



CANADA.

SUPREME COURT CASES.

A COLLECTION OF JUDGMENTS

OF THE SUPREME COURT OF CANADA IN CERTAIN APPEALS IN WHICH THE BARE DECISIONS ONLY ARE REPORTED IN THE APPENDIXES TO VOLUMES XIV., XVI. & XVIII. OF THE OFFICIAL REPORTS OF THE COURT, AND WITH WHICH HAVE BEEN INCLUDED SOME JUDGMENTS OF THE SUPREME COURT OF CANADA, AND OF THE COURTS APPEALED FROM, NOT HERETOFORE REPORTED.

COMPILED FROM THE NOTES OF THE JUDGES AND THE OFFICIAL RECORDS OF THE COURT,

AND EDITED BY

EDWARD ROBERT CAMERON, K.C.,

Registrar of the Supreme Court of Canada.

CANADA LAW BOOK COMPANY,
TORONTO.

1905.

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Entered according to Act of the Parliament of Canada, in the year one thousand nine hundred and five, by R. R. CROMARTY, at the Department of Agriculture.

TO

The Honourable Charles Fitzpatrick,

Minister of Justice of Canada.

THIS VOLUME

IS

WITH HIS PERMISSION

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EDITOR'S PREFACE.

Some explanation is perhaps due to members of the legal profession for the appearance of this volume of Supreme Court cases.

It will be found upon reference to Volumes XIV., XVI. and

ERRATA.

- P. 275, line 24 of head note, insert "no" before "ratification."
- P. 365, line 8, for "corner" read "quarter."
- P. 487, line 10 from the bottom, for "1885" read "1855."
- P. 512, line 11, for "on" read "of."
- P. 608, line 3 from the bottom, for "trail" read "trial."
- P. 612, line 15, after the word "this" insert "is."

the mistake may be readily detected, but it is of very great consequence when, as in these cases, the judgments are not printed and the only report is a brief note of the result of the decision.

Upon reading these unreported judgments it appeared to me that there were in the cases following some useful expositions of legal principles that would justify their publication.

In some of the cases the judgments of the courts below are not reported in the official reports of these courts, because the members of the court appealed from were equally divided in their opinion, but these judgments subsequently became of importance by reason of the Supreme Court adopting the reason-

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EDITOR'S PREFACE.

Some explanation is perhaps due to members of the legal profession for the appearance of this volume of Supreme Court cases.

It will be found upon reference to Volumes XIV., XVI. and XVIII. of the Reports of the Supreme Court of Canada that each of these has an appendix in which notes of certain decisions are given, but not the text of any of the reasons for judgment. I found, upon taking office as Registrar, that my predecessor, the late Mr. Cassels, had made a collection of many of these judgments with the purpose of some day publishing them. In his time, and also since, applications have been made to the reporters of the court for certified copies of the reasons for judgment in many of these cases, and also of the judgments in other appeals in which the decisions were reported only in the form of a short note in Mr. Cassels' Digest, and I understand these certified copies have been occasionally cited and used in argument before the courts.

In two instances I found the report in the appendix was incorrect. An erroneous headnote may not be a matter of great significance if it is followed by the reasons for judgment by which the mistake may be readily detected, but it is of very great consequence when, as in these cases, the judgments are not printed and the only report is a brief note of the result of the decision.

Upon reading these unreported judgments it appeared to me that there were in the cases following some useful expositions of legal principles that would justify their publication.

In some of the cases the judgments of the courts below are not reported in the official reports of these courts, because the members of the court appealed from were equally divided in their opinion, but these judgments subsequently became of importance by reason of the Supreme Court adopting the reason-

ing of some of the judges below. In such cases I have thought that these judgments could be with advantage incorporated in any report of the Supreme Court decisions.

In conclusion, I desire to express my indebtedness to Mr. L. W. Coutlée, K.C., one of the reporters of the court, who has prepared the subject index and lists of cases, and supervised all the press work.

E. R. CAMERON.

OTTAWA, Nov. 1, 1905.

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*THE IMPERIAL FIRE INSURANCE } APPELLANTS: 1889
 COMPANY (DEFENDANTS) } **April 5, 6.
 **June 14.

AND

GEORGE L. T. BULL (PLAINTIFF) RESPONDENT;

AND

THE NORTH BRITISH CANADIAN } RESPONDENTS.
 INVESTMENT COMPANY, LIMITED }
 (DEFENDANTS) }

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Insurance by mortgage—Interest insured—Payment to mortgagee—Subrogation.

Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and if he failed to do so that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the name of the mortgagor who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred the company paid the mortgagees the sum insured, and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this, claiming that they had a valid defence against the mortgagor by reason of breaches of a number of the statutory conditions, and were subrogated to the rights of the mortgagees. The Court of Appeal (15 Ont. App. R. 421) and the Divisional Court (14 O.R. 322) held that, the insurance company having failed to establish its defence, that the policy had been voided by the acts of the mortgagor, the latter was entitled to the benefit of the money paid by the insur-

*Incorrectly reported XVIII. Can. S.C.R. 697.

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

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ance company to the mortgagees and to have his mortgage discharged.

Held, per Strong, Fournier, Taschereau and Gwynne JJ., that the judgment of the Court of Appeal for Ontario(a), should be affirmed and the appeal dismissed with costs.

Held, per Taschereau and Gwynne JJ., that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause which was inserted in the policy without the knowledge and consent of the mortgagor could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor; and that the payment to the mortgagees discharged the mortgage.

Held, per Taschereau and Gwynne JJ., that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him; not having done so they could not, in the present action, raise any questions which might have afforded them a defence in an action against them on the policy.

APPEAL from a decision of the Court of Appeal for Ontario(a), dismissing an appeal from the judgment of the Common Pleas Division(b) which affirmed the judgment of Rose J. at the trial in favour of the plaintiff.

The facts in this case were as follows:

The plaintiff borrowed money from the investment company and gave a mortgage therefor which provided that the plaintiff should insure the mortgaged premises, and should produce the receipt for the renewal premium to the company at least three days before the expiration of the insurance, failing which the investment company was entitled to insure and to charge the plaintiff with the premium.

Default having been made by the plaintiff in insuring the premises, the mortgagees obtained a policy from the appellants in the name of the plaintiff for one year, and the plaintiff having neglected to renew this insurance, the investment company obtained a renewal for a further

(a) 15 Ont. App. R. 421.

(b) 14 O.R. 322.

period of one year. The policy was subject to the usual statutory conditions, but it was also issued with a special agreement called the mortgage clause, which read as follows:

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It is hereby especially agreed that this insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

It is also provided and agreed that the mortgagees shall notify the company of any change of ownership or increase of hazard (not permitted by this policy to the mortgagor or owner) on each renewal of this policy, and sooner, if the same shall come to the assured's knowledge, and shall, on reasonable demand, pay the additional charge for the same, according to the established scale of rates for the time such increased hazard may be or shall have been assumed by the company during the continuance of this insurance.

And it is further agreed that whenever the company shall pay the mortgagee any sum for loss under this policy and shall claim that as to the mortgagor or owner no liability therefor existed, said company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt to the extent of such payment, but such subrogation shall not impair the right of the mortgagee to recover the full amount of his claim; or said company may at its option pay to the mortgagee the whole principal due, or to become due, on the mortgage with the interest then accrued, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt.

All the premiums were paid by the plaintiff.

A fire having occurred the insurance company paid the amount of the policy, and it was admitted that by including this sum all the mortgage money had been paid by the plaintiff. The plaintiff brought the present action asking to have it declared that the insurance company had no rights or claim to the mortgage or the monies paid by them to the loan company, and that a proper discharge of the mortgage be executed and delivered to the plaintiff; and also that an account be taken of all monies received by the defendants, the loan company, upon the said mortgage.

A number of defences, based upon breaches of the statu-

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tory conditions, were set up by the insurance company, but all of these were held to fail in the Courts below.

The fire occurred on the 24th February, 1882.

Within the time provided by the statutory conditions, proofs of loss were prepared by the mortgagees on a form supplied by the insurance company. No objections were made to these proofs by the latter, nor was any notice given by them to the plaintiff that any other claim and proofs of loss were required until over 10 months after the fire. On the 4th September the insurance company tendered the amount of the policy to the mortgagees, claiming that there was no liability to the mortgagor or owner, and demanding to be subrogated to the rights of the mortgagees. The amount tendered was paid on the 23rd December, and the grounds on which the company claimed to be subrogated to the rights of the mortgagees were then for the first time set forth in detail, *inter alia*, that the plaintiff had never made claim on the company in accordance with the statutory conditions which provided for the giving of proofs of loss within a limited time after the fire.

The courts below held that the insurance company could not be permitted to settle the loss with the mortgagees upon a policy of this kind, raising no objection to the proof, and then turn round upon the mortgagor and deny liability on the ground that the proofs of loss had not been properly furnished, but must be taken to have dealt with the mortgagees as agents of the mortgagor, and to have accepted as sufficient for both parties what they were content to take from the mortgagees.

The judgment at the trial ordered that the defendants, the mortgagees, should execute and deliver to the plaintiff a re-conveyance of the mortgaged property free and clear of all incumbrances, or a statutory discharge.

The mortgagees united with the insurance company in the appeal to the Divisional Court. In the latter court the plaintiff abandoned all claim to an account against the

mortgagees of what was due on the mortgage, and in the Court of Appeal made no claim against the mortgagees.

The mortgagees did not appeal from the judgment of the Divisional Court, and the insurance company was ordered to pay both the costs of the plaintiff and the mortgagees of that appeal.

In the Court of Appeal and in the Supreme Court the appellants claimed that if they should be found liable to the plaintiff they were entitled to be repaid by the mortgagees.

In the courts below it was held that the effect of the subrogation clause was that as between the insurance company and the mortgagees the contract became in effect to all intents one of insurance of the mortgagees' interest, but as between the mortgagor and the insurance company the contract remained as if no such agreement existed, and that the right therefore of the insurance company to be subrogated to the rights of the mortgagees must depend upon whether they had or had not a good defence against the mortgagor, the person in whose name the insurance was effected. If they had a good defence the money paid to the mortgagees would be so paid by reason of the agreement and that alone, if they had not, the money would necessarily go in discharge of the mortgage, as the policy was effected for the mortgagor's benefit and at his expense(c).

D'Alton McCarthy, Q.C., appeared for the appellants. *Christopher Robinson*, Q.C., and *C. Miller* appeared for the respondent Bull.

C. Moss, Q.C., and *Urquhart* appeared for the North British Canadian Investment Company.

The only reasons for judgment were the following:

STRONG J., was of opinion to dismiss the appeal(c).

(c) Cf. *per Strong C.J.*, in *Guerin v. The Manchester Fire Ins. Co.*, (29 Can. S.C.R. 139).

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 Fournier J.

FOURNIER J.—I am of opinion that the judgment of the Court of Appeal is right and should be affirmed, and this appeal dismissed with costs.

TASCHEREAU J.—I am of opinion to dismiss this appeal for the reasons given by my brother Gwynne. I also refer to the case of *Sovereign Fire Ins. Co. v. Peters(d)*, where this court has already decided that a mortgage of a property insured is not an assignment which renders a policy void under a condition that an assignment without notice to the company would avoid the policy.

GWYNNE J.—The grounds upon which I desire to rest my judgment are as follows:

As between the mortgagees and the mortgagor, the mortgagees were bound in effecting an insurance of the mortgaged premises to effect one for the benefit of the mortgagor in respect of his interest and not one for the benefit of the mortgagees themselves and in respect of their interest.

The policy which the mortgagees under their obligation to the mortgagor as above did effect was one wherein and whereby the mortgagor is the person expressed to be insured with a provision that the loss, that is to say, the insured person's loss, if any, is payable to the mortgagees. Under such a provision payment to the mortgagees of any loss sustained by the mortgagor would be a fulfilment of the insurer's covenant with the insured as expressed in the policy.

A policy so expressed cannot become converted into or be construed to be a policy wherein and whereby the mortgagee became the person insured and to the extent of his own interest alone. The subrogation clause, therefore, which without the knowledge and consent of the mortgagor was inserted in the policy which the mortgagees under their obligation to the mortgagor as above stated procured to be entered into by the Imperial Fire Insurance Company with the mortgagor, cannot have the effect of converting the policy framed as it is with the mortgagor as the insured

(d) 12 Can. S.C.R. 33.

person, and to cover his loss in case the insured premises should be destroyed or damaged by fire, into a policy with the mortgagees as the insured persons and to cover their interest in case of injury by fire to the insured premises.

The policy in the present case, therefore, must be read and construed as one wherein and whereby the mortgagor is the person insured, the payment of the amount of whose loss, if any there be, being made to the mortgagees will discharge the mortgage. The mortgagees' interest in the policy is in fact, as it appears to me, precisely the same as if the mortgagees were assignees of a policy of insurance effected with the mortgagor. A subrogation clause, therefore, of the nature of that inserted in the policy, cannot be appealed to by the mortgagees or any person claiming through them as against the mortgagor. Payment therefore by the insurance company to the mortgagees, to whom by the policy in the present case the mortgagor's loss, if any, was made payable, must be regarded as a payment made in pursuance of the policy and on account of the mortgagor who is the person expressed to be insured, and his loss, and the insurance company after such payment cannot be heard to say that in fact they paid the money to the mortgagees as upon a policy of insurance with them alone to cover their interest only, which policy is contained in the subrogation clause of which the mortgagor knew nothing.

If under any circumstances a policy framed as the present one is, with the mortgagor as the person expressed to be insured, such a subrogation clause can have the effect of creating a valid contract between an insurance company and a mortgagee, as to which I express no opinion, the insurance company must, I think, contest their liability with the mortgagor and establish their indemnity from liability to him before they can with safety pay the mortgagees under the subrogation clause. Upon an assignment of the mortgage by the mortgagees in such a case it may be admitted that the insurance company like any other assignee would acquire an interest in the mortgage; but the insur-

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ance company in the present case having paid the amount secured by the policy to the mortgagees under a policy wherein the mortgagor was expressed to be the person insured, and which contained a direction that the loss, if any, that is, of the mortgagor, should be paid to the mortgagees, the company cannot in the present action dispute the mortgagor's right to have recovered, in case he had brought an action on the policy upon any ground which by the policy created a forfeiture of it, as if this was an action on the policy, which it is not, nor anything of the kind. The mortgagor in the present action simply insists that the mortgagees have received monies from the insurance company in discharge of the insurance company's liability to the mortgagor under the policy, and the mortgagees cannot under the circumstances be heard to say that the monies they received from the insurance company were paid under a contract between the insurance company and the mortgagees to cover the mortgagees' interest only in the insured premises. The mortgage having been thus paid in full the mortgagees must reconvey the mortgaged premises to the mortgagor, and in an action of this nature no question does or, in my opinion, can arise as to whether anything has been done or omitted to be done by the mortgagor, the doing or omitting to do which would have given the insurance company a good defence to any action brought, if such had been brought against them upon the policy by the mortgagor. All such inquiry is, in my opinion, wholly irrelevant in the present suit. For these reasons I am of opinion that the appeal must be dismissed with costs, and that the mortgagor is entitled to a reconveyance to him of the mortgaged premises.

PATTERSON J. took no part, having sat as a member of the court appealed from.

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Appeal dismissed with costs.

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Solicitors for the appellants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for respondent Bull: *Morphy & Millar.*

Solicitors for the respondent,

The North British Can. Invest. Co.: *McMurrich & Urquhart.*

1889 *KATHERINE BATE (PLAINTIFF) APPELLANT;
 **April 4, 5.
 **June 14.
 AND
 THE CANADIAN PACIFIC RAILWAY }
 COMPANY (DEFENDANTS) } RESPONDENTS.

Railway — Negligence — Condition limiting liability — Contract to carry passenger.

The plaintiff purchased from an agent of the defendant company at Ottawa what was called a land seeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable and had printed on it a number of conditions, one of which limited the liability of the company for baggage; to wearing apparel, not exceeding \$100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket, explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, the plaintiff having sore eyes at the time was unable to read the conditions herself. On the trip to Winnipeg an accident happened to the train and plaintiff's baggage, valued at over \$1,000, caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the baggage.

Held, reversing the judgments of the Court of Appeal, (15 Ont. App. R. 388), and of the Divisional Court, (14 O.R. 625), (Gwynne J., dissenting), and affirming the judgment at the trial, that the plaintiff was entitled to recover damages for loss of baggage caused by the defendants' negligence notwithstanding the condition limiting the defendants' liability printed upon the ticket sold to the plaintiff.

Held, per Strong and Taschereau JJ., that the plaintiff was misled as to the effect of the conditions endorsed on the ticket, and by the answers she received from the defendants' ticket agent, and should not be bound by the condition limiting the company's liability.

*XVIII. Can. S.C.R. 697.

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

Held, per Fournier J., adopting the reasons of Mr. Justice Rose in the court below, that there was evidence on which the jury could reasonably find negligence; that the condition limiting the company's liability could not avail; and that the decision in *Grand Trunk Ry. Co. v. Vogel* (11 Can. S.C.R. 612) applied.

Held, per Gwynne J., that it was competent for the railway company to enter into a contract with a passenger of the nature pleaded by the defendants in this case, and that the decision in the *Grand Trunk Ry. Co. v. Vogel* (11 Can. S.C.R. 612) had no bearing upon this case.

Per Gwynne J., that improper construction of the road-bed did not under the circumstances of the case constitute "any negligence or omission of the defendants or their servants," within the meaning of the statute.

Per Gwynne J., concurring with Patterson J., in the court below, that the accident having occurred upon a portion of the railway which had been constructed by the Dominion Government, the defendants could not be charged with negligence in the construction.

APPEAL from a decision of the Court of Appeal for Ontario (a), Burton J., dissenting, affirming a judgment of the Divisional Court (b), Rose J., dissenting, which set aside a judgment in favour of the plaintiff entered by O'Connor J., upon the findings of the jury, and dismissing the action with costs.

The facts are fully shewn in the judgment of Gwynne J., in this Court and Patterson J., in the Court of Appeal.

