, 285, the evidence was properly received; but that this was immaterial, for apart from F.'s evidence there was sufficient evidence to support the finding of the jury, and under Rule 311, where no substantial wrong or miscarriage is occasioned, the Court will not interfere.

The learned Judge at the trial nonsuited, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The

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defendant's counsel cross-examined one of plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination.

Held, that by reason of such re-examination the plaintiff was not deprived of his right of calling witnesses in reply to the defendant's evidence of fraud; at all events, this was a matter for the Judge at the trial, and also the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply.

The defendants objected that by reason of frequent interruptions and reading of text books by plaintiff's counsel during the delivery of the Judge's charge injustice was done defendants, and the jury improperly influenced thereby.

Held, that this was a matter for the Judge at the trial, and it would have to be a very strong case for the Court to interfere, and the Judge had made no complaint.

Held, also that it was no objection that the land in question was situate in Manitoba, and out of the jurisdiction of this Court, for relief may be given, if necessary, by proceedings operating *in personam*. *McDonald* v. *Murray et al.* 559.

4. *Will—Construction—Devise to Sisters of Charity—Statutes of Mortmain — Pedigree — Evidence.*]— A testator devised land to K., in trust to sell and pay the proceeds "to the Sisters of Charity of Hamilton, to be their property absolutely." There were also bequests to K. of money, to pay the same to the St. Mary's Hospital, an Orphan Asylum and a Convent. No evidence was given to show who the Sisters of Charity were. In an action to recover the land, brought by the heirs at law of the testator,

Held, that a corporate capacity could not be imputed to the Sisters of Charity, in order to destroy the gift to them under the Statutes of Mortmain, and that the devise might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity.

Declarations made by the deceased mother of the plaintiff, in the hearing of the plaintiff and of the plaintiff's son, as to the marriage of the plaintiff's parents, received in evidence to prove the plaintiff's pedigree. *Walker v. Murray*, 638.

Onus probandi.]—*See* FRAUD AND MISREPRESENTATION, 2.

See EXTRADITION—PARLIAMENT—SALE OF GOODS—WILL, 2.

EXECUTORS AND ADMINISTRATORS.

Administration — Account—Illegitimacy—Escheat—Grantee of crown —Constitutional law — Executor—Trustee—Statute of Limitations—Parties.]—C.M. died in 1869 entitled to real and personal estate, which by will he devised and bequeathed to his two illegitimate children D. & E., and in the event of either dying, his share to go to the survivor, and he appointed C. executor and guardian of D. & E., who were infants. C. forthwith took possession of the estate and managed the same for the benefit of the infants. Both D. & E. died in 1871, D. surviving E. C. afterwards, also in 1871, paid off a mortgage outstanding upon the realty, and took a conveyance of the land

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from the mortgagor to himself in fee. On July 24th, 1880, the plaintiffs procured a grant from the Crown, under the seal of this Province, of real and personal estate of which D. died entitled, upon certain trusts therein therein set forth, and as such grantee, on October 20th, 1880, procured letters of administration to D.'s estate.

Held, that the plaintiffs, as such administrators, were entitled to an account of the defendant's dealings with the real and personal estate of C. M.

Held, also, that although the original mortgagee might, under the circumstances, have become entitled to hold the mortgaged lands freed from the equity of redemption, yet that the defendant, standing in a fiduciary relation to the lands in question, could not set up the title acquired from the mortgagee adversely to the plaintiffs, but was a trustee thereof for the plaintiffs.

Held, also, that notwithstanding *Attorney General* v. *Mercer*, 5 S. C. 538, the plaintiffs' right to an account, as administrators of D.'s estate, was not affected by the alleged invalidity of the grant to them of the escheated estate, and neither the *cestuis qui trustent* named in the grant from the Crown, nor the Attorney General for the Dominion, were necessary parties.

Held, also, that the Statute of Limitations was no bar to the action. *Simpson* v. *Corbett*, 377.

EXTRADITION.

Information alleging that prisoner is accused, &c. — Surplusage — 32-33 Vic. ch. 30, sec. 11, D., ch. 29, sec. 27, D.—Depositions—Sufficiency of proof of—Corroboration.]—In extradition proceedings, the information charged that the informant "hath just cause to suspect and believe, and doth suspect and believe that H. L. Lee," the prisoner, "is accused of the crime of forgery." &c., "for that the said H. L. Lee," &c., "did feloniously forge" some 78 orders for the payment of money. The 79th charge was, that the said H. L. Lee, at the aforesaid several times, &c., did feloniously utter, knowing the same to be forged, the said several orders, &c.

Held, sufficient, for that the information charged that the prisoner "did feloniously forge," &c.; and the allegation that the informant believed that the prisoner "is accused," &c., might be treated as surplusage; but even if objectionable at common law, it was good under sec. 11 of 32-33 Vict. ch. 30, D., and 32-33 Vict. ch. 29, sec. 27, D.; and moreover the 79th charge was free from objection.

Held, also, that in these proceedings a plea to the information is not required.

Certain foreign depositions used were sworn to before E. G., a justice of the peace for Cincinnati township, Hamilton county, Ohio. A certificate was attached, commencing, "I, Daniel J. Dalton, clerk of the Court of Common Pleas for said Hamilton county," certifying as to the signature of E. G., and that he was a duly qualified justice of the peace for said county, and entitled to take depositions of witnesses, &c.; and concluded, "In testimony whereof I have hereunto set my hand and affixed the seal of the said Court at Cincinnati," &c. D. J. Dalton, by Richard C. Rohner, Deputy. To this was attached the certificate of the Governor of the State of Ohio, under the great seal of the State, cer-

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tifying that D. J. Dalton, "whose genuine signature and seal are affixed to the annexed attestation, was at the date thereof clerk of the said Court," &c.; that "he is the proper person to make such attestation, which is in due form, and that his official acts are entitled to full faith and credit."

The Court, without specially pronouncing on the question, refused to allow an objection, which as a matter of fact was not taken, to the sufficiency of the depositions under 45 Vict. ch. 25, sec. 9, sub-sec. 2 (*a*) D., for the official seal of D. J. Dalton is attached, and the Governor certified that he was the proper person to make such attestation; and also there was *viva voce* evidence given in proof thereof, so that the "papers were authenticated by the oath of some witness" under sub sec. (*b*).

Per WILSON. C. J. In these proceedings the evidence of interested parties need not be corroborated. *In re H. L. Lee*, 583.

FIRE.

Clearing land—Fire—Sudden rising of wind — Negligence.]—The defendant, for the purpose of clearing his land, set out fire on the same, but before doing so consulted with the plaintiff, who had some lumber piled on an adjoining lot, and who agreed that the weather was favourable, the wind blowing in a direction away from the plaintiff's property, and to prevent it spreading thereto the defendant burnt up the stubble, &c., around the plaintiff's property. The fire was set out on Monday, the wind continuing in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep watch over the fire. On Thursday morning there were indications of a change of wind, and the defendant sent his son to watch the fire, but when the latter arrived on the ground the wind was blowing a heavy gale, at the rate of from thirty-five to forty miles an hour, and the fire communicated to the plaintiff's property, which was destroyed, and it appeared that even if the defendant had been watching he could not have prevented the fire spreading.

Held, that the defendant was not liable for the damage sustained by the plaintiff. *Murphy* v. *Dalton*, 541.

FOREIGN LAW.

See HUSBAND AND WIFE, 3.

FORGERY.

See EXTRADITION.

FRAUDULENT CONVEYANCE.

See BANKRUPTCY AND INSOLVENCY, 2—CHAMPERTY AND MAINTENANCE.

FRAUD AND MISREPRESENTATION.

1. *Action on note—Partial failure of consideration—Sale of goods—Misrepresentation—Rescission of contract.*]—K., acting as agent for the plaintiff company, his wife, but which was in reality a trading name for his own business, fraudulently represented that certain goods manufactured by himself possessed curative or medicinal qualities and were sale

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able, and thereby induced the defendant to buy a quantity, and to give his promissory note therefor.

In an action on the note by the plaintiff company, the defendant counter-claimed for part of the amount of the note, which he had been obliged to pay to an innocent holder. The jury found that the articles sold were valueless: that defendant had been induced to purchase by the misrepresentations, and that he had received no consideration for the note, except as to some of the pads, which he had sold.

Held, that the plaintiff could not recover, for the partial failure of consideration, being for an amount capable of definite computation, could be set up as an answer *pro tanto*, and the consideration received had been more than covered by the sum paid.

Held, also, that the defendant was entitled to recover against the plaintiff company the damages sustained, without having previously offered to return the goods.