D'Alton McCarthy, Q.C., and *Christie*, Q.C., for the appellant, contended that the writing signed by the plaintiff was so signed at the request of the respondents and solely upon the representation that her signature to the voucher for the payment of her money was for the purpose of identification of the appellant as a person entitled to apply for a return ticket to enable her to return from Winnipeg to Ottawa; that the question of negligence was a matter to be determined upon the facts solely by the jury, and relied upon *Grand Trunk Ry. Co. v. Vogel* (c); *Watkins v. Rymill* (d).

(a) 15 Ont. App. R. 388.

(b) 14 O.R. 625.

(c) 11 Can. S.C.R. 612.

(d) 10 Q.B.D. 178.

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Christopher Robinson, Q.C., and *Scott*, Q.C., for the respondents, contended that the plaintiff, an educated person, had voluntarily chosen, in consideration of a pecuniary benefit, to exonerate the railway company from a greater liability than a stipulated sum, and the terms being just and reasonable, she was bound by her agreement, and that sec. 25 of the Railway Act did not apply.

STRONG J., was of opinion that the appeal should be allowed.*

FOURNIER J.—I am in favour of allowing this appeal for the reasons given by Mr. Justice Rose in support of his opinion in the Divisional Court of Ontario; motion to set aside verdict to be dismissed with costs and judgment entered for appellants according to verdict, with costs.

TASCHEREAU J.—I am of opinion to allow this appeal for the reasons given by my brother Strong.

PATTERSON J., took no part in the judgment.

* No reasons for judgment were handed down by Mr. Justice Strong, but they were stated as follows by him when delivering judgment in *Robertson v. The Grand Trunk Ry. Co.* (24 Can. S.C.R. 611):

"Some reference was made in the judgments in the Court of Appeal and also on the argument here to the case of *Bate v. Canadian Pacific Ry. Co.* (e) I may say at once, that the case was not decided on the authority of *Vogel's Case*, but, on totally different point there arising on the findings of the jury, viz., that the appellant had not read, and could not (in the state of her eyesight) have read, the conditions on the ticket, and that she was misled as to the effect of those conditions by the answers she received in reply to her inquiries addressed to the ticket clerk of the defendants. In short, it was decided upon authority of *Henderson v. Stevenson* (f), which was followed in preference to *Watkins v. Rymill* (g), and the choice thus made between two apparently conflicting authorities seems now to be confirmed by the very late case of *Richardson, Spence & Co. v. Rowntree* (h), which is a decision to the same effect as *Bate v. Canadian Pacific Ry. Co.* (e) on facts very similar."

(e) 18 Can. S.C.R. 697.

(g) 10 Q.B.D. 178.

(f) L.R. 2 H.L. Sc. 470.

(h) 1894, A.C. 217.

GWYNNE J.—The plaintiff in her statement of claim alleges that on the 30th of September, 1886, she became a passenger on a car of the defendants' railway, and for a valuable consideration, being the fare legally authorized therefor, the defendants agreed to take the plaintiff and her baggage by their cars and engine safely from the city of Ottawa to the city of Winnipeg; that on the said day and when she became a passenger on the car of the defendants' railway she delivered to the defendants two parcels of baggage to be safely carried for her from Ottawa to Winnipeg, containing certain enumerated articles of the value, to wit, of \$1,500.00. She then alleges that

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On the 3rd day of October, 1886, the car of the defendants containing the said parcels of baggage, and while the same was being transported by the defendants from the city of Ottawa to the city of Winnipeg, was by the negligence and omissions of the defendants thrown from the defendants' railway track and by the negligence and omissions of the defendants the said car and the said two parcels and the contents thereof were completely destroyed.

To this statement of claim the defendants plead,

1st. A denial of all the allegations contained in the plaintiff's statement of claim.

2nd. They deny that they were guilty of any negligence or omissions as in the statement of claim is alleged. Now if these had been the only grounds of defence pleaded to the above statement of claim the liability of the defendants upon the contract alleged in the statement of claim would have arisen by reason of their being common carriers of the plaintiff's goods for reward, and such liability would have attached upon proof of the receipt of the goods by the defendants under the contract for their carriage alleged and of their loss without any enquiry whether or not such loss was attributable to any negligence of the defendants or their servants being necessary; so that, notwithstanding the averment of negligence in the statement of claim and the denial of it in the statement of defence, no question of negligence at the trial of the action need have arisen; it

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would have been immaterial whether the loss had or had not been occasioned by defendants' negligence and the averment to that effect in the statement of claim superfluous. The defendants, however, did plead another ground of defence for the purpose of displacing their liability as common carriers; they pleaded:

"3rd. The defendants say that the plaintiff before becoming a passenger on the cars of the defendants purchased from the defendants a special ticket at a reduced rate, and in consideration of such reduced rate entered into a special contract with the defendants, signed by the plaintiff, whereby the plaintiff agreed, among other things, that the liability of the defendants as to wearing apparel should be limited to a sum not exceeding \$100.00; and

"4th. The defendants, while denying liability, etc., etc., bring the \$100.00 into court, etc., etc."

The plaintiff's replication to the defendants' statement of defence is

1st. A joinder in issue thereon; and a denial of the third ground of defence in the following terms:

"2nd. The plaintiff did not purchase a special ticket as mentioned in defendants' statement, but the ticket purchased by the plaintiff was signed by her at the request of the defendants; and sold upon the representation of the defendants that her signature to the said ticket was for the purpose of identification of the plaintiff as a person entitled to apply at the defendants' office in Winnipeg for a return ticket from Winnipeg to Ottawa, and the plaintiff never agreed with the defendants that the liability of the defendants as to wearing apparel should be limited to a sum not exceeding one hundred dollars."

Now the issue joined by this replication is the whole and sole answer offered upon the record to the above third ground of defence of the defendants, and this issue is of a threefold character, namely,

1st. That the plaintiff never did, in point of fact, purchase a special ticket as alleged by the defendants.

2ndly. That she never did agree with the defendants that their liability as to the plaintiff's wearing apparel, etc., should be limited to a sum not exceeding one hundred dollars; so far in substance simply denying the allegations of fact to the above effect made in the defendants' said third plea or ground of defence; and

3rdly. That although the plaintiff did purchase a ticket from the defendants and did sign it, she signed it at the request of the defendants and solely upon their representation that it was signed for the purpose of identification of the plaintiff as a person entitled to apply at the defendants' office in Winnipeg for a return ticket to Ottawa, by this intending to raise the contention which has been raised—that her signature to the ticket had under these circumstances so pleaded no binding effect upon her in law. If there never was any contract for limitation, in point of fact, of the defendants' liability for wearing apparel to one hundred dollars, or if, although in point of fact there was a contract for such limitation over the plaintiff's signature, and if such contract was void in law by reason of the plaintiff's signature having been obtained, as the plaintiff alleged in her replication, then the defendants would fail to establish their defence, without any necessity whatever arising for any enquiry, whether the loss of the plaintiff's luggage had, or had not, been occasioned by negligence of the defendants or their servants; and it was perhaps for the reason that the plaintiff's counsel was content to rely upon the sufficiency of this answer to the plea of limitation of liability that no replication to the effect that the loss was occasioned by the defendants' negligence was pleaded to the defendants' plea of their liability having been limited to a sum not exceeding one hundred dollars—the averment of negligence in the statement of claim which, as I have already shewn, was *there* immaterial, cannot be treated as a replication to the defendants' plea. If a contention had been intended to have been raised to the effect that the defen-

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dants, notwithstanding their plea of limitation of their liability, were, nevertheless, still liable by reason of the loss having been occasioned by their negligence, that contention could only have been raised by a replication to the plea; and to such a replication the defendants might have rejoined denying the negligence in point of fact, or they might have demurred in law for the purpose of raising the question whether the 25th section of the Consolidated Railway Act of 1879 applied to a case like the present; but no such replication having been pleaded, no issue is joined or question raised upon the record as to whether or not the defendants have been deprived of the benefit of their plea of limitation of liability by reason of the loss being alleged to have been occasioned by the negligence of the defendants or their servants, but although there is no such issue formally raised upon the record, the case has been argued as if there had been. I shall therefore consider the case as if there were upon the record an issue in law, as well as one in fact, joined upon such a replication, the former raising the question whether the 25th section of the Railway Act of 1879 applies in the case of a limitation of liability as pleaded in the defendants' statement of defence? and the latter, whether in point of fact the plaintiff's luggage was lost by the negligence of the defendants? Apart from the above section of the Railway Act, there cannot, I apprehend, be any doubt that it was competent for a railway company to enter into a contract with a passenger of the nature of that pleaded by the defendants. *Vogel v. The Grand Trunk Ry. Co.* (i) has, in my opinion, no bearing upon this point, in the view which I take.

Nothing, as it appears to me, could be more unreasonable than that a railway company should be expected, or under any obligation, to carry a passenger as well as his luggage of the value it may be of \$1,500 or \$2,000 for the same fare as would be chargeable to and paid by the passenger alone for his own conveyance without any luggage;

(i) 11 Can. S.C.R. 612.

or that the company should not be at liberty to refuse to carry as passenger's luggage, and for the fare chargeable to the passenger himself alone, anything in excess of a fixed weight; or to carry anything in excess of such weight without payment of a special rate fixed either upon a scale commensurate with the weight or with the value of the luggage at the option of the company. So, likewise, there can, I think, be no doubt, apart from the above section, that it is quite competent for a railway company, for the purpose of protecting themselves from unreasonable liability, to contract with passengers that in consideration of their luggage being carried with themselves free, that is to say, without payment of anything in excess of the fare chargeable to themselves alone travelling without any luggage, the value of the luggage so carried should be held and taken to be a fixed sum; or that, whatever its actual value might be the company's liability in case of loss should not exceed a fixed sum, which is the contract as here pleaded by the defendants. Now assuming for the present such a contract to have been proved, does the 25th section of the Railway Act of 1879 affect or qualify it? That section enacts that

Trains shall be started and run at regular hours to be fixed by public notice and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation, at the place of starting, and at the junctions of other railways and at the usual stopping places established for receiving and discharging way passengers and goods from the trains. Such passengers and goods shall be taken, transported and discharged, at from and to such places on the *due payment of the toll freight or fare legally authorized therefor.*

The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants.

Now, in so far as this section relates to goods, the true construction, as it appears to me, of the above words "the party aggrieved by any neglect," etc., etc., is that they must

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be confined to cases of goods being received by the company for carriage and delivery upon due payment of the freight authorized by law; and that they in no way affect or restrict the right of railway companies to enter into contracts with owners of goods to carry their goods for them either free of charge or at a reduced rate below the customary freight charged, or which might legally be charged for the carriage of such goods, upon condition that the liability of the company shall be limited to a fixed amount in the case of loss or damage from whatever cause proceeding; so neither does the section, in my opinion, in any manner qualify or restrict the right of companies to prescribe a limit to the quantity or to the value of the luggage which they will undertake to carry free of charge or of all charge other than the fare paid by the passenger for the conveyance of himself; or prevent them from agreeing with a passenger that in consideration of carrying himself with his luggage at a less rate than that ordinarily charged for the distance contracted for, the liability of the company in case of loss of the luggage, from whatever cause arising, should not exceed a named sum; in order that the liability should bear a reasonable proportion to the remuneration paid. Nothing could be more unreasonable than that the parties who are interested in such a contract should be deprived of the power of themselves determining the extent of the company's liability under such circumstances, and I am of opinion that the statute has no such unreasonable intent or effect; and that, therefore, assuming the contract to have been made as pleaded by the defendants, all enquiry whether or not the loss was occasioned by the defendants' negligence is immaterial, and that the plaintiff's replication, as it is, was well advised: but, assuming such enquiry to be open on the record, I entirely concur in the opinion of those learned judges who have held that what the jury found to have been the cause of the accident whereby the plaintiff's luggage was lost, namely, "improper construction of the road bed," did not under the

circumstances of the case constitute "any negligence or omission of the defendants or their servants" within the meaning of the section of the statute under consideration. Upon this point I entirely concur in the judgment of Mr. Justice Patterson. The place where the accident occurred was upon that portion of the Canadian Pacific Railway which was constructed by the Dominion Government. It became the property of the defendants only by transfer to them from the Government under the statute incorporating the company after its completion. The defendants had nothing whatever to do with the construction of the roadbed, and they, therefore, cannot be charged with any negligence in its construction. Ever since the company have received possession of the section so constructed by the Government they have maintained it and have worked it continuously up to the time of the occurrence of the accident, a space of time covering nine years without any appearance of any defect or imperfection of any kind being exhibited at the place in question. Not a tittle of evidence was offered for the purpose of establishing that there were any indications of defect from which the officers and servants of the company, or some of them, could and should have discovered and repaired the imperfection in the construction which the jury have found to have been the cause of the accident. No negligence has been imputed to the defendants for their not having discovered and repaired the defect. In *The Canadian Pacific Ry. Co. v. Chalifoux* (ii) this court has decided that they were not guilty of negligence, and that no action would lie against them as for negligence for not having discovered a defect in a rail (by the breaking of which an accident had occurred) which presented no indications by which the defect being latent could and should have been discovered; and there is no more reason why they should be held responsible for an accident occasioned by reason of the improper construction of the roadbed, not constructed by themselves, and which

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(ii) 22 Can. S.C.R. 721.

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presented no indications of the presence of a latent defect by which it could and should have been discovered, than in the case of an accident accruing from a broken rail as in *The Canadian Pacific Ry. Co. v. Chulifoux* (iii). Then, as to the answers of the jury to the questions submitted to them as to the possibility of the baggage having been saved by proper efforts of the company's servants if they had proper appliances, and as to whether they had proper appliances, it is impossible, I think, to add anything to what has been said upon these questions by several of the learned judges in the court below. I shall only say that my surprise is not so much that the jury answered those questions as they did, as that they should have been submitted to them, for the evidence certainly *disclosed no facts* which justified their submission. In so far, then, as any question whether or not the accident was occasioned by the defendants' negligence is concerned, it is impossible, in my opinion, that the plaintiff's action can be sustained. The only material question, therefore, in the case is that raised by the plaintiff's replication to the defendants' plea of their liability having been limited by contract to the sum of \$100, which has been paid into court.

In order to prove the contract set out in the plaintiff's statement of claim, namely, a contract for the safe carriage and delivery by the defendants, as common carriers, of the baggage of the plaintiff delivered to them to be carried forward, the plaintiff herself and her brother gave evidence to the effect that they went together to the defendants' office to purchase a ticket for the plaintiff to go by the defendants' railway to Winnipeg; that they asked for a return ticket, to Winnipeg and back. The defendants did not sell any return tickets to Winnipeg, except in a special form designed for the use of persons going up to Manitoba to look for lands in contemplation of settlement, and which they called Land Seekers' tickets. These tickets were good for 40 days only.

The plaintiff and her brother say that when they asked for a return ticket to Winnipeg the agent replied that they could have one good only for 40 days, but as the plaintiff wished to remain at Winnipeg longer, that her brother asked the agent if he could not issue one good until the 16th or 20th December, to which the agent consented, and proceeded to make out the ticket good to 21st December, and when he had done so he handed it over to the plaintiff and asked her to sign it. The plaintiff having asked why she should sign it, the agent replied for the purposes of identification; that the ticket was not transferable and would have to be presented at Winnipeg and would have to be signed for the purposes of identification. Accordingly she signed it in the presence of the agent, who signed his name as witness to her signature, and she paid \$55.00 for the ticket and took it away. This was at 10 o'clock in the morning of the 30th September. Twelve or thirteen hours afterwards she went down to the train, presented her ticket, had her baggage checked and went in the train upon her passage to Winnipeg. The ticket so purchased by her was produced at the trial and identified by the plaintiff, and whatever may be its tenor it constituted the only evidence which was offered of any contract between the defendants and the plaintiff for the carriage of herself and her baggage for hire and reward as alleged in the statement of claim or otherwise. The plaintiff's brother accompanied her to the defendants' office for the purpose of assisting and advising her in the purchase of her ticket, as we may well presume, and as indeed would seem from the prominent part which he took in the purchase of it. Now it is to be observed that the ticket which they purchased, and which was produced at the trial and identified by the plaintiff, both in external form and appearance as well as in its contents, was quite different from the ordinary tickets sold by the defendants for full fare. The ticket was a special one designed, as already said, for the use of persons going to Manitoba looking for land, and was called "Land

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Seekers" ticket. It was sold at a rate considerably reduced from the ordinary fare, namely, for \$55.00 for the journey to Winnipeg and back, whereas the ordinary price charged for a ticket to Winnipeg is \$40, and for a ticket from Winnipeg to Ottawa \$46. The plaintiff could not have got a return ticket to Winnipeg and back in any other form than this "Land Seekers" ticket. Not only was it special in its external form, but also in its terms. It had printed upon its face the following:

Issued by Canadian Pacific Railway.

Good for one first-class passage to station stamped or written in margin of attached coupon and return—only on presentation of this ticket when stamped by company's agent and presented with coupons attached *subject to the following contract*:

1st. It is not good for passage if any alterations or erasures whatever are made hereon.

2nd. If the coupons are marked second-class or emigrant the passenger is entitled to such passage only.

3rd. If this contract and its coupons bear no 'L' punch cancellations or stamp other than the ordinary dating stamp the passenger is entitled to all the privileges accorded to holders of unlimited tickets of like class.

4th. If this contract and its coupons are cancelled with an 'L' punch it indicates that the ticket was sold at a reduced rate and must be used on or before the expiration of date as cancelled on the margin hereof, and that no stop over will be allowed hereon; if not so used or if more than one date is cancelled it is void.

5th. This ticket is not transferable; it must be signed by the passenger in ink, and if presented by any other than the original purchaser whose signature is hereon the conductor will take it up *and collect full fare*; the purchaser will write his or her signature when requested to do so by the conductors or agents.

6th. The return part of the ticket will not be honoured for passage unless the holder identifies himself or herself as the original purchaser to the satisfaction of the ticket agent of the Canadian Pacific Railway at station stamped or written in margin of the ticket, and unless officially signed and dated in ink and duly stamped on back hereof by authorized agent.

7th. Baggage liability limited to wearing apparel not exceeding \$100.00 in value.

8th. The coupons belonging to this ticket will not be received for passage if detached.

(Sgd.) W. C. VAN HORNE,
Vice-President. (L.S.)

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In consideration of the reduced rate at which this ticket is sold I hereby agree to all the provisions of the above contract.

(Sgd.) KATIE BATE (Signature).

(Sgd.) J. E. PARKER (Witness).

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Such was the form and substance of the ticket to which were attached several coupons. This was the only ticket which the plaintiff bought, and it is upon the contract, which is contained in it, that her action is brought. She offered evidence of no other. In point of fact there was no other contract entered into by the defendants with the plaintiff than that which is expressed in this ticket, which she signed. She took it away with her, and after having it in her possession for twelve hours, during which she and her family had the fullest opportunity of perusing it, she made use of it, and upon the faith of it became a passenger on the defendants' railway and placed her luggage in possession of the defendants for carriage by them. Under no other contract than that contained in the ticket did she deliver her luggage to the defendants or did they receive it for carriage.

Now all that the plaintiff and her brother say as to what took place at the time the plaintiff signed her name at the foot of the ticket is, that when the defendants' agent had filled it up and handed it over the counter to the plaintiff to sign, she enquired—*Why she was to sign it?* This was a very natural question for her to ask. The idea would naturally occur to her mind that it was rather unusual that a purchaser of a railway passenger's ticket should be asked to sign it. She would naturally know that the purchasers of ordinary tickets are not required to sign them. It was natural, therefore, for her to ask *why she should sign it.* But this question would not be likely or calculated to convey to the mind of the agent the idea that what she was asking for was information as to the contents of the document she was asked to sign; it lay before her, was in her hands and plainly expressed what its contents were. She says that she did not read the ticket because her eyes were

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sore; but her brother was with her, purchasing the ticket with her, and he could have read the ticket for her; and informed her of its contents, if that was what she wanted to know; so also could the agent have informed her if she had asked him; but she did not communicate to the defendants' agent the fact that her eyes were sore, or give him the slightest intimation that she could not read the ticket or that she wished to have it read to her, or to be informed of the purport of the document she was asked to sign, but she simply asked—*Why she should sign it?* seemingly thinking it unusual for a purchaser of a railway ticket to be asked to sign it. The defendants' agent seemingly and naturally, as I think, understanding her in this sense, replied that the ticket was not transferable and that her signature was necessary for purposes of identification. This was the plain and exact truth as appears by paragraphs 5 and 6 printed on the face of the ticket. Now this answer that the plaintiff's signature was necessary for purposes of identification would naturally convey to her mind, if the form and appearance of the ticket, with all its coupons attached, were not sufficient for that purpose, that the ticket was one of a special character; she made no further inquiries but signed the ticket. Now, although she says that she did not read the ticket because her eyes were sore, it is plain that she could see well enough to write her name and to discern the place where it should be written—opposite the word "signature," printed to indicate the place where she should sign. It is noticeable also that, although she says she did not read the ticket, she does not say that she did not read the sentence printed at the foot of the ticket immediately above the place where she signed her name, which is in these terms:

"In consideration of the reduced rate at which this ticket is sold I hereby agree to all the provisions of the above contract."

Her signature is subscribed so close to the above that it is difficult to conceive that she could see well enough to sign

her name at the foot of it without being able to read and understand this sentence. Neither does she say that she did not know she was signing a contract, or that by the terms of the contract the liability of the defendants as to her luggage was limited. She had abundant opportunity of learning this fact at any rate during the twelve hours that the ticket was in her possession between the time of her purchasing it and the time when she gave her luggage into the defendants' charge subject to the terms of the ticket. There is a very marked distinction between the present case and that of *Henderson v. Stevenson*(e). In that case there was a complete contract in the terms stated on the face of the ticket which were sought to be qualified by a notice endorsed on the back of it, to which there was no reference upon the face of the ticket, and the House of Lords held in effect that there was no evidence of any contract than that appearing upon the face of the ticket. In *Parker v. The South Eastern Ry. Co.*(f) the condition which the defendants relied upon as qualifying a contract which appeared on the face of the ticket, was also printed upon the back of it. In the present case there was no contract nor any suggestion of any contract other than that appearing on the face of the ticket, and it expressly contains the provisions for limitation of the defendants' liability. Upon the authority, then, of *Zunz v. The South Eastern Ry. Co* (g); *Burke v. The South Eastern Ry. Co.*(h), and indeed of *Henderson v. Stevenson*, read in the light of the difference in the circumstances and explained as that case is, in *Burke v. The South Eastern Ry. Co.*(h), and in *Watkins v. Rymill*(i), there can be no doubt that in the present case even if there had been nothing requiring the plaintiff's signature for her identification, and if, therefore, she had not been asked to sign and had not signed her name at the foot of the ticket the limitation of the defendants' liability

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(e) L.R. 2 H.L. Sc. 470.

(g) L.R. 4 Q.B. 539.

(f) 2 C.P.D. 416.

(h) 5 C.P.D. 1.

(i) 10 Q.B.D. 178.

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appearing, as it does, upon the face of the ticket, in virtue of which alone the defendants took charge of the plaintiff's baggage, must have been held to form part of the contract evidenced by the issue of the ticket by the defendants, and its receipt and use by the plaintiff. None of the cases cited are precisely similar to this one. *Zunz v. The South Eastern Ry. Co.*(j) and *Burke v. The South Eastern Ry. Co.*(jj) would be similar to it if the ticket in the present case had not had the plaintiff's name subscribed to it by her, but she having signed the only contract produced in the case, the only ground upon which she seeks to avoid its effect is, the contention that by reason of the answer given to her enquiry *why she should sign the ticket*, the contract must be read as if it did not contain the clause of limitation of the defendants' liability. That is to say, as if it was a contract for the safe carriage of the plaintiff's luggage upon a carrier's common law liability; a contention which it is impossible to maintain unless it be upon the ground that the non-communication verbally to the plaintiff by the defendants' agent (in answer to her question why she should sign the ticket) of the contents of the document presented to her for her signature, and which the defendants' agent had no reason whatever to imagine she could not herself read, can be held to constitute a fraud in law which not only avoids the contract which she signed, but has the effect of substituting in its place a wholly different contract which as a matter of fact was never entered into by the defendants. For such a proposition there is, in my opinion, no foundation in law. The plaintiff's case is based upon the contract in the terms appearing upon the face of the ticket produced at the trial and subject to which alone she delivered to the defendants and they received the plaintiff's luggage for carriage. In the present action she must rest her case upon that contract only. There is not, nor was there ever, any other. If the plaintiff had been advised, or wished to assert a claim based upon

(j) L.R. 4 Q.B. 559.

(jj) 5 C.P.D. 1.

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the contention that she was induced to sign the contract, the terms of which she did not understand, by the wrongful or fraudulent concealment of its contents by the defendants' agent, she should have so framed her suit; but such a cause of action I am bound to say that, in my opinion, the evidence adduced at the trial of the present case would have utterly failed to establish. I am of opinion that the appeal should be dismissed with costs.

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Appeal allowed with costs.

Solicitors for the appellant: *Pinhey, Christie & Christie.*

Solicitors for the respondents: *Scott, MacTavish & MacCracken.*

NOTE.—The above forms one of a co-related group of decisions dealing with the power of a railway company to exempt itself from liability for damages sustained through the negligence of itself, its servants or agents, notwithstanding the provision contained in the Railway Act Amendment of 1879, and subsequently carried into the Railway Act of 1888 as sec. 246, and which provides that the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or its servants.

These decisions began with the *Grand Trunk Ry. Co. v. Vogel (k)*, delivered in 1886, in which it was held on the facts of that case by a majority judgment of one, that the railway company could not escape liability for damages which occurred through the negligence of its servants by virtue of a condition attached to the contract which provided that,—“The owner of animals undertakes all risks of loss, injury, damages and other contingencies in loading, unloading, transportation, conveyance or otherwise howsoever, no matter how caused.”

This was followed in March, 1889, by a decision in the *Grand Trunk Ry. Co. v. McMillan (l)*, in which it was held that the *Grand Trunk Ry. Co. v. Vogel (k)*, did not apply to a case where the railway company undertook to carry goods to a point beyond the terminus of its own line, and the contract expressly provided that the company should “not be responsible for any loss, misdelivery, damage or detention that may happen to the goods so sent by them if such loss, misdelivery, damage or detention occur after the said goods arrive at said station or places on their line nearest to the

(k) 11 Can. S.C.R. 612.

(l) 16 Can. S.C.R. 543.

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point or places which they are consigned to, or beyond their said limits."

In the June following, the decision in *Bate v. The Canadian Pacific Ry. Co.* (n), above reported, was given where the decision in *Grand Trunk Ry. Co. v. Vogel* (o), was again distinguished as above set out in the judgment of Sir Henry Strong, then Chief Justice.

In 1895 it was held in *Robertson v. The Grand Trunk Ry. Co.* (p), that the *Grand Trunk Ry. Co. v. Vogel* (c), did not apply to a case where the contract was to carry a horse over the line of the railway and the bill of lading contained the condition that "the company shall in no case be responsible for any amount exceeding \$100 for each and any horse."

The generality of the law as expounded in the *Grand Trunk Ry. Co. v. Vogel* (o), was so materially narrowed by the above decisions that Sir Henry Strong C.J., in *The Queen v. Grenier* (q), questions whether it has any further binding authority, and the court, speaking through him, held itself free to reconsider the whole matter if the question which had to be decided in the *Grand Trunk Ry. Co. v. Vogel* (o), should again arise for consideration.

The Railway Act of 1903, 3 Edw. VII., ch. 58, sec. 214, reproduces substantially the provisions of sec. 246 of the Railway Act of 1888, and in addition there is in sec. 275 a new clause apparently framed upon the corresponding section of the Imperial Railway and Canal Traffic Act, 17 & 18 Vict., ch. 31. This section reads as follows:

"275. No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall relieve the company from such liability, except as hereinafter provided, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

"2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited; and may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

The effect of sec. 275 would appear to be to give in Canada to the Board of Railway Commissioners the same power as in England is exercised by the court in determining whether a condition limiting liability is just and reasonable.

The Board on the 17th October, 1904, made an order that the *Grand Trunk Ry. Co.*, the *Canadian Pacific Ry. Co.*, the *Canadian Northern Ry. Co.*, and the *Pere Marquette Ry. Co.*, should

(n) 18 Can. S.C.R. 697.

(p) 24 Can. S.C.R. 611.

(o) 11 Can. S.C.R. 612.

(q) 30 Can. S.C.R. 42.

severally be authorized and empowered to use the forms of bills of lading and other traffic forms filed with the Board until the Board should otherwise thereafter order and determine.

At the date of this publication, the Board has made no general regulation describing the extent to which a railway company may limit its liability for damages, which have occurred through the negligence of its servants or agents.

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 *May 20.
 *June 14.

W. E. BROWN (CLAIMANT AND PLAINTIFF) } APPELLANT;
 TUFF) }

AND

HECTOR LAMONTAGNE (EXECUTION CREDITOR AND DEFENDANT) } RESPONDENT.

Interpleader issue—Chattel mortgage—Hire receipt—48 Vict., ch. 26, sec. 2 (Ont.)—13 Eliz., ch. 5—Clarkson v. Sterling (15 A.R. 230) distinguished.

B. sells to P. on time, a quantity of machinery, and the agreement of sale contains a provision by which P. agrees to give B. a hire receipt or a chattel mortgage as security. A few days after L. had brought an action against P. for the price of goods sold and delivered, P. gives B. a chattel mortgage.

Held, that the mortgage in question was given with intent to delay, hinder and defraud creditors, and was void.

Held, per Taschereau J., approving the judgment of Hagarty C.J.O., that the equitable doctrine under which the mortgage was upheld in *Clarkson v. Sterling* (15 Ont. App. R. 234), did not apply, first, because there was no absolute contract to give a chattel mortgage—the contract was alternative, either a hire receipt, or a chattel mortgage;—and, secondly, the mortgage given was not that contracted for but included additional goods.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing with costs, the court being equally divided, an appeal by the claimant and plaintiff from a judgment of the Queen's Bench Division of the High Court of Justice for Ontario, which set aside the verdict and judgment entered thereon at the trial in favour of the plaintiff, and ordered that judgment be entered for the defendant.

The plaintiff, Brown, who was a wholesale manufacturer and dealer in boots and shoes, etc., on the 6th February,

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

1886, sold to one Paquette (the execution debtor) his plant, consisting of an engine, boiler, shafting and certain shoe-making machinery, described in the agreement for sale, at the price of \$3,379.08. The agreement for purchase signed by the execution debtor contained an agreement on his part to give Brown a hire receipt or chattel mortgage as a security for payment of the purchase money. A chattel mortgage was given after the defendant Lamontagne had issued and served his writ against Paquette, which recited that the mortgagor had purchased from the mortgagee the goods and chattels mentioned in the schedule annexed, and that it was part of such purchase that the mortgagor should give the mortgagee a chattel mortgage to secure payment of the purchase money. The mortgage proceeded to grant to the mortgagee the plant and machinery, and also all the stock in trade upon the premises, and all stock, goods and chattels which might be purchased thereafter by the mortgagor, and which might be in his possession and upon the premises at any time during the continuance of the security.

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The action was tried before Galt J., who gave the following judgment (unreported):

I find a verdict in favour of the claimant as regards the different articles set forth in the statement of claim beginning at the first and including the two gaiter trees, on the ground that the articles were sold by the claimant to the mortgagor on condition that a chattel mortgage should be given.

I find a verdict in favour of the defendant as regards all the other articles mentioned in the statement of claim on the ground that it was a fraud on the creditors of the mortgagor to include them in the said mortgage. So far as I have control over the costs, I direct there shall be no costs, as both parties have to a certain extent been successful. I direct judgment as regards the articles mentioned in the statement of claim in accordance with the above findings.

4th January, 1887.

Upon appeal to the Queen's Bench Division, this verdict and judgment was set aside and a verdict and judgment directed to be entered for the defendant. The judg-

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ment of the Divisional Court, delivered by Armour J., was as follows (unreported):

ARMOUR J.—This was an interpleader issue directed to try whether certain goods at the time of the seizure thereof in execution by the sheriff of the county of Carleton under a writ of *fiery facias*, tested the first day of September, 1886, and issued out of the Common Pleas Division of the High Court of Justice, directed to the said sheriff for the having of execution of a judgment recovered in the said last mentioned court by the said Lamontagne in an action at his suit against Henry Paquette, were liable to such seizure under the said writ as against the claim of the said Brown.

It was tried by Galt J., at the last sittings of this court at Ottawa.

It appeared that the plaintiff claimed the goods in question under and by virtue of a chattel mortgage, dated the 20th day of August, 1886, and made between one Henry Paquette, of the city of Ottawa, boot and shoe merchant, therein called the mortgagor of the first part, and the plaintiff, therein called the mortgagee of the second part, whereby, after reciting that the mortgagor had purchased from the mortgagee the goods and chattels mentioned and set forth in the schedule thereunto annexed, and that it was part of such purchase, that the mortgagor should give to the mortgagee a chattel mortgage to secure payment of the purchase money, and that there was then due by the mortgagor to the mortgagee, on account of said purchase money, the sum of \$3,350, the said mortgagor in consideration of the said sum and \$1, then paid, conveyed to the said mortgagee all the goods and chattels mentioned and set forth in said schedule, and also all the stock in trade consisting of boots, shoes, moccasins, mitts, trunks, valises, rubbers, leather and boot and shoe findings, and, in fact, everything then in stock and then held by the mortgagor and in his possession, and upon the boot and shoe factory and premises then occupied by the mortgagor, and also any stock, goods and chattels purchased thereafter by the mortgagor and which might be in his possession in or upon the said boot and shoe factory and premises at any time during the continuance of the mortgage, or any renewals thereof, which said mortgage contained therein a proviso for making the same void upon payment of \$3,360, without interest, as follows: that is to say, in forty-eight consecutive equal monthly payments of seventy dollars each, the first of such monthly payments of seventy dollars to become due and be paid on the first day of September, 1886, and it was by the said mortgage provided, and thereby agreed, that, in the event of default of payment of any of the said instalments of principal thereby secured, or any part thereof, the whole principal money should become due and payable, and, also, that if any attempted sale or disposal or removal of the said goods and chattels, or any

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part thereof, was made, then, and in such case, the whole principal money should immediately become due and payable. It also appeared that on the 10th of June, 1886, the said Henry Paquette had agreed to purchase the goods and chattels mentioned and set forth in the said schedule from the plaintiff by the following writing:

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"I hereby agree to purchase the above machinery, tools and fixtures now in factory lately occupied by Isaie Dazé, and now owned by W. E. Brown. I agree to pay for same the sum of \$3,120.08 and to pay for same in monthly instalments to extend over a period of forty-eight months without interest, and I agree to keep said machinery insured payable, if any loss to W. E. Brown, and I also agree to give said Brown a hire receipt or chattel mortgage as security for payment of said goods."

(Sgd.) H. PAQUETTE.

Upon this agreement being made the plaintiff delivered the goods so agreed to be purchased to Paquette, and he continued in possession of them until the seizure by the sheriff. The plaintiff swore as follows in his direct examination:

"Q.—Now under what circumstances did you allow him to take possession? A.—Upon the understanding that the goods were to remain mine until he gave security.

"Q.—Did you ever part with this property until you got this chattel mortgage? A.—No.

"Q.—It was part of the same transaction your getting the chattel mortgage and the sale of the goods? A.—Yes.

"Q.—Would you have let him have your goods at all unless he gave you a chattel mortgage or hire receipt? A.—No."

And in his cross-examination:

"Q.—Is it not a fact that Paquette at the time of the purchase and up to the month of August invariably refused to give a chattel mortgage whenever you asked him for it? A.—No, I don't think he invariably refused. I told him I wanted the hire receipt and he said he thought he would give a chattel mortgage.

"Q.—When was that? A.—Sometime in the month of July, probably.

"Q.—Might it not have been in August? A.—It might.

"Q.—Didn't you ask Paquette for this chattel mortgage all along the months of July and August? A.—I asked him several times.

"Q.—What did he say when you asked him? A.—Said he would not sign just now.

"Q.—What reason did he give for not signing? A.—That it would hurt his credit.

"Q.—Did you know that Paquette had purchased these goods from Lamontagne? A.—I did not know.

"Q.—You never knew it? You did not know that Paquette had

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gone down and purchased leather from Lamontagne? A.—He told me he had purchased leather.