It was objected that the representation had not been found to be false to the knowledge of the plaintiff company; but *Held*, that the question as put having been assented to by counsel on both sides, as one the finding on which would be decisive, it was too late to take this objection; and the effect of the finding must be taken to be that defendant knew the representation, which was as to goods of his own manufacture, to be false. *Star Kidney Pad Company and George A. Walton* v. *Greenwood*, 28.

2. *Setting aside conveyance—Influence — Confidence —Constructive fraud—Onus of proof.*]—Action to set aside a conveyance obtained from an old woman, who was deaf and unable to write, and who had no relatives or friends, by the Reeve of the Township in which she lived, and who was well known as a Justice of the Peace and an active, shrewd business man engaged in many enterprises. The plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him, she however having sworn in her evidence that she never placed any dependence on him. The plaintiff's case was closed, and it was contended that the *onus* was now on the defendant to show that the transaction was a righteous one. The defendant declined to call any witnesses, and plaintiff's action was dismissed.

Held, on motion for a new trial (sustaining the judgment of Proudfoot, J.,) that the *onus* was not on the defendant, and that the plaintiff must prove her case.

Semble, the mere existence of confidence is not enough; influence must be proved, and is not to be presumed from the existence of confidence. *Wallis* v. *Andrews*, 16 Gr. 637, followed. *McEwan* v. *Milne*, 100.

3. *Deed — Misrepresentation.*] — Where it appeared that the defendant, a man of education and well acquainted with commercial business, had executed a certain agreement and bond to pay certain sums of money in certain events to the plaintiffs; but he alleged that they had been executed by him under a misunderstanding as to their effect, and relying on misrepresentations made to him as to this, not by the plaintiffs but by one of his joint obligors and parties to the agreement, and made, moreover, a month before execution of the documents, which he executed without reading them over, or taking any legal advice

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thereon; but the plaintiffs had not, either by themselves or any agent, made any representations to the defendant as to the effect or contents of the said documents:

Held, after a review of the authorities, that the defendant was bound by the execution of the documents, and was liable upon them, according to their term and purport. *The Merchants Bank of Canada* v. *Moffatt*, 122.

4. *Promissory note—Syndicate—Partnership—Sale of land—Price of land — Misrepresentation — Rescission.*]—Action on a promissory note for $1000 made by the defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate formed under an agreement which stated that "We the undersigned hereby covenant, promise, and agree with each other to form ourselves into a syndicate," to purchase a lot of 300 acres of land in Manitoba from M., for $50,000, divided into 15 shares of $3,333,33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, &c., to be borne proportionately by each member according to his share, appointing M. trustee to form the syndicate, and on completion the members were to appoint M., or any other person trustee to carry out the objects of the syndicate. The syndicate was completed, and the defendant appointed trustee, and a conveyance of the land made to him It appeared that M. by fraudulently representing to defendant that the price he M. paid for the land was $50,000, whereas it was only $31,000: that it was well worth $50,000; was suitable for being laid out in town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resided in Toronto, and had no knowledge, or means of acquiring knowledge, but relied upon the truth of these statements, to enter into the agreement. The defendant in consequence asked to have the agreement rescinded and the note delivered up to be cancelled.

Held, that by reason of the misrepresentation the defendant would have been entitled to be released from the contract had he been solely concerned, but that the defendant was not in a position alone to put an end to the agreement, for that the so-called syndicate was in fact a partnership, and all the members thereof were not asking for its rescission; and the defendant's remedy must be by cross-action or counter-claim for deceit. *Morrison et al.* v. *Earls*, 434.

See CHAMPERTY AND MAINTENANCE.

GIFT.

See HUSBAND AND WIFE, 4.

GUARANTEE AND INDEMNITY.

Guarantee to firm—Death of partner—Effect of—Notice determining guarantee.]—By an agreement under seal made between C. & Co., a firm of brewers, consisting of C. and his two sons, of the first part, Q. of the second part, and defendant of the third part, the defendant agreed to become responsible in a continuing guarantee of $5000 to C. & Co., or the members for the time being constituting the firm of C. & Co., for beer to be supplied to Q., so long as C. & Co. should desire to sell and Q. to purchase the same. On the 6th September, 1881, C. died, Q.'s liability then being $5248. By C.'s will he appointed his said two sons his execu-

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tors. They continued to carry on the business, and shortly afterwards entered into partnership under the same name, C. & Co. On the 2nd of October, 1882, the assets of the then firm were conveyed to one D. in trust for a joint stock company to be formed, and on its incorporation, on the 13th of December following, the assets were conveyed to the company, the present plaintiffs. Q. continued to be supplied with beer, and on the 6th June, 1883, when this action was commenced, the indebtedness was over $5080, but since C's death more than the then liability, $5248, had been paid by Q. In an action against defendant to recover the amount of his guarantee of $5000,

Held, that by the death of C a change of the firm was made whereby the defendant was released from any further liability under the agreement than for the amount then due, which the evidence shewed had since been paid.

On the 5th April, 1882, in consequence of Q. falling into irregular habits, defendant notified the then firm not to supply Q. with any more beer. The evidence shewed that the firm were aware that Q.'s business was not in a satisfactory state.

Semble, that this would put an end to defendant's liability, if not before terminated, notwithstanding the guarantee was under seal, and that the amount due was not paid or tendered at the time of notice. *The Cosgrave Brewing and Malting Co. of Toronto* v. *Starrs*, 189.

See EVIDENCE, 1.

HAWKERS.

See MUNICIPAL CORPORATIONS, 3.

HIGHWAY.

See WAY.

HUSBAND AND WIFE.

1. *Husband and wife — Tort — Joint liability — Separate estate.*]— Where the plaintiff proved a joint wrongful occupation and conversion of the rents and profits of his land by a husband and wife,

Held, that the husband and wife were jointly liable to the plaintiff, and the plaintiff was entitled to recover against the separate property of the wife, for it could not be inferred that the latter was acting under the direction or coercion of her husband so as to exempt her from liability. *Barker* v. *Westover et al.*, 116.

2. *Married woman—Next friend —Separate estate—O. J. Act—Rules* 97, 494—*Pending business.*]—In an action by a married woman commenced before the O. J. Act, it was held, on demurrer, that the plaintiff must sue by next friend, and an order was made accordingly. Subsequently, and after the passing of the O. J. Act, the next friend became insolvent. On an application to the Master in Chambers for the appointment of a new next friend, he made an order for such appointment, which was affirmed on appeal by PROUDFOOT, J., he holding that he was bound by the previous order: that even although under the O. J. Act, Rule 97, a married woman may sue in respect of her separate estate without a next friend, by Rule 484 this was not to apply to pending business.

On appeal to the Divisional Court the judgment of PROUDFOOT, J., was affirmed.

Per ROSE, J., that there was no evidence to shew that the woman had separate estate when the order appealed from was made. *Webster et al* v. *Leys*, 599.

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3. *Foreign law — Post nuptial settlement—Contract—Lex domicilii —Community property—Concurrent suit in Quebec—Locus of Bank stock —Banking Act* 1871*—Lex loci rei sitæ—Estoppel—Void trust deed.*]—A., being domiciled and carrying on business in Montreal, in 1875, executed at Toronto, where he was temporarily resident, a deed entered into between B., his wife, of the first part, and himself and C. of the second part, whereby A., B. and C. covenanted that certain Ontario Bank stock, which had been bought with certain moneys received by B. after her marriage, and which were then held in the name of A. in trust for B., should be duly transferred into the names of C. and A., and that this stock, as well as a sum of $4000, which B. had received from her mother at the time of the marriage, and which had been put into the commercial business of A. in Montreal, should, with $2000, the value of some furniture received by B., be held by C. and A. in trust to invest as therein mentioned, and to permit B., during her life, to receive the income to her own use, and after her death in trust for the children of the marriage, and in default of surviving issue over. In 1877 the bank stock was transferred in Montreal in trust pursuant to the deed. The head office of the Ontario Bank is in Toronto, but they have a stock registry in Montreal for convenience.

Held, that inasmuch as all the property settled appeared on the evidence to have become, and to have been "community property," and inasmuch as, although the bank stock must be held to have been at the time of the execution of the deed and of the transfer, situate in Ontario, yet the deed not purporting to be a complete transfer of the property in the stock, but containing only a covenant to transfer, which was consummated afterwards, not in Ontario, but in Montreal, the case fell under the law of the owner's domicile, and applying that law, there was not a good transfer by the husband of the right of property in the stock.

Held, also, as to the money, that being at the time of the deed in Quebec, the validity of the transfer of it must depend on the law of that province, under which the transfer both as to the wife and the children was void; for even if the wife's signing the deed amounted, as contended, to an acceptance by the children, it was only the acceptance of a promise and not of a gift.

Held, on the whole case, that no property passed into the hands of the trustees by the transactions set forth.

When the husband's domicile is in the Province of Quebec, and there is no ante-nuptial settlement, the law there upon marriage makes a settlement of the property of the parties, wherever situate, including that acquired subsequently, though the ceremony of marriage may take place out of the province. This is called "community property," and it is not in the power of the husband, during the coverture, to make a gift of it, directly or indirectly, to his wife, although he is the administrator of it, and may make gifts to the children, if the gifts are properly accepted.

The fact that a suit for the same matter is pending in Quebec cannot be urged as a plea in bar to a suit for the same cause in this province. *Hughes* v. *Rees*, 654.

4. *Replevin—Detention—Conversion—Evidence—Married woman—Gift by husband—Separate estate—R. S. O. ch.* 125.]—The plaintiff was executor of H. D., widow of T. D.,

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whose executor the defendant was. The plaintiff claimed a piano in the house lately occupied by the widow, of which the defendant had the key. At an interview between the plaintiff and defendant the latter claimed the piano, but said he was willing to leave the question of the ownership to a person to be named. The plaintiff left him, promising to write, and afterwards did write, saying he had decided to bring the matter before the proper Court. Subsequently the plaintiff's solicitor wrote the defendant offering to release all demands upon the defendant giving up all claim to the piano, to which the defendant's solicitor answered that he could not comply with the demand. The defendant commenced an action in which the title to the piano would come in question. The plaintiff's solicitor having again written to ask whether possession of the piano would be given, the defendant's solicitor wrote that it was perfectly safe where it was, and that the action commenced would decide the question. He also wrote that the plaintiff would not have to put the law in motion.

Held, in an action of replevin, assuming the piano to be the plaintiffs, that there was no evidence of trespass or conversion to support the affirmative of the issue, that the defendant did not take or detain the piano.

The evidence shewed that the husband had purchased the piano, and had made a present of it to his wife by putting it in the house where they lived, and subsequently recognizing her right to it.

Held, that the piano did not form part of the wife's separate estate, as the husband could not at common law make a gift *inter vivos* of this description of property, so as to prevent its passing to his personal representatives; and that there was no evidence of intention on his part to constitute himself a trustee of the piano for his wife. *Schaffer* v. *Dumble*, 716.

See ESTOPPEL, 2—WILL, 8.

IMPROVEMENTS.

Occupation rent — Improvements under mistake of title.]—No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor* v. *McGregor*, 617.

See SALE OF LAND, 2.

INDEMNITY.

See EVIDENCE, 1—GUARANTEE AND INDEMNITY—PRACTICE.

INJUNCTION.

Copyright — License — Writing — Injunction.]—To create a perfect right under 38 Vic. ch. 88, C., there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but without any writing there may be such conduct on the part of the owner, in assenting to and encouraging the infringement complained of, as to disentitle him to relief in equity by way of injunction. *Allen* v. *Lyon*, 615.

See ESTOPPEL, 1.

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INSOLVENCY.

See BANKRUPCY AND INSOLVENCY.

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INSPECTORS.

Principal and surety — General Inspection Act, 1874, 37 *Vic. ch.* 45, *secs.* 6, 11, *D.—Liability of inspectors' sureties for deputy's default—Disputes within sec.* 11—*Notice of action.*]—The defendant M. was appointed an inspector under the General Inspection Act, 1874, 37 Vic. ch. 45, D. By sec. 6 each inspector and deputy-inspector is required to give security by bond to the Crown for the due performance of the duties of his office, and such bond shall avail to the Crown and to all persons aggrieved by any breach of the conditions thereof. By sec. 7 the inspectors are to appoint the deputy-inspectors, who are to be the deputies of the inspector for all the duties of his office, and their official acts shall be held to be his acts, and he is to be responsible therefor as if done by himself. A bond was given by the inspector, and the other defendants, as sureties for the faithful discharge of the duties of the said office, and for duly accounting for all moneys and property. A similar bond was given by the deputy-inspector. The deputy-inspector made a faulty inspection, and the plaintiffs purchased, relying thereon, and were damnified.

Held, under the statute and the bond given thereunder the inspector M.'s sureties were liable for the default of the deputy; and that the fact of the plaintiff having a remedy also on the deputy-inspector's bond was no answer to the claim against M.'s sureties.

Held, also, that the plaintiffs were persons aggrieved within the meaning of the statute.

Quære, whether the defendants were entitled to notice of action, but the question was not decided, as want of notice was not pleaded.

Sec. 11 provided that disputes between the inspector and the deputy-inspectors and owners, &c., of articles inspected through or relating in any respect to the same, were to be settled by the board of trade, or where there was no such board, by certain specified persons.

Held, that the claim in this action was not a dispute within this section. *Verratt* v. *McAulay et al.*, 313.

See ACTION.

INVESTMENT.

Vendors' and Purchasers Act, R. S. O., c. 109—*Power to invest—Exchange—Power to sell.*]—A., on his marriage, having conveyed a certain farm (which was then under contract of sale) to the trustee of his marriage settlement, provided that the purchase money, if the sale was carried out, and the land itself, if the sale was not carried out, was to be held subject to the trusts of the settlement, as follows: "And it is hereby agreed by and between the parties hereto, that on the payments of principal being made from time to time by the said J. J. V. (purchaser) the said S. B. H. (trustee) or any other trustee or trustees to be appointed as hereinafter mentioned, shall invest the same in such estate or securities, whether real or personal, and of what nature or kind soever as to him or them shall seem best, and most advantageous to the interest of the trust hereby created, and on such investments being from time to time realized, the same to reinvest in like manner." The settlement also pro-

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vided that if the said J. J. V. forfeited any right he had to the said real estate it should vest in the trustee for the purposes and uses of the said trusts thereinbefore mentioned as regards the purchase money, *with full power to lease or sell* the same, &c.

The purchaser, J. J. V., having failed to carry out his purchase, and having relinquished any claim he had to the farm, the trustee subsequently exchanged the farm for a city lot.

On an agreement for a sale of the city lot, the purchaser, declined to carry out the purchase on the ground that the trustee had no power under the settlement to sell and convey. On an application by the trustee under the Vendors and Purchasers Act, R. S. O., ch. 109, it was

Held, that there was a direction to invest in real estate, and, following *Joint Stock Discount Co.* v. *Brown*, L. R. 3 Eq. 139, that "investing in" means the "actual purchase," and the purchaser's objections were overruled, with costs. *Re Barwick and Lot Three on the North Side of King Street in the City of Toronto on the Plan of the Jail and Court House Block*, 710.

JUDGMENT.

Res Judicata.]—The plaintiff in this action having a contract with a township corporation for constructing drains, the defendant occasionally cashed cheques or orders on the corporation for him, and was also in the habit of supplying him with goods, on account of which the plaintiff gave him two orders. The defendant having sued the plaintiff on the common counts, the plaintiff pleaded payment. By the particulars in that action the now defendant claimed for goods sold and money lent, and gave credit for one item of $300, received upon an order for that sum. He had a verdict for $920, and the now plaintiff afterwards brought this action against him to recover back a sum of $300, which he alleged had been received by the defendant on another order, but had not been credited in the former action.

Held, that the plaintiff was estopped by the former judgment.

Sedden v. *Tutop*, 6 T. R. 607; *Chisholm* v. *Morse*, 11 C. P. 589, distinguished. *Sorenson* v. *Smart*, 678.

Affirmance of, by discontinuance—*See* APPEAL.

See EVIDENCE, 1—CROPS.

JUDICATURE ACT.

See HUSBAND AND WIFE, 2.

JURISDICTION.

See EVIDENCE, 3 — JUSTICE OF PEACE.

JUSTICE OF PEACE.

Criminal Law—Misdemeanour—Jurisdiction of justice — 46 *Vict. c.* 15, D.]—Justices of the Peace out of session have no jurisdiction to try misdemeanours in a summary manner, except on special statutory authority; and it was *held*, therefore, that a conviction by two J. P.'s under 46 Vic., c. 15 D., for assisting in the distilling of spirits contrary to that Act, must be quashed. *Regina* v. *Carter*, 651.

See CONVICTION — TAVERNS AND SHOPS.

LANDLORD AND TENANT.

See MORTGAGE, 1.

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LIBEL.

See DEFAMATION.

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LIEN.

See SALE OF LAND, 1.

LIQUOR LICENSES.

See TAVERNS AND SHOPS.

MANITOBA.

See EVIDENCE, 3.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE, 3—INVESTMENT.

MASTER AND SERVANT.