"Q.—Did he tell you? A.—He said something about buying goods

"Q.—Did he tell you he bought goods from Lamontagne? A.—I think he did. I could not say when it was.

"Q.—Did he tell you more than once? A.—I think he did. He told me he was giving cheques.

"Q.—Didn't he tell you every time that he went down to Montreal to buy goods from this defendant Lamontagne that he had purchased leather from him? A.—I don't know whether he did.

"Q.—How many times did he tell you? A.—Once or twice I think.

"Q.—Not three or four times? Will you swear he did not tell you more than twice? A.—I don't think that he did.

"Q.—When he went down to Montreal didn't he get letters of recommendation from you to these creditors? A.—I think the first time he went down I gave him a letter of recommendation.

"Q.—Don't you know as a matter of fact that it was on the strength of these letters that he got the goods? A.—He got letters from other parties, too.

"Q.—Don't you know that these creditors would not have given Paquette this leather if you had not given these letters of recommendation? A.—I don't know. They might have given them.

"Q.—Before you asked for the chattel mortgage did you know that Paquette had been served with a writ? A.—No, I swear that.

"Q.—When was it you asked him for the chattel mortgage? A.—I was asking him all the time for the chattel mortgage, for a hire receipt first, for a hire receipt between the time that the agreement was drawn up to the time he gave it to me.

"Q.—Now, what did you tell him when you asked for the chattel mortgage? A.—Told him I wanted to get that agreement fulfilled.

"Q.—What else did you tell him? Do you remember telling him it would be better for him (Paquette) to give you a chattel mortgage so nobody else could bother him? A.—I don't know that I told him that.

"Q.—Will you swear you didn't? A.—I will not swear positively that I didn't."

And in re-examination:

"Q.—Did you take this mortgage for any purpose other than to carry out the arrangement? A.—No."

Paquette was sworn and the following was read to him as from a former examination:

"On the day I was served with the writ of summons I told Brown of the service. He asked me for the chattel mortgage. It was about that time;" and he was asked, "Is that correct?" and he answered, "It was about that time." He was also asked and answered as fol-

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lows:—Q.—But after you got possession of the goods did Mr. Brown ask you for the hire receipt after you got the goods and machinery? A.—He wrote a few lines when I took possession of the goods: between me and Mr. Brown. He was busy and wanted to go down to Montreal, so we wrote those few lines between him and me, and he gave me the things there and then; it stopped that way. Q.—And was it upon that paper you got the goods? A.—It was on that paper—yes, on the first paper. I got it for the possession of the key.”

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The writ of summons in the suit of Lamontagne against Paquette, upon the execution in which the seizure was made, was tested on the 11th day of August, 1886, and was served on the 13th day of August, 1886, and was specially indorsed as follows:

1886. June 11—To goods.....	\$387.54
June 23—To goods.....	202.31
July 2—To goods.....	107.96
July 31—To goods.....	383.08
Aug. 10—To interest to date.....	7.43

\$1,088.32

June 22—By cash..... 100.00

\$988.32

Shortly after the seizure, Paquette made an assignment and a meeting of creditors was held, and one Findlay, the plaintiff's book-keeper, was appointed assignee. The plaintiff made an affidavit proving his claim upon Paquette's estate, under the chattel mortgage, at \$3,360, and valuing his security thereunder at \$300, and it was explained that this security was valued thus low in order to give the plaintiff greater voting power in the appointment of assignee and in dealing with the estate. The learned judge indorsed the following judgment on the pleadings: (*ante*, p. 31).

On Feby. 19, 1886,

Shepley moved to set aside the judgment for the plaintiff and to enter it for the defendant on the following, among other, grounds: (1) The chattel mortgage under which the plaintiff claimed title was given by Paquette at a time when he was in insolvent circumstances or unable to pay his debts in full, or knew himself to be on the eve of insolvency, and had the effect of preferring the plaintiff to the other creditors of Paquette, and was, therefore, void as against such creditors and as against the execution of the defendant. (2) If material, the facts established in evidence proved that the plaintiff, at the time when the said chattel mortgage was so given, knew that the said Paquette was in insolvent circumstances and unable to pay his debts in full, and that the said mortgage was so given with the intent on the part of the plaintiff and the said Paquette of giving the plaintiff a preference over the other creditors of the said Paquette. (3) The evidence of an anterior promise from the

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said Paquette to the plaintiff to give the said chattel mortgage makes no difference since the passing of the Act 48 Vict. ch. 26, sec. 2 (O.), which renders the said mortgage void upon proof of the facts alleged therein simply, and the doctrine of pressure of which the saving of a security given to a creditor pursuant to an antecedent promise is an application, cannot be involved since the passing of said Act.

Moss, Q.C., shewed cause.

The question for our determination is whether at the time of the seizure the plaintiff had a valid claim to the goods in question as against the execution, and the fact that after the seizure the judgment debtor made an assignment cannot affect the determination of this question. The learned judge who tried this cause has not fettered us with any special findings of fact nor with any special reasons for his finding the verdict he did, and we are thus left free to form our own conclusions of fact from the evidence as it presents itself to us.

I am of opinion that the chattel mortgage under which the plaintiff laid claim to the goods in question was procured to be executed, with the intent of delaying, hindering and defrauding creditors, and ought to have been and ought to be held to be "clearly and utterly void, frustrate and of none effect," under 13 Eliz. ch. 5. At the time it was taken I have no doubt that the plaintiff knew that Paquette was in difficulty, and that he was being pressed by the defendant for payment of his claim, and that the plaintiff procured Paquette to execute it and to include therein not only the goods which he had sold him, and which he was entitled to have included therein, but also all his other goods acquired and to be acquired, and that he did this "so that," as he himself refused to deny, "nobody else could bother him." The plaintiff's conduct in delaying to insist upon getting a mortgage from Paquette upon the goods which he had sold to him, on Paquette's excuse that it would hurt his credit, his recommendation of Paquette with a view to his obtaining credit and his subsequent conduct in valuing his security do not tend to rebut the conclusion I have drawn as to his intention in taking the chattel mortgage.

It follows that this chattel mortgage was also void under 48 Vict. ch. 26, sec. 2. Paquette was in insolvent circumstances and unable to pay his debts in full, and both he and the plaintiff knew, as I find, that he was so, and the chattel mortgage was, as I find, made with the intent on the part of both Paquette and the plaintiff to defeat, delay and prejudice Paquette's creditors, and to give the plaintiff a preference over his other creditors.

The fraudulent intention in procuring the chattel mortgage to be executed has the effect of wholly voiding it, both under 13 Eliz. ch. 5 and under 48 Vict. ch. 26.

It is unnecessary to discuss the question how far and under what circumstances, if any, an antecedent promise to give a chattel mortgage will avail, if at all, to support it against the provisions

of 48 Vict. ch. 26, sec. 2, because there was no antecedent promise to give this chattel mortgage, the promise was to give a chattel mortgage upon the goods sold by the plaintiff to Paquette, but there was no promise to give a chattel mortgage upon all Paquette's other goods acquired and to be acquired.

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My opinion upon the point of such an antecedent promise to prevail against the provisions of 48 Vict. ch. 26, sec. 2, has been sufficiently pronounced in *River Stave Co. v. Sill (a)*, and I have seen no reason to depart from it.

In my opinion the verdict should have been and should be entered for the defendant as to all the goods in question, and the motion allowed with costs.

Upon appeal to the Court of Appeal for Ontario the court was equally divided, Hagarty C.J., and Osler J., being to dismiss the appeal, while Burton and Patterson, JJ., were to allow the appeal. The judgments of the judges of the Court of Appeal were as follows (unreported):—

HAGARTY C.J.O.—The facts of the case are very fully set out in the judgment of the learned Chief Justice in the Divisional Court, and it is unnecessary to repeat the statement.

The goods were purchased under the agreement of 10th June, 1886, signed by the debtor on a credit extending over four years, payable in 48 monthly instalments, and the debtor agrees "to give said Brown a hire receipt or chattel mortgage as security for payment of said goods."

Immediately on getting the goods on the agreement the debtor appears to have purchased goods in different parcels from the defendant in Montreal up to nearly \$1,000; the first item is June 11th, and again June 23rd; the plaintiff admits giving him a letter of recommendation the first time he went to Montreal for goods after this sale.

The defendant sued him for payment by writ served 13th August, 1886, and, I think, the court rightly held on the evidence that the plaintiff was at once told thereof, and on 20th August the chattel mortgage was given. It contains the same terms of credit, with a provision that if the debtor suffered the goods to be taken in execution without the mortgagee's assent, the latter might at once seize, etc.

The plaintiff's execution was issued 1st September, and on the sheriff seizing the plaintiff claimed, and an interpleader order was made.

Pending the proceedings on this claim the debtor made an

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assignment in insolvency, and the sheriff proved that the goods seized were handed over to the assignee.

The issue directed is, whether the goods were liable to seizure by the defendant as against the claimant.

The mortgage recites that the debtor had purchased the goods marked in Schedule A, and it was part of the purchase (*sic*) that the mortgagor should give the mortgagee a chattel mortgage to secure payment of the purchase money.

It then assigns the goods in the schedule:

And also all the stock in trade, consisting of boots, shoes, moc-
casins, mitts, trunks, valises, rubber, leather, and boot and shoe
findings and, in fact, everything now in stock or now held by the
said mortgagor and in his possession in and upon the said boot and
shoe factory and premises now occupied by the said mortgagor on
said lot number fourteen on the south side of Church Street, in the
said city of Ottawa, and also any stock, goods and chattels purchased
hereafter by the said mortgagor, and which may be in his possession
in or upon the said boot and shoe factory and premises at any time
during the continuance of this security or any renewals thereof.

The plaintiff says the mortgage covered other things in the
debtor's store. He does not think they amounted to over \$100, that
he thought he should have whatever security there was there, that
he and the debtor had a discussion as to these extra goods, and took
about two days to decide whether he would give them or not, and
finally it was done.

He says the debtor was to give him a chattel mortgage or hire
receipt, whichever he asked for, and he allowed him to take posses-
sion in June, on the understanding the goods were to be the plain-
tiff's until he gave security, and that he never parted with the pro-
perty till he gave the security.

As already noticed Paquette at once, on making this agreement,
began purchasing goods from the plaintiff.

The plaintiff discounted notes for him, in June, at 12 per cent.
interest, and says he was repeatedly applied to by him for further
help through July and, perhaps, in August.

He was only in business about three months, and during that
time was dealing with the plaintiff, selling goods, the goods both
for himself and for the plaintiff.

I think, on the evidence, the court rightly held that the debtor
was in insolvent circumstances when this mortgage was made.

The plaintiff's relations with him were constant and intimate.
The debtor was frequently applying to him for loans to meet
claims and to discount his notes, and this in the interval between
10th June and 20th August. He knew also his dealings with the
plaintiff and of his being pressed for money. He is shewn not to
have paid a note or notes to the plaintiff, and that he applied in
vain to the defendant to discount for him to pay the same.

For some time after the 10th June he says he applied for security, that the debtor kept putting him off. He said at one time that on applying he asked for a hire receipt and that the debtor said he thought he would give a chattel mortgage. Again, that on applying the debtor said he would not sign just then, that it would hurt his credit. The plaintiff says, "I was asking him all the time for the chattel mortgage;" first he asked for the hire receipt, and up to as late as in August the hire receipt was talked of between them.

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I hold, on the evidence, that the plaintiff knew of the defendant's suing Paquette on the day after the writ was served. He knew of his being in arrear with his payments to the defendant from the fact of his being applied to for help to meet the \$208 note.

As soon as he heard of the defendant's suit he asked for the chattel mortgage. He did not succeed in getting it for eight days, two days being consumed in getting Paquette's consent to include all his other goods.

Then it is urged that it can be supported as given at the time it was originally agreed, on the well known equitable principle discussed before us in our recent case of *Clarkson v. Stirling* (a). I think there are several objections to the application of the doctrine.

First. There was no absolute contract for a chattel mortgage. The contract was in the alternative, either a hire receipt or a mortgage. Paquette might have satisfied his contract by giving either.

But even if the right to elect, which it should be, was in the plaintiff, it is abundantly clear that for a couple of months they kept discussing which it was to be.

Secondly. The mortgage as ultimately given was not the security contracted for. Instead of that it was changed, on the plaintiff's urgency, into a mortgage of all Paquette's goods, including other goods, and of all goods of every kind that might be on his premises during the four years the mortgage had to run, or for any renewals thereof, and with the right of immediate entry and sale if an execution should issue.

If the defendant had been deterred by the registration of this mortgage from attempting to enforce his execution the effect would have been to cover and protect from creditors' claims all existing and future acquired goods of Paquette during the currency of a four years' mortgage, or any renewal of it.

I am of opinion that no such security was ever contracted for, and that the plaintiff's security must stand or fall as it was on the day of the actual execution thereof.

I am further of opinion that, apart from the objection as to the mortgage being different from that agreed to be given, it cannot

(a) 14 O.R. 460; 15 Ont. App. R. 234.

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be supported for the reasons given in such cases as *Ex parte Fisher (a)*; *Ex parte Burton (b)*; *Ex parte Kilner (c)*.

The execution of it was held over for nearly two months and a half, and I cannot avoid believing on the evidence that, but for the pressure of the defendant's action and threatened execution, it is very doubtful if it would have been given.

Paquette swears, and, I think, his statement may be credited, that when urged to execute, the plaintiff told him it would prevent any one troubling him or bothering him, as he expresses it.

I think the conduct of the parties points to the conclusion that it was held over, as Paquette declared, as its registration would injure his credit.

James L.J., says in *Re Burton (b)*, p. 109:

"*Ex parte Fisher* (L.R. 7 Ch. 636) establishes this exception upon the exception to the rule, viz., that if the bargain be not an out and out one, but only an agreement to give the bill of sale when required, then it is only a device to enable the debtor to acquire false credit, and the creditor is not entitled to avail himself of it in the event of the debtor's bankruptcy. It is a fraud upon the bankrupt law."

The trial judge did not find any fact beyond that it was a fraud upon the creditors to include other property than that purchased from the plaintiff in the bill of sale.

This is certainly one of the strongest indications on the plaintiff's part that the execution of the mortgage was not a *bonâ fide* completion of an original contract.

It is much to be regretted that the facts were not distinctly found at the trial.

We are left to form our own opinion on them.

When Paquette was under examination the plaintiff's counsel objected, and I am obliged to regret, successfully objected, several times to his being questioned as to the particulars of the bargain and dealings with the plaintiff, insisting that the memorandum signed by him could alone be referred to, so he was prevented from answering questions, relating to the discussion or agreement, as to giving a chattel mortgage.

Of course the written memorandum shews the final arrangement, but an insolvent debtor is being examined and the essence of the enquiry was to ascertain the real nature of the dealing with the creditor who asserts priority over other creditors.

On the face of the memorandum, and on proof of actual delivery of the goods therein, there is nothing beyond the words "a hire receipt" to raise any question as to that being an executed contract of sale—the agreement to execute a chattel mortgage by itself is quite intelligible, and such could be given by the vendee of the goods.

(a) 7 Ch. App. 636.

(b) 13 Ch. D. 102.

(c) 13 Ch. D. 245.

The words "or a hire receipt" are utterly irreconcilable with the right to give a mortgage.

It is urged for the plaintiff that this shews the property remained in the plaintiff till either security was given.

If so, then, what act was required to be done, or was done, to pass the property to Paquette so as to vest in him and be conveyed by mortgage back to the plaintiff?

We can understand that when a man executes a chattel mortgage to another, who accepts and acts upon it, the latter admits a title in the mortgagor to convey to him: *Cameron v. Perrin* (d).

But we are here to discover when the mortgagor acquired any right to convey. The purport of this contract of sale was in itself certainly not to create any contract of hiring.

What, then, is the effect of this utterly repugnant alternative agreement to give security? It would necessitate the creation of a new contract, viz., a contract of hiring.

On the agreement to insure Paquette was to "Keep said machinery insured payable, if any loss, to W. E. Brown."

This would, to all ordinary understanding, convey the idea of an insurance as Paquette's property, but if he became entitled to claim for loss, such loss would be paid to Brown.

He could insure as agreed at once, on getting possession, before either of the repugnant securities had been agreed on. Both he and Brown may have had insurable interests, whether property did or did not pass, but the words used point to an insurance as owner.

In any country where an insolvent law, or such a statute as we have in lieu thereof, is in force, I cannot believe that such a course of dealing, as is here exhibited, can be allowed as against creditors.

I do not think any man can be allowed to hand over a large quantity of trade machinery to a man at a fixed price to be used in his trade, retaining the right of property as is done here.

He says, in effect: "At any time that I ask it, you must give me a chattel mortgage on the goods, as if they are your own, or, if I prefer it, we will make a contract or hiring of these goods by you from me."

Paquette, thus the apparent possessor of a large and valuable plant for his boot and shoe trade, obtains credit from the defendant and others apparently on the plaintiff's recommendation. But at any moment the plaintiff is to be at liberty, as he may be advised, either to treat the goods as Paquette's by taking the chattel mortgage, or treat them as still his own by making some new contract on undefined terms.

I agree he may take the chattel mortgage, but, I think, he must stand or fall by its validity as against creditors, at the time it is given by an insolvent debtor.

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The mortgage itself, nearly two and a half months after the sale, recites that,—“the mortgagor has purchased from said mortgagee the goods and chattels set forth in the schedule, etc., etc., and it is part of such purchase that said mortgagor shall give to said mortgagee a chattel mortgage to secure payment of the purchase money.”

On the face of this we should understand that the contract to give the chattel mortgage was part of the contract of sale.

I have to find the fact, having no findings by the trial judge to assist or guide me.

I find, on the whole case, that the property passed to Paquette on delivery into his possession.

That the introduction of the option of a “hire receipt” on some new unascertained terms must be treated as a device to enable the vendor to frame some new guard against creditors.

I am willing to concede to the plaintiff that he was entitled to get a chattel mortgage as security, but, for the reasons set forth in the equity cases cited, he cannot treat such mortgage as given at the original contract.

I would have been ready to concur with my learned brothers if they thought that a new trial should be directed to have the facts more fully investigated and found, but as that is not agreed to, I cannot see my way to hold the decision appealed from erroneous, and, I think, the appeal should be dismissed.