Tramway—Accident—Negligence of fellow servant.]—The defendants, the proprietors of extensive mills, constructed a tramway to carry lumber from one end of their yard to the other, the cars used being drawn by a steam engine. There was no passenger car, but the employees were permitted to be carried on the road. The track was laid on ties placed on wet ground, very little ballasting was done, and none where the accident happened, and there was other evidence of faulty construction. The plaintiff was going to his work on one of the cars, when it was thrown off the track by reason of a misplaced rail, caused by the defective construction. The defendants employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow servant of the plaintiff, and it was shewn that B. neglected to replace the rail, though he was aware of its being displaced.

Held, that the accident having been caused by the negligence of a fellow servant, the defendants were not liable.

Quære, apart from this, whether the plaintiff could have recovered, he being aware that the road was without ballast, the defects in construction being patent, and such tramways being known not to be substantially built or of a permanent character. *McFarlane* v. *Gilmour et al.*, 302.

MORTGAGE.

1. *Right of tenant to redeem—Waiver—Confirmation of lease by mortgagee—Action of redemption—Costs—Tender after action commenced.*]—*Held*, over-ruling the decision of WILSON, C. J. C. P., that the right of a tenant for years to redeem a mortgage is absolute, and the Court has no discretion to grant or refuse redemption.

Held, accordingly, in this case, where a tenant for years under a demise made subsequently to a mortgage, sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the present plaintiff was not a party, the plaintiff had a right to redeem in the event of the mortgagee refusing to accept him as a tenant.

Held, also, that although the plaintiff had at one time, before commencing this action, offered to give up possession on payment of $40, yet inasmuch as this offer had not been accepted by the defendant or acted upon at any time, the plaintiff had done nothing to waive or prejudice his right of redemption as such lessee by such offer.

After action brought, however, the

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defendant offered to confirm and adopt the plaintiff's lease, though before action she had refused to do so, and had, indeed, sold the property to a purchaser, without making the sale subject to the lease, of which, nevertheless, the purchaser had full notice.

Held, (per WILSON, C. J. C. P.,) that the lateness of the defendant's assent to affirm the lease only affected the costs; she had done nothing that debarred her from now confirming the lease of which the plaintiff was still claiming the benefit, and accepting the plaintiff as tenant, on behalf of herself and as representing the purchaser, and as she was willing now so to do, the plaintiff could not redeem.

Held, also. that in an action for redemption, if tender is made after action commenced, it must be enough to cover the costs of the plaintiff already incurred; and if it be so, the plaintiff is bound to accept it, and any litigation afterwards must be at his expense.

Per WILSON, C. J. C. P.—It may be said as a rule that every one having an interest from the mortgagor in the land can redeem the mortgagee. *Martin* v. *Miles*, 404.

2. *Power of sale—Taking security for purchase money — Multiplicity of actions — Costs — R. S. O. c.* 103.] — After default made in a mortgage, the mortgagee took proceedings under the power of sale and brought an action of ejectment and an action on the covenant. He died during the progress of these proceedings. In the two actions judgments were recovered against the mortgagor and the lands were sold under the power of sale, the purchase money being paid partly in cash and partly by a mortgage for the balance. This mortgage was subsequently turned into cash at a less amount than its face value, and in addition solicitors' costs for doing so were charged.

In an action for an account by the mortgagor against the mortgagee's executors, who had continued the proceedings, it was

Held, (reversing the judgment of PROUDFOOT, J.), that the defendants were entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but that they must account for the purchase money as cash at the time of the sale, and that they could not charge the mortgagor with the discount on the mortgage or the costs of turning it into cash; and that they were entitled to all three sets of costs, those of the two actions being given to them by the judgments they had obtained, and those of exercising the power of sale under the statutory form of mortgage as a matter of contract, they being made a first charge upon the proceeds of the sale: R. S. O. c. 103. *Beatty* v. *O'Connor*, 731.

3. *Action for account—Small balance—Costs.*]—In an action for an account by a mortgagor, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of $10 was found in his favour. Plaintiff having made charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him, and certain special matter pleaded by the defendants being found against them: *Held*, neither party entitled to costs. *Beatty* v. *O'Connor*, 747.

See CHAMPERTY AND MAINTENANCE—CROPS—EXECUTORS AND ADMINISTRATORS.

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MORTMAIN.

See WILL, 7.

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MUNICIPAL CORPORATIONS.

1. *Municipal Act — Drainage — Award—Report of Surveyors.*]—The report and plans of the surveyor made under R. S. O. ch. 174, secs. 529 *et seq.*, preparatory to the undertaking of drainage works affecting two municipalities, should be so specific as to indicate what is intended to be done in respect of which the servient municipality is to bear any expense.

The property owners petitioned that a certain drain should be deepened and enlarged. The surveyor reported that the work to be done would extend from a certain road in the township of Chatham to a little beyond a certain road in the township of Dover, but did not shew the point where it would begin or the point where it would end; that the work would improve the drain, and would afford a much needed outlet to all the lands draining into a certain stream; and that the drain would benefit lands in both townships. He then gave an estimate of the cost, amounting to $1096, and stated that the drain when so completed should be kept in repair by Chatham, at the joint expense of Chatham and Dover, and the lands in Dover assessed therefor; said municipalities and lands paying in the same relative proportion as for the work, and he assessed the cost of the work "as in the annexed schedule."

The by-law passed by Chatham for doing the work recited this report, adopted it, and provided for raising the money by assessment of the following rates, and then followed a schedule of assessment on lands and roads in Chatham "for the enlargement of Little Bear Creek drain," &c., and another assessment on lands and roads in Dover "for the benefit for outlet and for constructing a drain to carry off water brought down on lands to damage them." These schedules (which were assumed to be the schedules returned by the surveyor) shewed the lots and roads in each township to be assessed, and the sums assessed against each.

The township of Dover appealed, and this assessmeut having been confirmed by the award of arbitrators, *Held*, that the report was defective in not stating that the work was to be performed and maintained at the expense of both municipalities, and in what specified proportions, and in not shewing definitely the *termini* of the work; and because, taking the plans, profile, and report together, the extent and character of the work to be done in Dover was not sufficiently shewn.

D., one of the arbitrators, having signed the award, not in fact concurring in the apportionment between the lands and roads in Dover, but holding that this was for the Court of Revision to remedy, *Held*, that this was the duty of the arbitrators, and therefore the award was bad, as D. did not in fact concur in affirming the assessment.

Quære, however, as to the duty of arbitrators in this respect: *Corporation of Thurlow* v. *Corporation of Sidney*, 1 O. R. 249, questioned.

Quære, whether any obligation, on the part of another municipality, to pay part of the cost of the work arises, where the draining is not from, but to such municipality, as, in this case, to Dover from Chatham. *In re arbitration between the Corporation of the Township of Dover East and West*

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and the Corporation of the Township of Chatham, 325.

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2. *Action for penalty under Municipal Act of* 1883, *sec.* 167—"*Person aggrieved.*"] — The plaintiff was a ratepayer of the township and a candidate for the office of reeve, but was not elected. He brought this action under sec. 167 of the Consolidated Municipal Act, 1883, against a deputy returning officer, who was also clerk of the township, to recover the penalty for a contravention of sections 154, 142, and 245 of the Act. There was no allegation that the plaintiff lost his election, or any votes, or suffered any personal grievance by the acts complained of.

Held, on demurrer to the statement of claim, that the plaintiff was not, by reason only of being a candidate, a "person aggrieved" within sec. 167, and that he was thereupon not entitled to recover.

Held, also, that an action for the penalty under that section lies only for a breach of sections 118 to 166, inclusive, of the Act. *Atkins* v. *Ptolemy*, 366.

3. *Conviction—Hawkers and pedlars—Taking orders for goods—Subsequent delivery.*]—The defendant, who was a traveller for a tea dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then got the tea which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited "hawkers or petty chapmen and other persons carrying on petty trades" from selling goods in the manner pointed out by the Consolidated Municipal Act, 1883, sec. 495 (3).

Held, that the defendant was not a "hawker," nor was the word pedlar used in the Act, and if he was a "petty chapman or person carrying on a petty trade," the conviction could not be supported, for he "was not carrying goods for sale."

Held, also, that a municipality cannot pass a by-law prohibiting unlicensed traders from sending out agents to take orders from private persons for goods, and subsequently delivering the goods. *Regina* v. *Coutts*, 644.

See ESTOPPEL, 1—WAY, 1-3.

NEGLIGENCE.

See WAY, 1—MASTER AND SERVANT — RAILWAYS AND RAILWAY COMPANIES, 2—FIRE.

NEW TRIAL.

See DEFAMATION—EVIDENCE, 3—FRAUD AND MISREPRESENTATION, 1.

NEXT FRIEND.

See HUSBAND AND WIFE, 2.

NORTHERN RAILWAY CO.

See RAILWAYS AND RAILWAY COMPANIES, 3.

NOTICE OF ACTION.

See INSPECTORS—PARLIAMENT.

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OCCUPATION RENT.

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See IMPROVEMENTS.

PARLIAMENT.

Ontario Election Act, R. S. O. ch. 10 — Algoma Election — Refusing Votes—Liability of Deputy Returning Officer.] — At the election of a member of the Legislative Assembly of Ontario, in and for the District of Algoma, six persons tendered their votes and offered to take the necessary oaths required by the Election Act, R. S. O. ch. 10, to entitle them to vote. The Deputy Returning Officer refused the vote of one because he could not produce his title deeds, and of the others because they had no houses on their lands. In an action for penalties for refusing the votes, four of those rejected offered to take the vote prescribed and described the property on which they claimed to vote.

Held, that the duties of a Deputy Returning Officer in taking the votes are ministerial, (save where he suspects personification, want of qualification, &c. in which case he should exercise his judgment as to administering the oath); and that having refused the tendered votes of those who had sufficiently shewn their right to vote, he had refused to perform an obligation or formality required of him within sec. 180, and was liable to the penalties prescribed by the Act.

One Anderson, when tendering his vote, was not able to describe his land accurately, but stated that it was in one of three townships which he named. His vote was refused on the ground that he had no house on his land.

Held, HAGARTY, C. J., doubting, that the Deputy Returning Officer was liable for the penalty for refusing this vote.

Held, also that the point as to whether the polling division in question was within Ontario or not, could not be raised by the Deputy Returning Officer acting under a writ for an election in Ontario.

Held, also, that notice of action was not necessary, nor was it necessary to aver or prove notice.

Held, that where a foreign commission had been opened before trial for the convenience of parties, it was too late at the trial to object to the mode of its execution. *Walton* v. *Apjohn*, 65.

PARTIES.

See ESTOPPEL, 1—HUSBAND AND WIFE, 2—PRACTICE—WILL.

PARTIAL FAILURE OF CONSIDERATION.

See FRAUD AND MISREPRESENTATION, 1.

PARTITION.

Sale of life estate—Prohibition—R. S. O. ch. 101.] — The Crown, by letters patent, granted land to F. B. for life, with remainder to her children, the petitioners, as tenants in common in fee simple. On a petition presented to the Judge of the County Court under R. S. O. ch. 101, for partition or sale, a sale was ordered. A motion for a pro-

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hibition was made on behalf of F. B., the tenant for life.

Held, ARMOUR, J., dissenting, that the case did not come within the Partition Acts, and that there was no power to compel a sale of the lands as against the tenant for life. A prohibition was therefore ordered. *Murcar et al.* v. *Bolton et al.*, 164.

PARTNERSHIP.

See BANKRUPTCY AND INSOLVENCY, 1, 2—GUARANTEE AND INDEMNITY.

PARTY WALLS.

See WALL.

PEDIGREE.

See WILL, 7.

PEDLAR.

See MUNICIPAL CORPORATIONS, 3.

PLEADING.

See ESTOPPEL, 1—WALL—EXECUTORS AND ADMINISTRATORS—BILLS OF SALE AND CHATTEL MORTAGES, 1—HUSBAND AND WIFE, 3.

PLEDGE OF STOCK.

Margin speculation — Unauthorized sale by the pledgee.] — The plaintiff pledged with the defendants certain shares of bank stock as security for a loan, under an agreement in writing poviding that he was to keep up a cash margin of not less than 10 per cent. above the market price of the stock, and authorizing the bank, in the event of default, "to sell or dispose of the said security without notice, and to apply the proceeds in liquidation of the said advance."

The plaintiff claimed that before default was made the bank wrongfully loaned or sold his stock without his knowledge or consent; and that he was entitled to credit for the amount realized, and to a return of interest paid, and damages for being compelled to give additional security.

The defendants alleged that although the stock was transferred backwards and forwards by way of loan, it was never sold until default was made.

Held, that if the stock was sold before default made, such sale was *tortious*, and following *ex. p.* Dennison, 3 Ves. 552, that a *loan* of the stock was a *sale;* and that the plaintiff might elect either to claim damages, or affirm the sale and claim the proceeds and profits made by the bank; one element of the measure of damages being the highest point of the stock market between the conversion and the next default.

But that if default was made the bank was entitled to sell the stock without notice, but only for the purpose of liquidating the advance, and that credit must be given for the proceeds, at the current rates of the days on which the transfers were made, until all the shares had been transferred. *Carnegie* v. *The Federal Bank of Canada*, 418.

POWER.

See INVESTMENT—MORTGAGE, 2, 3—WILL, 6.

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PRACTICE (JUDICATURE ACT).

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Third party—Joinder—Relief as against.]—The action was upon promissory notes made by the defendants to the order of the B. C. L. Co., and by them endorsed to the plaintiff Co. The defendants claimed idemnity against the B. C. L. Co., and at the trial that company, against the protest of the plaintiffs, was made a third party defendant, and judgment was directed to be entered against them in favour of the defendants to idemnify the defendants against the judgment rendered against them at the suit of the plaintiffs.

Held, reversing the order making the company a third party, and the judgment against them, that third parties should be joined only before trial: that in any case they can be joined only for the purpose of binding them by the judgment against the original defendant; and that in order that the original defendant may obtain indemnity against a third party he must bring a separate action. *Lockie and the American Lumber Co.* v. *Tennant et al.*, 52.

PRINCIPAL AND SURETY.

See CHAMPERTY AND MAINTENANCE—GUARANTEE AND INDEMNITY.

Inspector's sureties liable for deputy inspector's default under 37 Vic. ch. 45, D.]—*See* INSPECTORS.

PRIVILEGED COMMUNICATION.

See DEFAMATION.

PRODUCTION OF DOCUMENTS.

See EVIDENCE, 2, 3.

PROGENY.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

RAILWAYS AND RAILWAY COMPANIES.

1. *Consolidated R. W. Act, 42 Vic. ch. 9, D.—Submission, rule of Court—Communications with arbitrators after evidence closed.*]—The railway company served a notice on H. under 42 Vict. ch. 9 (D.), offering a sum of money as compensation for land to be expropriated by them, and naming an arbitrator. H. served a notice on the company, naming his arbitrator, and the two appointed a third.

Held, that the notices of appointment of arbitrators and the appointment of the third arbitrator might be made a rule of Court under C. L. P. Act, sec. 201.

Re Credit Valley R. W. Co. v. *Great Western R. W. Co.*, 4 A. R. 532, distinguished.

After the evidence had been closed the construction committee of the railway company wrote a letter, addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the company before the award was made and by him to the umpire, but was not communicated to H. until after the award, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, and reduced the sum awarded, while the other two arbitrators swore it had no effect upon their finding

Held, that the award was bad.

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Remarks as to the caution to be observed by arbitrators in such cases in considering or acting upon such agreements made pending the arbitration. *Herring and Napanee, Tamworth, and Quebec Railway Company*, 349.

2. *Accident — Negligence — Contributory Negligence — Automatic bell.*]—The plaintiff, early in the morning, it not being quite daybreak and snowing a little, was driving a yoke of oxen and a pair of bob sleighs along the highway towards a railway crossing, sitting on the front bob, low down behind the oxen. The track crossed the highway at an acute angle, and was some seven feet above the highway which was graded up to it. At the crossing there were some bushes which obstructed the view, but before reaching them there was a view of the track for some sixty or seventy rods, but not while in the hollow at the bottom of the grade and sitting as the plaintiff was. The plaintiff, without looking out for the train, drove on to the track, and as he did so he saw a train approaching a few rods off, when he jumped to the off side and hit the off ox, causing it to spring aside and clear the track, but before he could clear himself he was struck by the train and injured. It was urged that the plaintiff by so doing voluntarily exposed himself to danger; but there was evidence to the contrary. The defendants' engine had an automatic bell. A witness stated that these bells no not always ring when the train is in motion. The engineer stated that the bell was in good order when the engine left the last station, but he could not say whether or not it was ringing when the accident happened; while a number of witnesses stated that the bell was not then ringing. The jury found that the bell was not ringing; that it was not in good order; and that the plaintiff exercised reasonable care. On motion to enter a nonsuit,

Held, WILSON, C.J., doubting, that there was evidence for the jury; that it could not be said that the findings were not justified, and the Court therefore refused to interfere. *Wilton* v. *The Northern Railway Company*, 490.