I do not discuss some of the points raised by my brother Armour, but agree in the result.

BURTON J.A.—I am unable to agree with the judgment pronounced in the court below.

There is no special finding by the learned judge at the trial as to the defendant's circumstances at the time of his purchase from the claimant of the machinery and fixtures in question, and there is no evidence of how he stood at that time, or whether in truth he was at all indebted at the time of that purchase.

The learned judge must have been of opinion that at the time the chattel mortgage was given he was not solvent, or he could not have held the mortgage void as to the small quantity of additional goods included in it beyond those which formed the subject of the sale of the 10th June.

The property in question in this suit was not merchandise sold in the ordinary course, the property in which would pass on delivery to the purchaser and put an end to any lien for the price, but consisted of a quantity of machinery, tools and fixtures then in a factory belonging to the vendor, and which the defendant agreed to purchase upon a long credit, without interest, on the distinct agreement that the property was not to pass till full payment, but that

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the payment should be secured either by means of a hire receipt or chattel mortgage.

If the mortgage had not been given, I think it clear that the property would not have been liable to seizure at the suit of Paquette's creditors, and it seems to me that it would be a grotesque travesty of justice if the giving of the chattel mortgage in pursuance of the agreement to do so, whenever the election was made, should have the effect, unless the objection taken that the whole instrument is avoided by reason of the small additional quantity of goods being included in it and which, as against the creditors, were held not to pass, is entitled to prevail.

The difficulty is to see how this transaction could ever be said to come within the provisions of our Act at all, as the property never was at any time before the giving of the mortgage liable to execution at the suit of Paquette's creditors, still less am I able to follow the suggestion of Chief Justice Armour, in the Divisional Court, that it was void under the Statute of Elizabeth, even with the aid of the interpretation put upon it by our own Act, 35 Vict. ch. 11.

It was given admittedly to secure an actual debt, and not as a mere cloak for retaining a benefit to the grantor, and was, therefore, clearly a good deed under that statute.

It is said that it was made to cover all goods to be subsequently acquired by Paquette, and there would probably be much force in that objection if the property had passed on the 10th June, and the plaintiff was relying on an agreement to give a mortgage, when called upon, upon certain specified property, and the mortgage did not follow and comply with the terms of the agreement. That is not this case, the property did not pass at all to Paquette till the election was made to take an actual transfer of the property, and whenever that election was made he was bound *eo instanti* to give the mortgage.

Then, can including a small additional quantity of goods in the mortgage have the effect of vitiating the whole security and make this property, upon which Paquette has never paid a cent, liable for the payment of his debts?

It is explained in the evidence that as the goods were sold upon a long credit without interest, and were in continual use and deteriorating therefore in value, the plaintiff urged upon him to give this additional security to better his own position, and not with the view of defeating or delaying creditors.

It may be that the decision of the learned judge as to these chattels was too favourable to the defendant, but if Paquette was not then in a position to give that security it could not stand, and so the learned judge held, but in the absence of actual fraud I can see no ground for holding that the mortgage would be void altogether.

I do not throw the slightest doubt upon those cases which decide

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that when a transaction is tainted with actual fraud, where, for instance, there is a *bonâ fide* debt for a small amount, but a judgment or other security is given, not only for that, but for a demand which is altogether fictitious and given for the fraudulent purpose of defeating or delaying creditors, such a judgment would be utterly void, but there is not only no such finding by the learned judge, but not a scintilla of evidence which would warrant such a finding.

The cases which have been referred to where an agreement existed to postpone the giving of a bill of sale until the grantor should be on the verge of bankruptcy, or to give it, when required, the request being postponed until the debtor was insolvent, have no application to such a case as the present. Such agreements are properly regarded as a mere device to enable the debtor to acquire false credit and a fraud on the bankrupt law; they have no application to a case where, as part of the contract of sale, the property was not to pass till paid for unless the purchaser, at his own election, or at the request of the vendor (for it is immaterial, to my mind, who is to make the election), elects to take the absolute title and give back a mortgage. If this case had not been complicated with the additional chattels being included, could there be a doubt on the subject that the goods always were the property of Brown? Until the debtor consented to give the mortgage, how can the creditor be affected by the debtor wrongfully refusing from time to time to give it? The agreement was distinct that the property was not to vest in the debtor until he consented to give a mortgage, and when he did give it in pursuance of that agreement it was precisely the same as if it had been given at the time.

What have the creditors to complain of? Why should they be entitled to be paid their debts out of Brown's property, upon which the debtor has never expended the first penny?

I agree with my brother Patterson that a great deal of irrelevant evidence has been introduced into this case, for the purpose, apparently, of creating a prejudice against the plaintiff. That evidence was of the haziest kind and entirely failed to shew any fraud or improper dealings so far as I can discover, and had nothing to do with the question of the title to this particular property.

I think that the appeal should be allowed, the judgment of the Divisional Court reversed, and that of the Chief Justice upon the trial restored, with costs of the trial of the Divisional Court and of this court to the appellant.

PATTERSON J.A.—The question on this interpleader issue is whether goods seized by the sheriff of the county of Carleton on a *fi. fa.* issued by the defendant against one Paquette were liable to be so seized as against the claim of the plaintiff.

The issue was tried before the Chief Justice of the Common Pleas, who gave judgment for the claimant for the bulk of the goods claimed, being goods which had been sold by the claimant to Pa-

quette, and included in a chattel mortgage from Paquette to the claimant, and for the defendant as to some other goods, included in the same mortgage, directing that so far as he had control over the costs of the issue each party should be left to pay his own.

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I have come to the conclusion, after carefully examining the evidence with all the light thrown on the case by the arguments at the bar, that the decision of the learned Chief Justice, which, so far as it was in favour of the plaintiff, was reversed in the Divisional Court, was correct and ought to be restored.

From the very short note we have of what was said by His Lordship in pronouncing judgment at the trial we may perhaps be unable to say, with certainty, what were the precise views he took of the evidence as bearing on the question of title.

The remark attributed to him that the articles were sold by the claimant to the mortgagor on condition that a chattel mortgage should be given is ambiguous, or, rather, is not a complete explanation. By failing to denote the time at which he holds the sale to have been made, whether the 10th of June, when the memorandum was signed, or the 20th of August, when the mortgage was made, it omits a fact on which the whole question of title may turn. I think the latter date must have been intended by His Lordship. It is the date which, as I read the evidence, we are almost driven to adopt, and it puts the question of title on a footing which does not seem to have been sufficiently brought to the attention of the Divisional Court.

The goods in question are the plant and apparatus of a boot and shoe factory. The plaintiff is a dealer in boots and shoes, and Paquette is a manufacturer of boots and shoes. The goods had become the property of the plaintiff through dealings with another manufacturer, with which we have no concern. They were, on the 10th of June, 1886, indisputably the property of the plaintiff. How and when did they cease to be his property?

He agreed to sell them to Paquette but, according to the evidence, only on the terms that they were not to become the property of Paquette but were to remain the property of the plaintiff until security was given for the price. That is the oral evidence we have. It is given by the plaintiff himself but it does not rest on that alone. The memorandum signed by Paquette bears it out: "I hereby agree to purchase from W. E. Brown the above machinery, tools and fixtures now in factory lately occupied by Isaac Dazé, and now owned by W. E. Brown. I agree to pay for same the sum of three thousand one hundred and twenty dollars and eight cents, and to pay for same in monthly instalments to extend over a period of forty-eight months without interest; and I agree to keep said machinery insured, payable, if any loss, to W. E. Brown, and I also agree to give said Brown a hire receipt or a chattel mortgage as security for payment of said goods.

Witness:

(Signed) H. PAQUETTE.

(Signed) S. J. EDMONDSON.

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To hold that the property was intended to pass before the price was either paid or secured, or that the letting of Paquette into possession was an act of conveyance to him for any larger title than that of bailee, we must, in my judgment, assume facts that are not in evidence, but are contrary to the evidence we have, and must at the same time assume that the term "hire receipt," which of late years has come to be widely used and well understood in connection with arrangements by which the intending purchaser of goods gets the use of them without the ownership while he is making the periodical payments of the purchase money, was employed by the parties without meaning or object.

The other provisions of the memorandum are consistent with the understanding that the property was not to pass, including the stipulation as to insurance, even if Paquette was intended to insure in his own name, for he did not require the ownership in order to have an insurable interest.

The contention of the defendant is based, as it appears to me, on grounds which are not properly applicable to the question of property, which is all that in this interpleader issue we are concerned with, and from remarks reported as having been made by the learned Chief Justice at the trial while the evidence was being given, I think that was His Lordship's opinion.

The aim of the defendant was to make a case looking like a conspiracy between the plaintiff and Paquette to commit some kind of fraud on other dealers, such as the defendant.

I do not read the evidence as establishing or even for creating fair grounds for suspecting anything of the kind. But while evidence of that character would be relevant if the goods had been the property of the debtor, and the charge was that he had made a conveyance of them with a fraudulent purpose, as against creditors, it strikes me as beside the issue until the property is once shewn to have been so far the property of the debtor as to have been at some time exigible under execution for his debts.

We have to start with the facts, which I see no shadow of reason for questioning, that the goods were the plaintiff's once, and that he had not been paid anything whatever for them. If, contrary to what he presents as the transaction, they have become liable to seizure, the effect is that he is to pay so much of Paquette's debts.

That is a result that no doubt happens now and then from the shape in which things are done and the operation of our laws.

What is there to compel it in this case?

First, it is said that Paquette, who was about to begin to manufacture boots and shoes on the premises where the plant, etc., was, procured credit in Montreal on the recommendation of the plaintiff.

The word "recommendation" is used in the evidence, but so far as it is evidence of the contents of any letter written by the plaintiff, it must not receive any specific force. It is proved that Paquette took with him to Montreal letters from the plaintiff and

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from another person, as introductions or recommendations. The letters are not produced. We know nothing of their contents, and have no ground whatever for saying that the plaintiff stated anything untrue, or anything to suggest that Paquette owned the goods now in question. If an untrue representation were made on which credit was given, the person deceived would have his appropriate remedy. Any statement by the plaintiff respecting these goods would be evidence against him either to prove the ownership of Paquette or to estop the plaintiff from denying it, but there is no evidence on which to raise any question of that kind.

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Pains were taken to prove that the defendant had dealings with Paquette in the trade in which they were both engaged, buying his manufactured goods, and once getting Paquette, or his traveller, to take orders for the plaintiff on a business to run up the Gatineau, and the plaintiff sometimes discounted paper for Paquette, I think customers' paper, but that is not very clear. I cannot understand the bearing of this on the questions we have to try, nor can I see any relevancy in the circumstance, to which importance seems to have been attached on the part of the defendant, that the failure of Paquette was precipitated by the refusal of the plaintiff to continue to discount for him.

It is urged that the taking of the chattel mortgage was postponed in order not to injure Paquette's credit. The only foundation for this seems to be that Paquette, on one of the occasions on which the plaintiff pressed him to close the matter, gave it as a reason for not doing so that giving a mortgage would injure his credit. The complicity of the plaintiff in that motive for delay is, I think, derived from conjecture only. But, however that particular suggestion is regarded, its significance must depend a good deal on the conclusion we may have already formed respecting the time at which the property passed. If it passed in June, the plaintiff then parting with his goods without either payment or security, there is not much to discuss in the later incidents. But if the property did not, as between the plaintiff and Paquette, pass in June to Paquette, but Paquette was merely to have the use of it, as on a hire receipt, it is not impossible, and from the allusion to the effect a chattel mortgage might have on his credit, it may not be unlikely that Paquette reckoned on the influence of his possession of the plant, etc., to induce a credit to which he was not entitled. But if we assume that the plaintiff knew of this and connived at it, what then? The utmost effect would be an estoppel *in pais* in favour of anyone who changed his position in reliance on the apparent state of things. The subject of estoppel was pretty fully discussed in this court in *Walker v. Hyman* (e), where there was a difference of opinion as to the right of the purchaser of goods, which had been held under a hire receipt, to assert, under the peculiar facts of the case, a title

(e) 1 Ont. App. R. 345.

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by estoppel against the true owner, the majority of the court holding him not so entitled. In the present case some facts essential to the application of the rule in *Pickard v. Sears (ee)* are wanting, and if there are conceivable circumstances under which a right by estoppel could be maintained by an execution creditor to seize a stranger's goods under his writ, they must be very different from anything now before us.

The plaintiff, as the defendant has been careful to prove, in putting in his proofs of debt under Paquette's assignment for the benefit of creditors, valued his security at \$300 only, for the purpose of ranking as an unsecured creditor for a sum which gave him a controlling vote among the creditors. This enabled the creditors to take the property if they chose, allowing the plaintiff \$300 for it. I do not understand them to complain of that concession, nor can I understand in what way the incident can be made to bear on the question of the title.

I think the proper result is that the goods remained the property of the plaintiff up to the 20th of August. His title did not depend on his having a hire receipt from Paquette. That was to be given if Paquette ultimately decided to make all the payments before the vesting of the property in him. He did not make his decision, though often urged by the plaintiff to do so, until the 20th of August, and he then decided to give the mortgage; and then, as a part of the one transaction, the property passed to Paquette and was, *eo instanti*, re-conveyed, leaving in Paquette only the equity of redemption.

The mortgage was made to cover some other goods for which the defendant has succeeded on this issue. No complaint is made by the plaintiff on account of the application against that portion of his claim of the provisions of 48 Vict. ch. 26, sec. 2, and I make no remark on that part of the case.

I think we should allow the appeal.

OSLER J.A.—I think the judgment of the court below should be affirmed on the ground that the plaintiff's mortgage is void under the second section of 48 Vict. ch. 26.

A careful consideration of the evidence leads me to conclude that on the 20th August, 1886, when the mortgage was executed, and probably for some time before that date, the mortgagor Paquette was in insolvent circumstances.

Mr. Moss strongly urged that the mortgage ought to be supported as having been given in pursuance of the agreement of the 10th June, 1886, and that until, or immediately before, it was actually made, the transaction with Paquette did not become a sale; so that until then the property in the goods did not pass to him.

It appears to me that the case depends very much upon the

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view which ought to be taken of the evidence on this last point. If there really was no complete and finally concluded sale until the 20th August, it is difficult to see on what ground the mortgage can be held to be void. It would, in that case, I think, be within one of the saving clauses of section 3, a conveyance made in consideration of the present actual *bonâ fide* sale of goods to secure the purchase money of such sale. I take that to be the transaction—perhaps only one of the transactions—protected by the last exception in that section. And having regard to the comparatively trifling value of the goods included in addition to those sold by the plaintiff and re-conveyed to him by the mortgage and to the depreciation which would necessarily take place in the value of the latter during the term of the mortgage, I think it might be fairly held that the whole bore no more than a fair and reasonable relative value to the consideration.

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We are, however, obliged to resort to the agreement on the 10th June in order to ascertain the inception of the transaction, and, on the whole, I think the proper inference from the evidence is, that on the delivery of possession the day after that agreement was made, the goods became the property of Paquette and he became indebted to the plaintiff for the price.

By the contract he agreed to keep the machinery insured, the loss, if any, payable to the plaintiff. In what character he insured, if he insured at all, we do not know, but no interest other than that of owner or purchaser is so far as disclosed by the evidence conferred upon him.

The same implication arises from the clause by which he agrees to give a chattel mortgage as security for the price, an implication which is not rebutted by the fact that the same clause speaks of a "hire receipt" as an alternative form of security, the argument being that a security of that kind could not be given unless the goods remained the property of the vendor.

A mortgage is a security entirely consistent with the written agreement. The hire receipt involves the making of a subsequent agreement entirely inconsistent with it. If the property did not pass to Paquette upon delivery of possession under the contract of sale, when did it pass? No *novus actus* was proved. The mortgage recites that Paquette had purchased the goods from the mortgagee, and that it was part of the "purchase," that he should give a chattel mortgage to secure payment of the purchase money. This plainly refers to the memorandum of the 10th June, not to some later agreement by which what had been, up to the date of the mortgage as the plaintiff would now urge, a mere bailment, was converted into a purchase of the goods. I think we should hold that the mortgage recites and represents the real transaction of the 10th June. I find it difficult to understand how, under the circumstances, a valid "hire receipt" as that term is usually understood, could have been given. In all probability it was used merely as the name of a

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familiar form without much regard to its suitability to the case of an actual sale.

The goods then remained in the purchaser's possession until the 20th August, when, after having postponed it from time to time on the ground that it would hurt his credit, he executed the chattel mortgage in question.

For the purpose of this case it is unnecessary to consider, whether, as was argued, any change has been made by the recent Act in the well settled rule that where a sale or advance is made on the faith of a promise, that security shall be subsequently given, the sale or advance is to be treated as a present sale or advance upon the security, in other words, that the security relates back to the time when the sale or advance was actually made. Here, the mortgage, contrary, as I think, to the intention of the memorandum of the 10th June, includes other property than that which had been sold to Paquette, and also professes to grant or give security upon the after acquired property of the mortgagor, which may be in his possession on the premises during the term of the mortgage. Such a security cannot be held to have been given in pursuance of the agreement. It was one to which the plaintiff was not entitled, and of which he could not have enforced the execution under that agreement, and so must be regarded as the result of a new bargain for better terms. For this reason it cannot relate back to the original agreement, and stands, therefore, or falls according to the situation of the parties at the time.

Having been given to secure a past transaction, and at a time when the mortgagor was in insolvent circumstances, it has the effect of preferring the plaintiff, in respect of the debt created on the 10th June, to his other creditors and must fail. The plaintiff has his own folly or worse to thank for the result. His omissions to take his security at the time or to insist upon it promptly and effectually afterwards is hardly to be explained, except on the ground that he was willing to allow Paquette to trade on the credit of the property, taking his chances of being able to protect himself from loss under his agreement.

I think the appeal should be dismissed.

O'Gara and *Hick*, for the appellant, contended that the proof was conclusive that the possession given to Paquette on the day the agreement was signed was conditional, and that the title did not pass to him until the 20th August, when the mortgage was given; that the giving of a security stipulated for at the commencement of the transaction was valid, citing *In re Goldsmid(f)*; *Furlong v. Reid(g)*; *Burns*

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

(g) 12 Ont. P.R. 201.

v. *McKay*(h); *McRoberts v. Steinhoff*(i); *Building and Loan Association v. Palmer*(j); *Long v. Hancock*(k); *Ex parte Wilkinson, In re Berry*(l).