3. *Compulsory powers—Land—Material.*] — The Northern Railway Company of Canada have no power to take land compulsorily under sec. 7, sub-sec. 2, or sec. 9, sub-sec. 10, of the Railway Act of 1868, incorporated in their special Act 38 Vic. ch. 65, D., for the purpose only of obtaining therefrom gravel or other material for the repair or maintenance of their road, because these sections do not confer compulsory powers to take land.

Nor have they such powers under sec. 9, sub-secs. 38 and 39 of the Railway Act of 1879, because that Act does not apply to their railway.

Semble, even if compulsory powers are conferred by sec. 9, sub-sec. 10 (1868), the powers are to take materials only, not the land itself, as was attempted in this case. *Re Watson* v. *Northern Railway Company*, 550.

4. *Tender of compensation for lands taken — Omission to offer crossing until arbitration —Costs.*] —By sec. 9, sub-sec. 19 of the Railway Act, 42 Vic. ch. 9, D., where the sum awarded by the arbitrators as compensation for land taken and damages is not greater than that offered by the company, the costs of the arbitration shall be borne by the opposite party; but if otherwise, they

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shall be borne by the company; and in either case they may, if not agreed upon, be taxed by the Judge. On the 2nd August, 1883, the O. and Q. R. W. Co. served P. with the statutory notice of their intention to take three and forty-two hundredths acres of P.'s land, and tendered $3,635, as compensation therefor and for damages. This notice was abandoned and another notice given on the 23rd November, offering the same amount of money but reducing the quantity of land to one and fifty-four hundredths acres. The offer was refused and the arbitration proceeded with. The railway cut off P.'s land from the highway, and on the plan attached to the notice no crossing was shewn. The arbitrators met on the 27th December, when the company tendered a deed binding themselves to make and maintain a crossing. The arbitrators assessed the compensation and damages at $3,516, or $119 less than the amount tendered, but this was after taking into consideration the value to P. of the crossing.

Held, by reason of the offer to make the crossing after the arbitrators met, the tender then made was not the same as that made prior to the arbitration; and therefore the provisions of the section as to costs did not apply.

A rule for a mandamus to the county Judge to tax the costs to the company, and for a prohibition preventing him taxing P.'s costs, was refused.

Quære, whether the Judge has under the circumstances any power to decide as to costs at all. *The Ontario and Quebec R. W. Co.* v. *Philbrick*, 674.

See WAY, 3.

REGISTRY LAWS.

See EVIDENCE, 3.

REPLEVIN.

See HUSBAND AND WIFE, 4.

RESCISSION OF CONTRACT.

See FRAUD AND MISREPRESENTATION, 4.

RETURNING OFFICER.

See PARLIAMENT — MUNICIPAL CORPORATIONS, 2.

RIGHT OF REPLY.

See EVIDENCE, 3.

SALE OF GOODS.

Contract—Sale of goods—"Ordinary sections"—Right of selection—Parol evidence — Admissibility — Usage of trade.]—The plaintiff, in the beginning of January, 1880, had purchased through C. & G. of Montreal, a quantity of rails, and requiring 2000 tons more, negotiations were entered into between H., the plaintiff's agent, C. & G., and the defendant, which resulted in a note being signed, on the 14th January, by C. & G. addressed to the defendant, advising him that they had sold to the plaintiffs on the defendant's account 2000 tons of rails (56 lbs.) at £8 18s. 9d. stg., per ton, payment to be made in London against documents, and credit to be there opened with approved bankers in favour of defendant's agent. The defendant, who was then in Montreal, signed a sale note in similar terms to the above. The sale was immediately communicated to the plaintiffs, who signed a

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confirmatory note, adding the words that the make should be either Ebbwvale or Moss Bay, and wrote across the face that the rails were to be 56 lbs., "ordinary section and specification." This confirmatory note was not communicated to the defendant until after action brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in, and not manufacturers of rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbwvale, for the manufactare of rails of a section known as "Hamilton and North Western," and which came within the terms, "ordinary section," by which a number of different kinds of sections were embraced; and these were the rails which the defendant intended delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary section," and when they discovered the defendant's rails were Hamilton and North Western, they endeavoured to get defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and paid for under the credit, and it was not till afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had the right to name the section.

Held, that even if the confirmatory note were embraced in the contract, it did not give the plaintiffs the right of selection; that parol evidence was not admissible to add such a term to the contract; and that the evidence failed to establish any usage giving such right, especially as the parties were dealers and not manufacturers, and in view of the plaintiff's conduct in the matter; and that the contract was therefore performed by the section delivered. *Page et al.* v. *Proctor*, 238.

See FRAUD AND MISREPRESENTATION, 1.

SALE OF LAND.

1. *Vendor's lien.*]—W. S., being indebted to R. & Co., who held a saw mill and timber license, &c., belonging to W. S., in their own name, as security therefor, wrote to them that he had arranged with his son W. A. S. for the transfer to him of his business, and upon his arranging with R. & Co. the liability of W. S. that W. A. S. was entitled to be placed in the position of W. S. with respect to the property held by R. & Co., and that on settling that liability they were to convey to W. A. S. By a subsequent agreement W. S. agreed with W. A. S. that the latter was to pay off the liabilities of W. S. in two years, upon which W. S. was to transfer to him other lands than those held by R. & Co. Subsequent advances were made by R. & Co. to W. A. S. The defendants B. afterwards paid off R. & Co., and R. & Co. and W. A. S. joined in conveying the property in question to the defendants B., who subsequently made advances to W. A. S. and to his assignee, on his becoming insolvent. To some of these advances the plaintiffs, the executors of W. S., agreed by instrument under seal, stipulating that it should not affect their lien as against any one but the defendants B. They then claimed a lien on the lands for the amount of

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the liabilities of their testator W. S., which W. A. S. had agreed to pay as the consideration for the transfer to him of the business.

Held, affirming the judgment of GALT, J., CAMERON, J., dissenting, that no such lien existed, even if the defendants had had notice of the transaction between W. S. and W. A. S. *Scott* v. *Benedict*, 1.

2. *Property sold by the acre—Misdescription in the acreage—Payment for the overplus—Improvements.*]—Property described in the advertisement and conditions of sale as "the east part of lot No. 9, in the 5th concession of Fenelon, 100 acres, &c., &c.," was sold at $31 per acre, and in the conveyance to the purchaser, was described as "100 acres more or less" The east part of the lot really contained 124 $\frac{68}{100}$ acres, which neither party knew at the time of sale, but the purchaser became aware of it just after the sale and before he got his conveyance, while the vendors did not find it out until long after.

Held, that the purchaser must pay for the overplus at the same rate per acre that he purchased the rest, with interest, or deliver up possession of the same, but that if he should elect to deliver up possession, he was entitled to be paid for any permanent improvements. *Cottingham* v. *Cottingham*, 704.

See FRAUD AND MISREPRESENTATION, 4—INVESTMENT—MORTGAGE, 3.

SEDUCTION.

See COSTS, 2.

SETTLEMENT OF SUIT.

See ATTORNEY AND SOLICITOR, 2.

SET-OFF.

See CORPORATION.

SOLICITOR.

See ATTORNEY AND SOLICITOR.

STATUTE OF DISTRIBUTIONS.

See WILL, 8.

STATUTE OF LIMITATIONS.

See WAY, 2.

STATUTE OF USES.

See ESTATE.

STOCK.

See PLEDGE OF STOCK—CORPORATION.

TAVERNS AND SHOPS.

1. *Liquor License Act—Conviction—Two offences—One penalty—Locality of offence.*]—The defendant was convicted under section 41 of the Liquor License Act, R. S. O. ch. 181, for selling liquor without a license, and under section 46, for allowing liquor sold by him to be consumed on the premises; and one penalty was inflicted "for his said offence."

Held, bad, in not shewing for which offence the penalty was imposed.

Held, also, that it was bad in not showing the place where the offence was committed. *Regina* v. *Young*, 184*a*.

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2. *Liquor License Act—R. S. O. ch.* 181—*Convictions for second and third offences—Locality of offence—Punishment.*]—Convictions imposing the increased penalties for second and third offences, under the Liquor License Act, sec. 52, are bad unless proceedings have been taken for the first offence.

In proceedings for selling liquor on Sundays, it was not shewn that the defendant had a license, or that the place in which the liquor was sold was one where intoxicating liquors were or might be sold by wholesale or retail, pursuant to section 43 of the Act.

Held, that the conviction was bad.

Held, also, that the punishment for offences against section 43 must be either imprisonment with hard labour or a fine; and that such imprisonment in the event of non-payment of the fine could not be awarded, but only imprisonment without hard labour. *Regina* v. *Rodwell*, 186.