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Belcourt, for the respondent, contended that the mortgage was void, as the mortgagor was at the time it was made in insolvent circumstances to the knowledge of the mortgagee, both under 13 Eliz. ch. 5, and R.S.O. ch. 124, ss. 2 and 3; and cited *McRoberts v. Steinhoff*(i); *River Stave Co. v. Sill*(n); *Ex parte Fisher, In re Ash*(o); *Commercial Bank v. Wilson*(p); *Warnock v. Kloepfer*(q); *Clarkson v. Sterling*(r); *Dominion Bank v. Cowan*(s); *Cameron v. Perrin*(t); *MacDonald v. McCall*(u); *Ex parte Burton*(v); *Ex parte Kilner*(w).

SIR WILLIAM J. RITCHIE C.J., was of opinion that the appeal should be dismissed with costs.

FOURNIER J., concurred.

TASCHEREAU J.—I would dismiss this appeal with costs for the reasons given by Armour J., and Hagarty C.J., in the courts below.

GWYNNE J.—The question in this case is wholly one of fact, and I am of opinion that the Chief Justice of the Queen's Bench Divisional Court of Ontario has taken the correct view of the case—that the whole transaction was a

(h) 10 O.R. 167.

(i) 11 O.R. 369.

(j) 12 O.R. 1.

(k) 12 Can. S.C.R. 532.

(l) 22 Ch. D. 788.

(n) 12 O.R. 557.

(o) 7 Ch. App. 636, at p. 638.

(p) 3 E. & A. 257; 14 Gr. 473.

(q) 14 O.R. 288; 15 Ont.

App. R. 324.

(r) 14 O.R. 460.

(s) 14 O.R. 465.

(t) 14 Ont. App. R. 565.

(u) 12 Ont. App. R. 593.

(v) 13 Ch. D. 102.

(w) 13 Ch. D. 245.

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BROWN sham and a fraud. The appeal must, therefore, be dis-
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 Gwynne J.

Appeal dismissed with costs.

Solicitor for the appellant: *Robert Hicks.*
 Solicitors for the respondent: *McDougall, McDougall & Belcourt.*

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DOUGLAS DICKSON AND WILLIAM RYAN (DEFENDANTS)	} APPELLANTS;	1887
		*Oct. 26, 27.
AND		1888
MARIA KEARNEY (PLAINTIFF)	RESPONDENT.	*June 14.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Dedication—Public highway—Expropriation—Presumption—User.

K. brought an action against D. and R. for trespass to her land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years, and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost.

Held, reversing the judgment of the Supreme Court of Nova Scotia (20 N.S. Rep. 95), that in the absence of any evidence of dedication of the road it must be presumed that the proceedings under the statute were rightly taken and K. could not recover.

Held, per Strong, J., long occupation and enjoyment unexplained will raise a presumption of a grant not only of an easement, but of the land itself; and not only of a grant, but of acts of legislation and matters of record.

APPEAL from the judgment of the Supreme Court of Nova Scotia (a), affirming the judgment of McDonald, C.J., who ordered judgment to be entered for the plaintiff and a mandatory injunction to issue against the defendants.

The plaintiff, by her statement of claim, prayed an injunction commanding the defendants to remove certain water pipes laid down by them through land claimed by her and damages. The defence set up was that the acts

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

(a) 20 N.S. Rep. 95.

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complained of were not committed upon her land, but within the limits of the public highway between Dartmouth and the eastern side of Halifax Harbour; that the highway referred to was established as such under a provincial law in or about the year 1800 (*aa*), and had been in use for over 90 years. The provincial law referred to in the judgment read as follows:—

“That when and so often as any commissioner or commissioners for superintending the making or repairing of roads and bridges shall judge it necessary, for the convenience of the public, to make, alter, or enlarge any highway or road through the inclosed or improved lands or grounds of any person or persons, before such commissioner or commissioners shall proceed therein, he or they shall cause a plan of such new road or alteration to be drawn out and^d laid before two of Her Majesty's justices of the peace for the county or district within which such new road or alteration is to be made; and such justices shall and may thereupon order the clerk of the peace, for the county or district, to summon a special sessions of the peace to be held within ten days from the issuing of such summons, and the said two justices shall lay the said plan before the said sessions for inspection, and if the justices then present at such sessions, being three at the least, or the major part of them shall approve of such new road or alteration, they shall then and there order a precept to be issued to the sheriff of such county or district or his deputy, directing him to summon a jury of freeholders from one or more of the neighbouring townships lying most convenient to the place where such road or alteration is to be made, and such jury shall be composed of persons having no interest in or claim to the lands through which such road or alteration is to be made, and not of kin to any of the parties having an interest or claim to such lands; and the said jury being impannelled, shall be sworn by the said sheriff or his deputy, to view the lands through which the said highway or road is to be made or altered, and to lay the same out in such way as may be most advantageous to the public, and least prejudicial to the owner of such lands, and to assess such damages to the owner or owners, and tenant or tenants, of such lands, according to their several interests as the said jury shall think reasonable for the value of the lands and the improvements made on such lands to be taken into such highway, as also for the expense to be imposed upon the owner or tenant for making fences or ditches on the side of such highway.

“II. That if it should be found necessary to carry any such new road through waste and unimproved lands, and the owner or proprietor thereof shall suffer thereby any special damage, he shall be

(*aa*) 41 Geo. III., ch. 1.

entitled to have such damage ascertained and be compensated therefor, in manner hereinbefore directed, in the case of enclosed and improved lands.

III. That the verdict of the said jury shall be returned forthwith by the sheriff, or his deputy, to the clerk of the peace for such county or district, who shall thereupon send notice to the respective owners and tenants of the nature and course of the road to be made or altered through their lands, and of the recompense awarded by the jury, and also of the day appointed by said Court of Sessions to consider of the said verdict and if on such day no reasonable cause be shewn to said court why the said verdict should not be confirmed, the said court shall confirm and record the said verdict, and the road or highway shall be made or altered accordingly, and thenceforth become a public road or highway for all Her Majesty's subjects.

IV. And be it further enacted, That it shall be lawful for the Governor, Lieutenant-Governor or Commander-in-Chief, for the time being, to grant his warrant upon the treasurer of the province in favour of the person or persons who shall have obtained a verdict of a jury in the manner aforesaid, for the sums awarded in recompense of any lands so required and taken for a public road or highway and also for so much money as shall be sufficient to pay the lawful fees of the sheriff and the jury so employed about such valuation.

The defendants put in evidence the following extracts from public records to shew that the road was laid out pursuant to this statute :

"J. McD. 6."

"Quarter Sessions Book."

"Extract from the minutes of the Court of Quarter Sessions for the County of Halifax, held on December 13th, 1799. (J. McD.)."

"Upon application being made by William Turner and others, inhabitants of the south-east passage, stating that it would be of public utility to have a road laid out between the ferry house at Dartmouth and the southern part of the eastern part of the passage, the court taking the same into consideration, appoint Theophilus Chamberlain and Tobias Miller, Esquires, and Mr. John Allen, freeholders of the next township, to enquire into the necessity and conveniency thereof, and to report to this court on the first Tuesday of March next.

"Extract from the minutes of the Court of Quarter Sessions for the County of Halifax, held on March 14th, 1800. (J. McD.)."

"Theophilus Chamberlain, Tobias Miller and John Allen return their report of the necessity of a road being made from the ferry house at Dartmouth to the southern part of the eastern part of the

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passage. The court order that the sheriff do summon a jury of the next township to lay out the same pursuant to a law of the Province, and the same to be returnable on the 15th April next.

"Extract from the minutes of the Court of Quarter Sessions for the County of Halifax, held on May 1st, 1800. (J. M.C.D.).

"Ordered by the court that the time for the sheriff to make his return of the road to be laid out from the ferry house at Dartmouth to the southern part of the eastern part of the passage, be extended to the 20th May instead of the 15th April, as mentioned in minutes of 14th March."

The other facts and particulars of this case sufficiently appear in the judgment following of Sir W. J. Ritchie C.J.

MacCoy, Q.C., appeared for the appellants.

J. T. Wallace appeared for the respondent.

SIR W. J. RITCHIE C.J.—The claim of the plaintiff annexed to her writ is for damages and an injunction for entering her land and sinking a trench to lay pipes therein. The said trench when completed to be "for the purpose of conveying water through the same for a permanent, continuous and perpetual supply of water for the Hospital for the Insane," and, if permitted, will, she alleges, cause irreparable injury to her and her property.

In plaintiff's statement of claim, stated in compliance with command and judge's order, she claims a mandatory injunction and damages as follows:

The plaintiff claims the said mandatory injunction and damages for that the said defendants entered upon her said property on the sixth, seventh and eighth days of October last past and commenced to sink a trench through and across the same against the wishes and without the permission of the plaintiff, for the purpose of laying waterpipes therein to supply the hospital for the insane with a continuous, permanent and perpetual supply of water, to flow through the said pipes perpetually, and the defendants continued to sink the said trench with a large number of men until the tenth day of October past, up to which day they had sunk the said trench five feet or thereabouts deep, three feet or thereabouts broad, and six hundred feet or thereabouts long, through and across a portion of the plaintiff's said land, and threw the stones and earth so dug from the said

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trench on other parts of her property, and although they ceased digging for several days in consequence of a restraining order granted in this cause, they immediately resumed the work of digging on said order being set aside.

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And the statement further alleges that:

The water pipes so laid were and are intended as a permanent and perpetual work through which a continuous, permanent and perpetual supply of water is intended to be carried or to flow for the purpose of supplying the hospital for the insane or the Mount Hope Asylum with a continuous, permanent and perpetual supply of water, and the defendants dug the said trench and laid the said water pipes by direction and authority of the Provincial Government of Nova Scotia as they allege, but the plaintiff says that the said government had no right in themselves or permission from her to commit the said wrongs or any of them, nor had the said government or the defendants any right to the said land.

Plaintiff then sets out her title.

She likewise complains of being cut off of access to the main roads during progress of work, and that a large quantity of stagnant and impure water accumulated in trench and drained into another part of her land whereby, etc.

In what is called reply, plaintiff *inter alia* alleges:

9th. There was an ample supply of water from or through the old pipes, and would still be an ample supply for the same hospital had the same been retained or used solely for said hospital, but the water has been and still is as against the plaintiff illegally given to a sugar refinery lately erected in the vicinity of the said hospital.

And also says:

13th. The grievances complained of were not nor was any of them for laying water pipes in the highway, but for laying them in the space between the highway and the plaintiff's fence on the western side thereof.

The evidence clearly shews that the pipes were laid in the highway. And there is not a particle of evidence to sustain plaintiff's allegation of other damage other than digging the trench and laying the pipes, nor is there a tittle of evidence to shew that the pipes were laid other than the plaintiff herself alleges to supply the Hospital for the In-

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sane with a continuous, permanent and perpetual supply of water.

The defendants pleaded as follows:—

1. Denial of the acts complained of.
 2. That plaintiff was not in possession of the land alleged to be trespassed upon.

3. That the trench in which the water pipes were laid was made in and along the highway leading from Dartmouth to the eastern passage, and points beyond, and that the title to the soil and possession were vested in the Crown, and that the Crown, represented by the Government of Nova Scotia, as also the Commissioner of Public Works and Mines, authorized laying said water pipes in order to carry water from Maynard's Lake to the Hospital for Insane for domestic, fire and other purposes.

4. That said road was laid out by the Sessions for the county of Halifax in 1800 as a public highway, and that under the Statutes of the Province the title to the soil and possession vested in the Crown, and the Crown authorized the act complained of.

The reply is practically a denial of the defence.

No doubt the ordinary presumption is that the land owners on each side of the highway are entitled to the soil of the road which lies through or bounds their land; it is founded on the assumption that in making a road for public convenience the owners of the adjoining lands have sacrificed a portion of their property in order to devote it to public purposes, per Cockburn C.J., in *Leigh v. Jack* (b) referring to *Salisbury v. Great Northern Ry. Co.* (bb), and he adds:

Then such a presumption is both reasonable and useful when there is any uncertainty as to the person in whom the ownership of the soil is vested.

This would be so in the case of the dedication of the road, but not where the land for the road has been pur-

(b) 49 L.J. Ex. 220.

(bb) 28 L.J.C.P. 40.

chased and the ownership of the soil of the road thereby vested by such purchase in the Crown for the use of the public.

But in this case, I think, the evidence sufficiently rebuts the presumption that there was a dedication; on the contrary there was sufficient evidence, in my opinion, to shew that the road was expropriated under the statute 41 Geo. III., ch. 1. Mr. Wiswell says:

William H. Wiswell sworn: Am clerk of the municipality of Halifax; have been since 1879. Know Napean Clark; he was clerk of the peace until my appointment. I received from Mr. Clark the records and archives of Halifax County. This book, J. McD. 6, is the record book of the Quarter Sessions for the County of Halifax from Dec. 1799 to Feb. 1801. This book came to me with the records of the county, and is now in my possession. Reads extract marked J. McD. dated 13th Dec., 1799; also March 14, 1800, marked J. McD.; also entry May 1st same year, J. McD. The record of proceedings of the sessions between 22nd of July, 1800, and 9th of March, 1803, cannot be found. I have made very careful search among the books and records, and have not been able to find that containing the records between the dates above mentioned.

The following are the extracts referred to: (quotes extracts given *ante*, pp. 55-56).

There being no proof of dedication, and there having been a statute authorizing the taking of this land for a road, the presumption, I think, must be that the road was legally acquired under the statute subject to the payment of damages in the mode prescribed by the statute. Therefore, it must be presumed that what was necessary to give the statute effect and legal operation was rightly done and all necessary proceedings had; and the land owners received due compensation, though no other evidence can be now produced, but the order authorizing the commencement of the proceedings under the statute. And in view of the loss of the records, and the actual enjoyment of the user of the road for 75 or 85 years (and the commencement of such enjoyment would not be legal unless under the statute), I think a legal commencement must be presumed after such a long uninterrupted user.

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In the absence, then, of any evidence of dedication, and there being a statute under which the road could be laid out and the right to it acquired, and proceedings having been shewn to have been taken to acquire the road under the statute and under which the owners of the land would be entitled to the value of the road, and the records being lost by which the continuance of the proceedings could be shewn, I think it must be presumed that, if they could have been regularly opened under the statute; and, if so, it follows almost as a necessary consequence, that the parties interested had been duly paid and satisfied; and, if so, there does not appear ever to have been any claim made to, or right exercised over this road by the proprietors of the adjoining lands, claiming to own the fee simple in the road or to have any right therein or thereto; and where there are statutes on the subject I think it should be fairly presumed, in the absence of any evidence to the contrary, that the land was taken under the statute.

Then, what was the extent of such expropriation? Was it merely of the easement, or was it of the lands through which the roads passed? In the first instance I was very much inclined to think that under the Act in force in 1800 (41 Geo. III. ch. 1), the Legislature intended to establish an easement only in the land over which the Commissioner should judge necessary for the convenience of the public, and did not contemplate interfering with the general ownership of the soil at the time of the laying out of the road by vesting in the Commissioners, or the Crown, the title and freehold of the soil itself, over which the road was laid out and made under the provisions of the Act, and that no more was acquired by the public in the soil of the road than was necessary for the purpose for which it was to be used; but a decision of the Supreme Court of Nova Scotia, so far back as 1853, with respect to the title and freehold in the public roads laid out under a statute substantially the same, or, if anything, stronger in its language is in favour

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of the contention that the soil of the roads laid out under the statute was vested in the Crown. I cannot discover that this case has ever been overruled or repudiated, and I think all subsequent legislation in reference to roads has been on the assumption of the correctness of the law as enunciated in that case. The provisions in ch. 38 of the Acts of 1858, an Act for the management of the Hospital for the Insane, ignores any private right or property in the roads, streets and highways of the township of Dartmouth and recognizes only the commissioner of streets as having anything to do with the said roads or streets; and this same Act, when making provision for recompensing owners of lands taken for the use of the asylum, does not recognize any title or interest of private parties in the road in question, nor make any provision for recompensing the parties, but deals with it as belonging to the public.

The 23rd and 24th sections of the Act, ch. 38 of the Acts of 1858, "An Act for the Management of the Hospital for the Insane" (passed the 7th day of May, A.D. 1858), are as follows:

"23. The commissioners are authorized to take all proper and necessary steps to ensure to the hospital an ample supply of water, and to cause all such reservoirs, tanks, fountains, leaders, pipes and tubes as shall be requisite for that purpose to be laid and placed at proper and convenient distances below the surface of any of the roads, streets and highways of the township of Dartmouth; and it shall be lawful for the commissioners after ten days' notice given to the commissioners of streets for the township of Dartmouth, to break up and open such of those streets, roads and highways as may be necessary, and to keep the same open for a reasonable time; provided that such commissioners of the hospital shall faithfully and carefully close up, repair and make good such roads, streets and highways, or otherwise they shall be liable to defray all expenses that may be incurred by the commissioners of streets in closing up, repairing and making good the same.

"24 Whenever there shall be a necessity for the commissioners to enter upon and take possession of any lands, or lands covered with water, for the purpose of obtaining such supply of water, and cannot agree with the proprietors of such lands, and lands covered with water, for the sale or lease thereof, as may be required they may apply to the Supreme Court in term time, or to any two

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judges in vacation, by petition, stating the nature and position of the land, with the names of the owners or occupiers, so far as the same can be ascertained, and praying for the appointment of appraisers to value the land, and land covered with water, and the interest and estate therein required by the commissioners, and praying also the transfer, conveyance and use thereof to such commissioners; whereupon the court or judges shall appoint a time and place for considering such petition, after proper notice in writing given to all parties interested to attend at such time and place to be so appointed for that purpose, and at such time and place such Court or Judges shall require the commissioners to nominate one appraiser, and the parties interested in such lands, and lands covered with water, to appoint one appraiser, and such court or judges shall appoint a third appraiser; and such appraisers shall be severally sworn to the faithful discharge of their duties before such court or judges, and shall thereupon proceed to make a just and equitable valuation and appraisement of the fair and reasonable value of such lands, or lands covered with water, or of the fair annual rent thereof; and such appraisers, or any two of them, shall make a return in writing to the prothonotary of the Supreme Court at Halifax to be by him filed in his office, and if such court or judges shall, on application of the commissioners, be of opinion that the appraisement or valuation has been fairly and impartially made, they shall, by rule or order, confirm the same; and thereupon the persons entitled to receive the amount of such valuation or appraisement shall be paid the same by the commissioners, together with such reasonable costs and expenses as such court or judges may direct."

As the correctness of the law laid down in the case cited has never, so far I can discover, been impugned, it is easy to understand why the Legislature should, when a controversy arose in this case, by the Declaratory Act, ch. 23 of the Acts of 1887, put an end to any debatable question on the subject. The first two sections of that Act, ch. 23 of the Acts of 1887, "An Act to amend chapter 45 of the Revised Statutes, 5th series, 'Of laying out of roads other than great roads'" (passed the 3rd day of May, A.D. 1887), are as follows:

"Be it enacted by the Governor, Council and Assembly, as follows:

"1. The legal title to all highways; and the land over which the same pass, is hereby declared to have been heretofore vested in Her Majesty the Queen forever for a public highway.

"2. Every highway or street now opened or used as such shall be deemed to have been laid out under the statutes of this Province applicable thereto, unless the contrary can be shewn."

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Under all these circumstances I think the place where these pipes were laid down was a part of the public highway laid out under the authority of the statute before referred to, and which vested in the Crown the right to the soil and freehold of the said road so laid out.

Therefore I think the appeal should be allowed and the case dismissed.

STRONG J.—Having regard to the provisions of the statute which was in force in 1800 when the road in question was originally laid out, and the constant user which has since been had of it by the public as a highway, I am of opinion that without more we should presume that it had been regularly laid out and that the soil itself had been expropriated according to the provisions of the statute.

By the proper construction of the statute it is clear that what it authorized the sessions to take was the property in the soil itself, and not a mere easement. This is apparent from the provision for compensation, which directs the ascertainment, and payment to the owner, of the value of the land taken, which would, therefore, on such payment have the effect of completely diverting the property of the original owner. Moreover, the course of decision in Nova Scotia has long been in favour of this construction of the Act, which alone, as it seems to me, ought to be conclusive on the point.

I am of opinion that even if the records of the sessions shewed no trace of any proceedings to expropriate the land for this road, it would be proper, and in accordance with decided cases, to presume, after this long user, that all the requirements of the statute had been complied with. The records of the sessions, however, shewing that proceedings under the statute were actually taken and an order of sessions made to lay out this road, and the evidence of Mr.

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Wiswell shewing that all the records of sessions between 22nd July, 1800, and the 9th March, 1803, are missing and cannot, after a very careful search, be found, greatly strengthen the presumption that all things were regularly and legally done to warrant the long continued public user which has been had of this road as a highway.

I could not, I think, without disregarding authorities, do otherwise than hold that this is now a public highway, the original owner's title to the soil of which has been legally diverted.

I refer to the case of *Williams v. Eyton*(c), as an instance of a court making a much stronger presumption than any we are called on to make here, and that, too, after a user not half as long as that which has been had in the present case.

In *Williams v. Cummington*(d), a Massachusetts case, it is said:

Long occupation and enjoyment, unexplained, will raise a presumption of a grant not only of an easement but of the land itself; and not only of a grant but of acts of legislation and matters of record.

This can hardly be said to lay down a proposition of law, as these presumptions are rather presumptions of fact than of law, but it most correctly states the usage and practice by which courts of law are governed as well in directing powers as in themselves making such presumption in favour of long enjoyment.

Other strong objections to the judgment were raised and very forcibly argued by the learned counsel for the appellant, but I do not consider it necessary to enter upon them as, for the reasons already given, I am of opinion that the appeal should be allowed and the action in the court below dismissed with costs in both courts.

FOURNIER J., was of opinion the appeal should be allowed and action dismissed, but without costs.

(c) 2 H. & N. 771; 4 H. & N. 357.

(d) 18 Pick. 312.

SUPREME COURT CASES.

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TASCHEREAU J., concurred with the Chief Justice.

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GWYNNE J., concurred with Strong J.

Taschereau J

*Appeal allowed with costs and
action dismissed with costs.*

Solicitor for appellant: *Thomas J. Wallace.*

Solicitor for respondent: *William F. McCoy.*

on the boat as to their contents. On the passage the contents of the trunks were damaged by the negligence of the officers of the company, and an action was brought by D. and his employers to recover damages for such injury.

Held, affirming the decision of the Court of Appeal (15 Ont. App. R. 647), that the agreement between the association and the company was in force in 1886; that the term "baggage" in the agreement meant not merely personal baggage, such as every passenger is allowed to carry without extra charge, but commercial baggage, and would include the outfit in this case; and that in the expression "must be at owner's risk against all casualties" do not limit, control or destroy, but rather strengthen the protection which the former words "at owner's risk" afforded the defendants.

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NAV. CO.

APPEAL from the decision of the Court of Appeal for Ontario(a) allowing (Osler, J.A., dissenting) an appeal from the judgment of the Queen's Bench Division, which affirmed the judgment of Rose, J., at the trial, on the findings of the jury in favour of the plaintiffs.

In this case the plaintiff sued for damages to goods delivered to the defendants for carriage from Montreal to Toronto. The goods consisted of jewellery and watches, watch materials and jewellers' tools, to the value of \$15,000, contained in three large trunks described as "commercial trunks," and were said to be the usual outfit or equipment of a traveller for a jeweller's firm. In entering the Cornwall Canal the defendants' steamboat collided with one of the piers, the result being that the hull was stove in, the boat sunk and the plaintiff's goods were much damaged by water. The jury found that the accident was owing to the negligence of the defendants, and there was evidence to support the conclusion that if the vessel had been navigated with ordinary care and skill, she should have been brought up to the canal and should have entered it in such a way that the accident could not have happened. The defendants pleaded that the plaintiff was a member of an association called the Commercial Travellers' Association of Canada, which enjoyed certain rights and privileges with railroad

(a) 15 Ont. App. R. 647.

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companies and steamboat companies, and that the plaintiff was received on board the steamer as a passenger in pursuance of a contract made by the defendants with the said association, which, amongst other things, entitled the plaintiff to travel on a ticket at a reduced rate, and to carry a certain quantity of merchandise as baggage without paying for it as merchandise, and that by virtue of the contract the defendants were not to be liable for loss or injury or damages to any of the merchandise so carried, no matter how caused. The following are the questions submitted to the jury, and the answers:

Q.—1. Was the accident the result of negligence on the part of the company? A.—It was.

Q.—2. Was the nature of the contents of the boxes carried by the plaintiff Dixon obvious to the defendant company? A.—Yes.

Q.—3. Did the plaintiff Dixon know that by the regulations of the company there was any restriction upon his right to carry either merchandise or baggage? A.—According to his evidence he did not.

Q.—4. Did the company carry the contents of the three boxes as merchandise or as personal baggage? A.—Merchandise.

Q.—5. Did the defendant company know whether the three boxes contained goods and merchandise as distinguished from ordinary personal baggage? A.—The company assumed that the three boxes contained goods and merchandise.

Q.—6. Was Dixon at the time of purchasing his ticket aware that by the arrangement between the Commercial Travellers' Association and the defendants, the defendants were released from liability for damage to baggage? A.—He was not.

Upon these findings judgment was given in favour of the plaintiff, and the following were the reasons of the trial judge (unreported):

ROSE J.:—The jury having found the defendants guilty of negligence, and that the goods carried were carried as merchandise, the liability of the defendants must be considered in respect of these findings.

It was admitted that if the statute cited governed, the defendants would be liable unless the goods in question were personal baggage within the meaning of the statute 37 Vict., ch. 25.* The jury have found that the goods carried and damaged were not personal baggage, or carried as personal baggage, and that the nature

*Vide judgment, Wilson, C.J., *post*, p. 72.

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of the goods was obvious and therefore known to the defendant company. If, therefore, that statute applies, the defendant company is liable. It was argued that it did not apply because of the contract which the defendant company set up as having been entered into between them and the Commercial Travellers' Association, and under the terms of which they say they received the goods in question.

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I assume for the purpose of consideration—first, that this contract was a valid contract; that Mr. Sargent had authority from the Commercial Travellers' Association to make it or that having made it without express authority, they adopted it, and that the plaintiff Dixon and his co-plaintiffs, his employers, were bound by the terms of it. I assume further that he, having accepted the benefit of the contract, is not entitled to be freed from its burdens. And, so assuming, in order to construe the contract we look at its terms.

The only limitation which the defendants have set up in that contract or provided for by that contract are as to the amount of baggage to be carried free, and as to the risk to be incurred for casualties.

The limitation as to the amount of baggage is as to the quantity to be carried free. The word "baggage" has been argued to mean personal baggage, and has also been argued to mean commercial travellers' baggage. But I must assume in order to give effect to the finding, and on the facts here, that "commercial traveller's baggage" is a somewhat synonymous term, or is a synonymous term with merchandise; that it covers goods which a commercial traveller carries, not as personal baggage.

Strictly, therefore, the terms of the contract as to limitation do not cover commercial travellers' baggage or merchandise. Assume, however, that the term "baggage" does cover the goods in question. Then the defendant company has provided that it shall not be bound to carry more than 300 pounds free; it does not say that it shall not carry or will not carry more than 300 pounds, or that a traveller tendering himself with more than 300 pounds will be unable to have the whole amount carried. The contrary seems to be the fact, apart from any principle of law applying to any carriers, because we find from the custom of the boat, as given in evidence by the baggage-master, that he has no means provided by which to determine whether baggage equals or exceeds 300 pounds; and looking at the boxes in question he was unable to say whether, when filled, their contents would exceed 300 pounds, and in fact there is no express testimony, save the conjecture possibly of the plaintiff Dixon, that the three boxes which are chiefly in question did weigh more than 300 pounds.

I think the contract must be read, even assuming the word "baggage" to cover the goods in question, that if the plaintiff Dixon, a commercial traveller, tendered himself for carriage on the contract with more than 300 pounds of baggage, the company were not bound to carry more than 300 pounds free, and for the excess might charge

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reasonable rates. If they chose to carry more than 300 pounds, and to carry it free, that was their own concern. I think that they have tacitly abandoned the enforcement of that provision, and possibly, unless the excess were very great, would in no case take notice of the excess. However that may be, I think that the word "baggage" does not cover the goods in question, and I think if it did it would not limit the defendant company's liability for such baggage as they may carry in excess of 300 pounds and carry free. I do not take the word "free" as synonymous with the expression "without hire or reward." I think that the word "free" there, must mean that if the commercial traveller tender himself with 300 pounds of baggage and pay his fare from say Montreal to Toronto, \$8, that they will charge him nothing in excess for the baggage unless the baggage exceeds 300 pounds. It seems to me that the contract is one to carry him and 300 pounds of baggage for the price named, and that the 300 pounds are not carried without hire or reward, and if the company choose to carry more than 300 pounds free, that the word "free" will not make them gratuitous bailees.

Further consideration is required as to the expression "casualties." It has been argued on behalf of the defendant company that the plaintiff Dixon and his co-plaintiffs, the owners of the goods, have by this contract freed the company from all responsibility for injury or damage from neglect. It is therefore necessary to see in what light contracts of affreightment and clauses limiting liability have been construed by the courts in England.

The leading case, well known to counsel, is that of *Philips v. Clark (a)*, which, with the other cases I have referred to, may be found collected in the last edition of Addison on Contracts, page 496. The general rule of law is expressed in the text, and I think accurately expressed. A stipulation in a bill of lading that the shipowner is not to be accountable for leakage or breakage absolves him from responsibility for leakage and breakage the result of mere accident, where no blame is imputable, or for leakage, the result of bad stowage where the shippers have themselves superintended the stowage, but does not exempt him from the obligation which the law imposes upon him of taking reasonable care of the goods intrusted to him to be carried. And an exception in a bill of lading of "accidents or damage of the seas, rivers and steam navigation of whatever nature or kind soever does not protect the shipowner from liability for damage arising from a collision caused by gross negligence of his ship's master and crew."

Reference to the case will, I think, discover that the word "gross" is dropped from use or thought in the discussion of the matter; and the term "gross negligence," I think, may be replaced by the term "negligence" in the text without affecting the accuracy of the reported decision. "An exception of loss by thieves means, *prima facie*, persons outside the ship and not belonging to it."

And in the case of *Lyon v. Mells* (a)—I am citing from the text of Lord Ellenborough's observations: "We cannot construe a contract for the carriage of goods between the owners of vessels carrying goods for hire and the persons putting the goods on board so as to make the owners say 'we will not be answerable at all for any loss occasioned by our own misconduct,' for this would in effect be saying 'we will be at liberty to receive your goods on board a vessel, however leaky; we will not be bound to provide a crew equal to the navigation of her; and if through these defaults the goods are lost we will pay nothing.'"

We find, also, from the cases referred to in the text, that from losses occasioned by the act of God, the Queen's enemies, and the dangers and the perils of the sea and of navigation, a carrier by water is, and always has been, exempt by common law; but he is not exempt, nor does the exception in the bill of lading or other contract of affreightment exempt him, from accidents occasioned by his own negligence and misconduct or want of skill, or the negligence, misconduct or want of skill of the persons whom he has entrusted with the management of the vessel. I find the word "accident" is used in some dictionaries as a synonym for the word "casualty."

If we should read in this contract the word "accident" or "accidents" as replacing the word "casualties," we have authority distinctly in point that the contract must be read as exempting the carrier from damage for accidents happening without negligence.

I think, having reference to the cases mentioned, and also the American cases which are referred to in the foot-note of *Phillips v. Clark* (b), that I must read this contract as not freeing the defendant company from damage occasioned by casualties which were the result of negligence on the part of the company.

I refer particularly to the following cases: *Phillips v. Clark* (b); *Ohrloff v. Briscall* (c); *Czech v. General Steam Navigation Co.* (d); *Lloyd v. The General Iron Screw Collier Co.* (e).

I think, therefore, as there is nothing in the contract to limit the liability of the defendant company, and they have been found guilty of negligence, they must be held responsible by the findings of the jury.

There must be a reference to ascertain the amount of the damage; and the plaintiffs will have their costs. Unless the parties can agree upon the referees, I shall within a few days name them myself.

From this judgment an appeal was taken to the Queen's Bench Division, when the judgment below was affirmed (unreported), the only reasons delivered were the following:

(a) 5 East 428.

(c) L.R. 1 P.C. 231.

(b) 2 C.B.N.S. 156.

(d) L.R. 3 C.P. 14.

(e) 3 H. & C. 284.

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WILSON C.J.:—I do not consider the charge of negligence, because there was certainly evidence of it, and the jury have expressly found the charge against the defendants' employees who were in charge of the boat. The evidence shews the plaintiff was, at the time of the accident, and had been for years, and still is a member of the Commercial Travellers' Association of Canada, and that he was provided with a ticket as such member issued by the society to shew, on production, that he was entitled "to all the rights and privileges which the association may enjoy with railroads, steamboats," etc. On the back of that ticket there was printed at the time of its issue on the 5th of January, 1886, a declaration signed by Mr. Dixon, the plaintiff, that in consideration of the privileges granted by the different railways to him as a commercial traveller, he agreed to the conditions thereon stated as endorsed upon the railway company's tickets, and to be bound thereby.

The conditions must not be stated, as they are not the same which the association had made with the defendants. The ticket is referred to because on its face it states the members of the association are entitled to all the privileges which the association may enjoy with railroads, steamboats, etc., and because it requires the member using it "to present it when purchasing ticket, and to conductor when required."

At the time of the accident the association had an arrangement with the defendants that fares which members of the association and the wives of members when travelling with their husbands would be charged would be 20 per cent. under the regular fares with an allowance of 300 pounds of baggage free, "but this baggage must be at the owner's risk against all casualties," and members will be required to produce their tickets of membership.

The arrangement that was made by Mr. Sargent, the secretary of the association, was by the direction of the board of management with the defendants. Mr. Sargent reported that arrangement as follows: "When in Montreal your secretary called on Mr. Labelle, general manager of the Richelieu & Ontario Line of steamers and arranged for rate for 1886—20 per cent. off to members and their wives and 300 pounds of baggage free." The minute of last meeting says: "That the secretary's report referring to railway privileges be read, received and reported." That was at a meeting of the board in August, 1885. The like arrangement subsisted in 1886, and was renewed in 1887. It is not mentioned in the report of the secretary of the association which is the memorandum of the arrangement made for 1886, that "the baggage was to be at the owner's risk against all casualties," as contained in the letter of the 28th of May, 1885, of Mr. Milloy, one of the officers of the defendants' company, and which letter was the agreement for 1885. It may be that the terms for 1885 were the like terms for 1886, but it does not appear to be so in the report to or on the minutes of the board of management of the association. Dixon, the plaintiff, said he handed his

certificate of membership to the purser of the boat and he got his passage ticket for \$8 on that certificate, and the ticket he got has on it 158 T., the figures being the number of his association's certificate, and the T. is for Toronto. The plaintiff also said the association must have had some arrangement with the defendants or he would not have got a commercial travellers' ticket from them. He understood there was some arrangement, but what it was he did not know.

I cannot make out that there was any bargain about the baggage of the members of the association being at their own risk for 1886. If there was no such bargain, then the only question about the baggage is, whether any question, and if so what that question is, which arises about its being checked as ordinary personal baggage instead of being specifically put on board and delivered to be carried as merchandise.

If there was a contract that the baggage was to be carried at the risk of the owner, it would, I think, apply only to the 300 pounds that were to be carried free and not to the whole of the baggage. Then as to the goods that were carried, the evidence shews plainly that the kind of trunks that Dixon had with him were not such trunks as personal or ordinary travellers' baggage is carried in. They were plainly commercial travellers' baggage, and their baggage consists in such trunks of merchandise.