TENANT FOR LIFE.

See WILL, 4.

TENANCY IN COMMON.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

THIRD PARTY,

See PRACTICE (JUDICATURE ACT).

TIMBER.

See DEED—WILL, 4.

TITLE.

See ESTATE—ESTOPPEL, 2.

TRESPASS AND TROVER.

See HUSBAND AND WIFE, 4.

TRIAL.

See FRAUD AND MISREPRESENTATION, 1.

TRUST AND TRUSTEES.

See ESTATE—EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE, 3—WALL.

USAGE.

See SALE OF GOODS.

VENDOR'S LIEN.

See SALE OF LANDS, 1.

VENDORS AND PURCHASERS ACT.

See ESTATE—INVESTMENT.

VERDICT.

See FRAUD AND MISREPRESENTATION. 1.

VENDORS' LIEN.

See SALE OF LAND, 1.

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WALL.

Erection on plaintiff's land—Damages — Trustee — Parties.] — The plaintiff was the surviving trustee under the will of one J. B. of certain land, on which was erected a two storey brick house, the westerly wall of which formed the boundary of one L.'s land, immediately adjoining the plaintiff's on the west. L. leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two stories higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant.

Held, that the plaintiff under the O. J. Act, Rule 95, was entitled to maintain an action as representing the estate, without making the *cestui qui trustent* parties; and that he was entitled to a decree that the defendant should desist from further using the wall built on the plaintiff's wall, or the ends of the joists which he had placed therein, but not to a direction that the defendant should pull down such wall, which the defendant had not erected.

Held, also, that the plaintiff was entitled to recover as damages the expense of removing such wall, so erected on his wall, and the damages occasioned by his wall being weakened, but not damages for the loss of a sale of the property by reason of the erection. *Brooke* v. *McLean*, 209.

WASTE.

See WILL, 4.

WAY.

1. *Municipal corpopations—Drain—Accident—Negligence—Notice.*]—After a block pavement had been laid down on Queen street, one of the most travelled streets in the city of Toronto, a drain about two and half feet wide was opened out across the street to the street railway track, and then tunnelled under the track. It was filled in with loose earth not rammed down. On Sunday it rained, in consequence of which the earth was washed down and sunk, leaving a very dangerous hole. On Tuesday or Wednesday some residents in the neighbourhood, seeing its dangerous condition, took some cedar posts and placed them lengthwise in the hole. On Thursday night, about nine o'clock, it being very dark and no light at the drain, and the street lamps not being sufficient to shew it, the plaintiff, his wife, and another person, were driving along the road, and on reaching the drain the horse stumbled and fell, whereby the plaintiffs were pitched out of the waggon and injured. The jury found that the accident was caused by the wheels of the waggon coming in contact with the drain. The defendants contended that it was caused by the waggon coming in contact with the posts, and as they had not put them there they were not liable. It was agreed on the argument in the Divisional Court that the Court might draw inferences of fact as a jury, and give such judgment as in its view the evidence might warrant.

Held, that on the evidence the defendants must be deemed to have had notice of the condition in which the drain was at the time of the accident; and therefore it was immaterial whether the accident was caused by the drain or posts.

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Semble, that as the manner in which the drain was filled in made it certain that in the event of a rain the earth would sink, the defendants must be assumed to know that some one to protect the public would place posts or other covering over the hole; and were liable for any injury resulting. *Duck et ux.* v. *The Corporation of the City of Toronto*, 295.

2. *Way—Short Form Act—Continuous easement—Way of necessity—Highway—Statute of Limitations.*]—S. by his will devised his farm to trustees, who divided up the property into six several parcels, designated parcel 1, parcel 2, &c., according to a plan which was registed, and by contemporaneous conveyances under the Short Form Act conveyed the parcels to the testators' six surviving children. The description of parcel 2, included the lane in question, described as a right of way, the use of which was thereby reserved to the owners of parcels 4 and 6, to which it was a way of necessity. Parcel 3, which adjoined the way, was conveyed without any mention of the lane. During the unity of title some farm buildings stood upon parcel 3, adjacent to the lane in question, which was used as a means of ingress and egress thereto, but they had long since disappeared. By the Short Form Act, R. S. O. ch. 102, sec. 4, every deed, unless an exception be made therein, shall be held to include all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any wise appertaining, or with the same, held, used, occupied, and enjoyed.

Held, that the defendant claiming under the grantee of parcel 3, could not claim a right of way over the lane: that sec. 4 of the Short Form Act could not, under the circumstances, be deemed to apply: that the right of way was not a continuous easement, or way of necessity; and that plaintiff's right thereto was not barred by the Statute of Limitations.

Held. also, that the defendant, as owner of part of parcel 4, could not claim the right to use the way as appurtenant to parcel 3. *Maughan* v. *Casci*, 518.

3. *By-law—Closing street—Providing access to the lands adjacent—Month's notice—Arbitration.*]—A by-law was passed by the defendant municipality to close up and grant to a railway company a portion of a a street, by which alone the applicant had access to a piece of land sold and conveyed to him by the municipality at a tax sale, without providing other convenient access to the land. The land was unpatented, but the applicant had paid all dues to the Crown Land Department. The by-law was objected to, on the ground that it did not provide other convenient access to the land: that a month's notice of the passing of the by-law was not given, the notice having been given, on the 28th of March, for the 28th April: that it provided for arbitration by the Mayor, and by two persons, one appointed by the railway company and by the applicant, a mode different from that provided by the statute; and that the award was to be made within one month from the date of passing the by-law instead of one month from the appointment of third arbitrator.

Held, that all the objections were well taken, and that the by-law was invalid.

Held, also, that the applicant had sufficient interest in the land in question to entitle him to apply; and, at

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any rate, the municipality were estopped by their conveyance from setting that up: that an applicant affected by such by law is not bound to wait until the road is actually closed before coming to Court. *In re Laplante and The Corporation of the Town of Peterborough*, 634.

See MASTER AND SERVANT.

WILL.

1. *Construction — Executory devise — Legacy.*]—J C., by his will, directed his trustees to divide his real estate equally between his sons then living, when his eldest son should attain the age of twenty-five years, when the share coming to his eldest son was to be conveyed to him, and they were to give him $2000 to stock the same. In case any of his sons should die, before attaining the age of twenty-five years, without issue, then the share of the party so dying should be divided equally among the survivors. J. J. C., the eldest son, died under the age of twenty-five, leaving a widow and infant daughter, having made a will making no devise of real estate, but giving his wife his life insurance, then standing in favour of a Loan Company, and directed that so much of his $2000 as was necessary be used to redeem the insurance from the company, and the balance he gave to his wife.

Held, that the devise to the eldest son was a devise in fee simple, subject to an executory limitation over on his dying under twenty-five and without issue, and as issue was left, the infant was entitled to the land, as her father's heiress-at-law, subject to her mother's dower.

Held, also, that the $2000 was an absolute bequest, with a direction as to its application, and that the legatee was entitled to the money regardless of the particular mode of its application. *Cook* v. *Noble*, 43.

2. *Will — Construction — Devisee of land not owned by the testator — Evidence of intention — Extrinsic evidence.*]—Where a testator devised lot 14, con. 10, in the township of A. to his two nephews, and, after certain pecuniary bequests, directed as follows: "The balance of my estate that may remain, after paying the above bequests, to be paid to my relatives as my executors may think advisable;" and the evidence shewed that the testator did not and never had owned that lot; but that he did own lot 21, con. 10, in the township A., which was not specifically devised by the will:

Held, that evidence of the testator's intention to devise lot 21, in con. 10, to his nephews was inadmissible.

Held, further, that the Court would not authorize the executors to convey lot 24, in con. 10, to the nephews under the residuary clause in the will. *Summers et al.* v. *Summers et al.*, 110.

3. *Vesting — Void condition — Parent and child — Restraint on a devisee residing with his father — Infant.*] — A testator left all his estate to his executors "in trust for the benefit of G. H. till he arrives at the full age of twenty-one, at which time I direct my said executors to give to G. H. all the said property," subject to the condition that "should the said G. H. at any time before coming of age go to live with his father, W. H., he is to be disinherited of the whole or any portion of my estate; and the said estate so forfeited is to be then given to

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my son J. D., his heirs and assigns." The testator died in 1875. In 1876, while G. H. was still a minor, being only eleven years old, J. D. and W. H. entered into an agreement under seal, whereby it was agreed that J. D. should support the widow of the testator, who was his mother and the mother-in-law of W. H., during her life, and should convert into money the estate of the testator, to which he was or should be entitled under the will, and pay a moiety of the proceeds to W. H., in trust for the support of G. H., till he should attain twenty-one, the residue to be then paid by W. H. to G. H. Pursuant to this agreement G. H. forthwith resided with W. H. till he was seventeen years of age, when this action was brought by the executors for a declaration of the rights of G. H., J. D. and W. H. under the will.

Held, that G. H. took a vested interest in the property under the will; that the condition was a condition subsequent, and was void as being "against law;" and G. H. was entitled to all the estate given to him by the will, notwithstanding the agreement of 1876, which could not be regarded as a family compromise, or for the benefit of the infant. *Clarke et al.* v. *Darraugh et al.*, 140.

4. *Charitable bequests — Particular residuary gift followed by general residuary gift—Cumulation and substitution — Testamentary expenses — Costs.*] — One S. by his will directed his estate, real and personal, to be sold, except certain stocks, lands, and securities thereinafter specifically devised, and that his debts and "testamentary expenses" should be paid out of the first moneys that should come into the hands of his executors; and after making certain pecuniary bequests, (which he charged primarily on the fund to be produced by the sale of his real estate as aforesaid, and secondarily on the proceeds of his personal estate) he directed that "as to the residue of my personal estate which may be exclusively devoted by me to charitable purposes, I bequeath the same to the churchwardens of the A. Church, to be invested by them for the purpose of forming an endowment for the support of the said church."

Afterwards, by a codicil, S. bequeathed to three persons named by him $30,000 as an endowment for the A. Church, to be invested by them in their own names as trustees for the said church, and to be disposed of for the benefit thereof as therein mentioned, but in certain contingencies to merge in his residuary estate, and be disposed of under the last clause of his will, by which he devised all the rest, residue, and remainder of his estate, of which he should die possessed, to A. and L., to be equally divided between them, share and share alike.

Held, that on a proper construction of the will and codicil $30,000 of the pure personalty was to be held by trustees on the trusts as defined for the benefit of the A. Church: and as to the residue of that fund, it was to be held generally by the churchwardens for the support and maintenance of that church.

A legatee is entitled to take both a pecuniary gift and a residue, whether given in a will or in a combined will and codicil, and the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift.

Held, also, that although testamentary expenses, which include the costs of a suit for construction and

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administration, are usually payable out of the general personal estate, yet here the provision that the testamentary expenses were to be paid out of the first money which should come into his executor's hands, showed the testator contemplated the payment of such expenses out of a mixed fund of pure and impure personalty derived from the conversion of his real estate; and there being nothing else in the will to affect or alter this, the costs of this action must be borne ratably by the pure and impure personalty, and the proceeds of land directed to be sold. *Bull et al.* v. *The Rector and Churchwardens of the Church of the Ascension et al.*, 386.

5. *Description of land—Waste.*]—A. Mc. L. S., being the owner of a 200 acre lot, and having disposed of 12 acres at the north east corner and 5 acres in the centre portion in his lifetime, by his will devised as follows:—First, I devise and bequeath unto W. A. S., the easterly part of my lot No. 6 * * being described as one-third part of the length and the entire width, measuring westward from the easterly limit of the said lot No. 6, and containing 66⅔ acres, more or less. Second, I devise and bequeath unto H. D. S. the middle part of my said lot No. 6, in * * being described as one-third part of the length and the entire width, measuring westward from the land hereinbefore devised to W. A. S. of the said lot No. 6, and containing 66⅔ acres, more or less. Third, I devise and bequeath to my daughter A., the wife of J. B., of * * the remaining one-third part of my said lot No. 6, in * * being described as one-third of the length and the entire width of the said lot No. 6, measuring westward from the land hereinbefore devised to H. D. S., and extending to the westerly limit of said lot No. 6, containing by admeasurement 66⅔ acres more or less. To have and to hold the said hereby devised land and premises unto and for the use of my said daughter A., for and during the term of her natural life, with remainder thereof on her decease to the children of her body, and their heirs and assigns forever.

A codicil provided as follows:—I do hereby alter my said will, so that should my said daughter A., the wife of J. B., die without issue, or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike.

Held, that each of the three devisees took under the will according to the measurements given, that is to say, one-third part of the length of the lot, and the whole width of it, and only such portion of his or her respective parcel thus described, as the testator had title to and power to give, and that it could not be held that what land the testator had was to be equally divided amongst his three children.

Held, also, following *Drake* v. *Wigle*, 22 C. P., 405, that a tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but that he cannot cut down timber even for the same purpose, *and sell it*. *Saunders* v. *Breakie*, 603.

6. *Will—Power of appointment—Duration of power — Election of widow—Dower—Separate devises — Construction.*]—A testator devised certain lands to his wife, "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her de-

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cease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife by deed, under her hand and seal, and to his heirs and assigns, forever." The widow married again, without having executed the power.

Held, that there being no specific limitation as to time, the whole period of the life of the donee was allowed for the execution of the power, and it did not cease upon her second marriage.

Quære, whether she should exercise it till after her second marriage.

The testator also devised certain lands to his widow, to have and to hold the same for the following uses: "To sell and dispose of the same as she should think proper and right, and the moneys thereupon coming and arising to use and apply for the payment of my just debts, and for the maintenance of herself and my minor children, and the education of such children as she may see to be fit and necessary;" and he authorized his wife to convey the said lands in fee simple to the purchasers, and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain 21, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children.

The testator was twice married.

Held, that the children and grandchildren of the testator's first marriage had no right to demand an account of the lands sold under the above provisions, or investigate the amount used for maintenance.

Semble, that the widow took absolutely the balance of the proceeds of sale not required for debts.

In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others. *Cowan* v. *Besserer et al.*, 624.

7. *Will—Construction of—Devise to Sisters of Charity—Statutes of Mortmain—Pedigree—Evidence.*]—A testator devised lands to K., in trust to sell and pay the proceeds "to the Sisters of Charity of Hamilton, to be their property absolutely." There were also bequests to K. of money, to pay the same to the St. Mary's Hospital, an Orphan Asylum and a Convent. No evidence was given to show who the Sisters of Charity were. In an action to recover the land brought by the heirs at law of the testator.

Held, that a corporate capacity could not be imputed to the Sisters of Charity, in order to destroy the gift to them under the Statutes of Mortmain, and that the devise might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity.

Declarations made by the deceased mother of the plaintiff, in the hearing of the plaintiff and of the plaintiff's son, as to the marriage of the plaintiff's parents, received in evidence to prove the plaintiff's pedigree. *Walker* v. *Murray*, 638.

8. *Will—Construction—Married woman—Statute of Distribution—R. S. O., ch. 125, sec. 25.*]—A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one, when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to

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be invested, and the income arising from each share was to be accumulated until the remaining three children respectively attained twenty-one, when they were each to receive the annual income thereof, until the youngest (son) F. attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid equally to the two daughters C. and J., until one of them should die, and then one share was to be paid to the person or persons who would be entitled thereto under the Statute of Distributions in case such share was the property of the daughter so dying. C. attained twenty-one, married, and died before F. attained twenty-one, having made her will and left all her property to her husband for her children.

Held, that the proper effect of the will of A. was to vest in C.'s husband and children the one fourth share: that she was to draw the income of it for life, and that they were the persons entitled under the Statute of Distributions pertaining to the personal estate of married women who die intestate: R. S. O., ch. 125, sec. 25. *Arkell* v. *Roach*, 699.

9. *Will— Construction—Annuity —Residue — Dower—Election.*]—A testator, by his will and codicils, devising his real estate, &c., to G. H. M. and B. M., trustees, and the survivor of them, and the heirs of such survior, gave his widow an annuity and provided that when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject however to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions." The last codicil appointed G. E. T. & G. R. and the survivor of them, and the heirs, executors, administrators *and assigns* of such survivor new trustees and executors in place of G. H. M. and B. M., with the same powers.

The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue.

Held, that the widow was entitled to her annuity as well as her share under the Statute of Distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby, Quimby* v. *Quimby*, 738.

See ESTOPPEL, 2.

WORDS.

"Person aggrieved."]—*See* INSPECTORS—MUNICIPAL CORPORATIONS, 2.

Effectually prosecute.]—*See* APPEAL.

Good cause shewn.]—*See* COSTS, 2.

Syndicate.]—*See* FRAUD AND MISREPRESENTATION, 4.

Community property.]—*See* HUSBAND AND WIFE, 3.

Investing in.]—*See* INVESTMENT.

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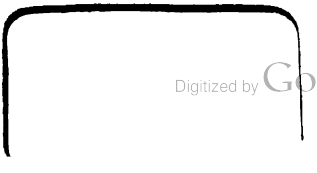

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