The plaintiff Dixon said he never paid for any excess of baggage or merchandise upon boats, and he did not know what was allowed. I agree with the learned judge who tried the case, that the plaintiff must be presumed to have knowledge of the terms of the arrangement between the association and the defendants, of which he was taking and claiming as of right the benefit, and that he knew therefore he was not entitled to have more than 300 pounds carried free; but that is of little consequence, as there is no question about free or not free, so long as the other condition relating to the free part, at any rate, being at the risk of the owner, is not a part of the agreement between the association and the defendants, as it appears not to be according to the report of the secretary of the association to the board of management, and the minute of the same on the association books; so that members of the association cannot be said, whatever the facts may be, to be presumed to have had knowledge that their baggage—300 pounds of it at any rate—is at their own risk, unless actual knowledge of the fact, if it be a fact, is brought home to the member that there is such an unwritten condition in truth in the agreement of the association in their favour.

If there was negligence on the part of the defendants, and that I think has been not improperly found against them, and if the trunks in question were delivered to them without fraud as trunks of merchandise, as I think they were, for they were the ordinary commercial travellers' baggage—trunks used for the carriage of their merchandise, and not for the carriage of ordinary personal baggage; and if the defendants, by their employees, received the trunks knowing them

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to be what they appeared to be without objection, as I think they did, they are, I think, responsible for their loss. The Carriers Act, R.S.C. ch. 82 (formerly 37 Vict., ch. 2, sec. d.), has now to be considered.

By sec. 2, sub-sec. 3, the defendants as carriers by water are liable for the loss of or damage to goods entrusted to them for conveyance.

Sub-section 4 provided they shall not be liable to any extent whatever to make good any loss or damage happening without their actual fault or privity, or the fault or neglect of their agents, servants or employees:—

(a) To any goods on board such vessel or delivered for conveyance therein by reason of fire or the dangers of navigation;

(b) Arising (that must mean or arising) from any defect in or from the nature of the goods themselves or from armed robbery or other irresistible force;

(c) To any gold, silver, diamonds, watches, jewels, or precious stones, money or valuable securities, or article of great value not being ordinary merchandise by reason of any robbery, theft, embezzlement, removal, or secreting thereof unless the true nature and value thereof has at the time of delivery for conveyance been declared by the owner or shippers thereof to the carrier or his agent or servant and entered in the bill of lading or otherwise in writing.

By these enactments the carriers are answerable for their negligence.

Section 3 then provides that carriers by water shall be liable for the loss of or damage to the personal baggage of passengers by their vessels, and the oath or affirmation of any such passenger shall be *prima facie* evidence of the loss of or damage to such articles and their value.

Provided that such liability shall not extend to any greater amount than \$500, or to the loss of or damage to any such valuable articles as are mentioned in the next preceding section unless the true nature and value of such articles so lost or damaged have been declared and entered as provided by the said section. The words "provided that such liability" apply to the loss of or damage to the personal baggage of the passenger and so not to these trunks or their contents and the limit of that liability is \$500. As to the latter part of the proviso "or to the loss of" these words must be used as if premised with the words "Provided also such liability shall not amount to the loss of or damage to any such valuable articles as are mentioned in the next preceding section," and so the proviso will be limited to the case of the passenger taking with him as personal baggage any of these valuable articles.

That was not done here, and so I must not consider what might have been the consequence if that had been done. There is, perhaps, an inconsistency between the proviso and the preceding section, for the proviso refers to personal baggage and the preceding section re-

fers to merchandise, the expression is "not being ordinary merchandise," but still merchandise. What may or may not be ordinary merchandise it is not necessary to say now, whether extraordinary or unusual as distinguished from the ordinary and common merchandise such as hardware, dry goods, etc., or of great value, which is a term used in that preceding section as distinguished from articles of common and ordinary value or what else it may be is no part of the case. It is a hard case that the defendants should be liable for so large a claim as is made upon them when they did not know the nature or the value of the goods they were carrying, and for which carriage by their own act they made no charge.

The goods were clearly at the risk of the plaintiffs by sec. 2, sub-sec. 4 (c), of that Act as against robbery, theft, embezzlement, removal, or secreting of them, for no declaration was made by Dixon of their nature and value at the time they were put aboard, but not at their risk as against the negligence of the defendants in running their boat against the canal pier and thereby damaging the goods.

The company might have protected themselves by printing on these travellers' or privileged tickets the conditions upon which alone they would carry such kind of baggage or luggage. All, however, that was done, according to the evidence was, the secretary of the association and the manager of the defendants' boat had a conversation and they agreed upon terms which the secretary of the association reported to the board of management, that the members should be allowed a deduction on their fares of 20 per cent., and have 300 lbs. of their baggage carried free, but reported nothing about the baggage or any part of it, carried free or otherwise, being at the risk of the owner against all casualties, and so the association had no actual bargain by adopting the secretary's report with the defendants' that such risk was to be borne by the members of the association. The railway conditions endorsed on the members' certificates are not the same as the defendants say they made with the association.

If there had been a binding agreement between the association and the defendants that the baggage of the members of the association, or any part of it, was to be at the risk of the owner of it against all casualties, the defendants to the extent of that condition would not have been liable and the members would be bound by it whether they knew of it or not. But there no condition of that kind was known to the company, nor known in fact by Dixon: *McCawley v. The Furness Ry. Co.* (f); *Gallin v. London & North Western Ry. Co.* (g); *Hall v. North Eastern Ry. Co.* (h).

For the plaintiffs had certainly a full equivalent for the exemption claimed by the company.

I am obliged to say that the motion and the order *nisi* must, I think, be dismissed, with costs.

(f) L.R. 8 Q.B. 57.

(g) L.R. 10 Q.B. 212.

(h) L.R. 10 Q.B. 437.

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On appeal to the Court of Appeal the judgments of the Queen's Bench Division and of the trial judge were reversed, Osler J., dissenting (i).

Christopher Robinson, Q.C., and Percy Galt, for the appellants.

Dr. McMichael, Q.C., and D'Alton McCarthy, Q.C., for the respondents.

All the members of the court were agreed that the appeal should be dismissed with costs, the only reasons for judgment being those of

SIR W. J. RITCHIE C.J.—I agree with the Chief Justice of the Court of Appeal that the agreement of 1885 was in existence and binding upon the parties to it in 1886. The terms of the agreement were "that the fare for members of the association (Commercial Travellers of Canada) would be 20% under the regular fare, with an allowance of 300 pounds of baggage free, this baggage must be at owner's risk against all casualties, members will be required to produce their tickets of membership." I also think that the provision as to baggage referred to a well known course of dealing with commercial travellers, and that the trunks damaged were, in accordance with that dealing, commercial baggage and so understood by both parties. Dixon claimed the benefit to which he was entitled as a commercial traveller, and it was accorded to him. He paid the reduced fare, produced his ticket, and had his trunks checked by the baggage master, and thus, as the learned Chief Justice says, they were treated by the owner in the ordinary way as personal baggage, checked, and given in charge of the baggage master.

I do not think the words "against all casualties" were intended to, or did in any way, limit, control or destroy, the protection which the words "at owner's risk" conferred

(i) 15 Ont. App. R. 647.

on the defendants. They strike me, as they appear to have done the Chief Justice, to have been intended to strengthen instead of destroying the exemption from liability. If that be so, and the addition of the three last words do not, as was contended, destroy the protection given by the two first, the carrier is protected in a case like this.

Inasmuch as the defendant, though guilty of negligence, cannot be said to have been guilty of wilful misconduct, and, except which, the words "owner's risk" would clearly protect the defendants, I think the appeal should be dismissed, and the judgment in favour of the defendants affirmed.

Appeal dismissed with costs.

Solicitors for the appellants: *Beatty, Chadwick, Blackstock & Galt.*

Solicitors for the respondents: *McMichael, Hoskin & Ogden.*

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 **June 22. } FUS (PLAINTIFFS) } APPELLANTS;

AND

JOSEPH CREIGHTON (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sheriff—Cause of action—Execution of writ of attachment—Abandonment of seizure—Estoppel.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ, that he had seized the goods. The sheriff subsequently seized and sold the goods under executions of other creditors. In an action against the sheriff:—

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it was the sheriff was estopped by his return to the writ from raising the question.

Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment of Mr. Justice Weatherbe in favour of the defendant.

The plaintiffs issued a writ of attachment against one McKean, as an absent debtor, and goods were levied on under the attachment which were in possession of one Spinney, who held them under a bill of sale not filed. The

*XIV. Can. S.C.R. 740.

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

goods were duly appraised and left in the possession of Spinney. After the attachment other creditors issued attachments against the goods, but Spinney having in the meantime filed his bill of sale, concluded to resist them, and employed the plaintiffs' solicitor for that purpose, Spinney agreeing to waive any opposition to plaintiffs' attachment and another levied before the filing of the bill of sale. The attachments ripened into execution in all the cases, and the goods were advertised and sold under them, but the proceeds were paid over to the holders of the subsequent attachments, who indemnified the sheriff. The sole question at the trial was whether the plaintiffs had abandoned their attachment.

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The learned judge who tried the cause held that the plaintiffs were estopped by the conduct and language of their attorney from saying that they had not abandoned, and the Supreme Court of Nova Scotia *en banc* being divided in opinion, the appeal from the trial judge was dismissed. The plaintiffs then appealed to the Supreme Court of Canada.

Russell appeared for appellants.

Gormully, Q.C., appeared for respondent.

All the members of the court were agreed to allow the appeal. The only reasons for judgment delivered were those of

GWYNNE J.—The plaintiffs sue the sheriff of the county of Lunenburg for moneys in the hands of the sheriff, which they claim to be entitled to in virtue of a writ of attachment executed by the sheriff upon the goods of one Mc-Kean at the suit of the plaintiff and a writ of execution placed in the sheriff's hands upon a judgment recovered in the suit in which such writ of attachment had issued. The only issue which the parties went to trial upon was one joined upon a plea of the defendant to the following effect,

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namely:--The defendant says that on the 23rd day of March, 1884, or thereabout, the plaintiffs caused to be delivered to him what purported to be a writ of attachment issued out of the Supreme Court of the county of Lunenburg at the suit of said plaintiffs; that he forthwith thereunder at the request and under the direction of the solicitor of the plaintiffs, levied upon certain goods and chattels, etc., then in the possession of one Spinney, and which he claimed to be his goods; that after the said defendant had attached, appraised and levied upon said goods the solicitor of said plaintiffs directed said defendant to abandon the same and to deliver the same up to Spinney, and stated to defendant that the goods so attached were the property of Spinney and not of McKean, and defendant thereupon abandoned said levy and delivered the goods up to Spinney. The plea alleges other writs of attachment at the suit of other creditors, namely, one named Esson, and another named Taylor, against the said McKean, by virtue of which the sheriff seized again the same goods, and the proceeding of such creditors to judgment and execution in their actions and the sale of the goods so attached as last mentioned under the said last mentioned executions, and the payment of the amount realized at such to the said last mentioned creditors.

At the trial the sheriff's return on the attachment issued at the plaintiffs' suit was produced whereby he returned that

on the 29th March, 1884, in obedience to the command of the within writ I served a copy of the within by leaving it at the last place of residence of defendant herein, and, at the same time, attached the personal property of defendant as per appraisement and inventory annexed, fees (items amounting to) \$8.30.

The deputy sheriff who executed the writ of attachment left the goods so attached in the possession of Spinney, taking from him the following paper:

March 29th, 1884.

P. McGuire, Esq., Deputy Sheriff.

I hereby undertake and agree that all the goods and chattels levied upon or attached this day by you at suit of *John Duffus et al.*

v. *Stephen D. McKean* will be by me held intact until such time as you may choose to make full list and seek to take charge of the same (without prejudice to my interest).

Yours truly,

(Sgd.) O. SPINNEY.

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This was done with the consent of the plaintiffs' solicitor. It was admitted at the trial that the only question to be tried was whether the plaintiffs had abandoned the attachment so made. Upon this issue alone the plaintiffs' right to recover depended.

The learned judge before whom the case was tried without a jury, found the issue on the above plea in favour of the defendant upon the ground that, in his opinion, the plaintiffs were estopped by the conduct and language of their attorney to deny the abandonment. The Supreme Court being divided in opinion as to the correctness of this verdict, the question now before us is whether it can be sustained.

The contest is substantially between the plaintiffs and the subsequent attaching creditors—Esson and Taylor, upon whose indemnity the sheriff has proceeded. The question is not one of estoppel, for no such question is raised by the issue; and no facts are pleaded out of which an estoppel could arise. The question simply is whether the evidence is sufficient to justify the conclusion in point of fact that the plaintiffs had abandoned the seizure under their attachment. It is not alleged or pretended that the plaintiffs' solicitor did ever, in fact, direct the sheriff (as is alleged in his plea) to abandon the seizure made by him under the plaintiffs' writ of attachment. All that the sheriff himself says is, that subsequently to his receiving from his deputy the above agreement addressed to him and signed by Spinney, the plaintiffs' solicitor never gave him any further instructions to proceed in the matter. The deputy sheriff also says that after the writ of attachment was executed by him the plaintiffs' solicitor never gave him any further directions to proceed in the matter; but he admits

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that shortly after he had executed the writs of attachment of Esson and Taylor the plaintiffs' solicitor said to him that there were only goods enough for Duffus and Boliver. He also admits that he once asked the plaintiffs' solicitor if he had abandoned the attachment of the plaintiffs, and that he replied that he had not and that he did not intend to do so. The solicitor, who was also examined as a witness, said, upon this point, that after the writs of attachment at suit of Esson and Taylor, but before removal of the goods, the deputy sheriff told him that a Mr. Hunt had written to him to say that Duffus's claim had been paid and that they had abandoned their attachment, and that the deputy sheriff asked him (the plaintiffs' solicitor) if such was the case, to which he replied "No, that Duffus had not been paid anything and that they had not abandoned, and had no intention of doing so." It is clear, therefore, that no order was ever given by the plaintiffs' solicitor to the sheriff to abandon the seizure made by him under the plaintiffs' attachment; it only remains to consider whether any conduct of the plaintiffs' solicitor constituted an abandonment in fact of that seizure.

That the sheriff executed the plaintiffs' writ of attachment on the 29th March, when the goods attached were left in the hands of Spinney under his agreement of that date, cannot be disputed in this action. The sheriff is concluded by his return upon the writ, which appears to have been made by him on the 4th April, 1884. Between that date and the 7th April, when the writs of attachment at the suit of Esson & Co. and Taylor against McKean were placed in his hands to be executed, nothing appears to have taken place in the nature of an abandonment of the writ of attachment of the present plaintiffs. Neither does anything of that nature appear to have taken place between the 7th and 14th April, when the writs of attachment, placed in the sheriff's hands on the 7th April, were executed by him. The plaintiffs proceeded to judgment and placed a writ of execution issued thereon in the sheriff's hands, but writs

of execution at the suit of Esson & Co. v. McKean and of Taylor v. McKean came to his hands first. The sale took place after the plaintiffs' execution had come to the sheriff's hands, and the deputy sheriff, in his evidence, admits that he told the plaintiffs' solicitor that the sale should take place under all the executions. Now, upon this evidence, it appears not only that there is no foundation for the allegation in the plea upon which the defence of the defendant was rested, namely, that after the seizure under the writ of attachment the sheriff was ordered by the plaintiffs' solicitor to abandon that seizure, and that, therefore, he had done so, but the evidence also shews that the plaintiffs' solicitor never had, in fact, any intention to abandon the seizure under the plaintiffs' attachment, and that he had so informed the sheriff through his deputy; and so the plea upon which alone the defence was rested was not proved, but on the contrary was disproved. However, it was argued that, nevertheless, an abandonment had, in fact, taken place, which was evidenced, as was contended, by the fact of the goods, after having been seized under the attachment, having been left in the hands of Spinney under his agreement of the 29th March with the consent of the plaintiffs' solicitor, and on the further fact that the gentleman who was the plaintiffs' solicitor in suing out the writ of attachment acted as solicitor of Spinney in an action brought by him against the sheriff for the seizure made by him under the writs of attachment issued at the suit of Esson & Co. and of Taylor v. McKean.

Now as to the good attached at the suit of the plaintiffs having been left in the hands of Spinney under his agreement of the 29th March with the assent of the plaintiffs' solicitor, it is to be observed, 1st, that the sheriff is concluded from raising this point as a defence in bar of the present action by his subsequent return of the writ on the 4th April, 1884, that he had executed the writ and had levied under it as he was thereby required to do; and, 2ndly, the explanation of that transaction given by the plaintiffs'

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solicitor shews that no intention of abandonment was entertained by him, so that if the act should operate as an abandonment of the seizure, it must do so in despite of the intention of the plaintiffs' solicitor to the contrary.

What was done in substance appears to have been that after the goods were seized under the attachment and left in Spinney's hands under the agreement contained in the paper delivered by him to the deputy sheriff, Spinney went to Boston, and here it may be admitted that in doing so he acted under the advice of Mr. Wade, who was solicitor of the plaintiffs in the attachment matter, to procure an assignment from McKean of certain book debts and claims of McKean against divers persons, together with the books, etc., evidencing such debts and claims. The consideration stated in the deed of transfer of such debts and claims, which Spinney took with him to get executed, and which was executed by McKean, is the assumption and payment by Spinney of debts due by McKean to Duffus & Co. and to Bolivar. When the sheriff executed the writs of attachment at suit of Esson & Co. and of Taylor v. McKean, Mr. Wade acted as Spinney's solicitor in bringing an action against the sheriff in respect of his conduct on such seizure, which was claimed to be in prejudice of rights acquired by Spinney under the assignment made to him by McKean. Mr. Wade testifies upon this point, and his is the only evidence upon the point, that he refused to act at all in the matter for Spinney until he agreed to waive any claim to interfere with Duffus' and Bolivar's attachment, and that those attachments should prevail. He thus, before acting for Spinney, took care, as was his undoubted duty, that his acting as Spinney's solicitor should not prejudice in any respect his clients, the attaching creditors of McKean, and should not fairly be open to any such imputation. There is nothing in the evidence to warrant the imputation of *mala fides* in this declaration of the solicitor as to his providing for the maintenance intact of the rights of his clients, the attaching creditors, which his duty to those

clients required him to provide. Anything done or said by him afterwards in the character of Spinney's solicitor could not have, nor do I think the sheriff could reasonably suppose that it should have, the effect of releasing the goods seized by the sheriff under Duffus & Co. and Bolivar's attachment from the operation of those writs.

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The defendant having failed to establish the truth of the plea upon which he rested his defence, the plaintiffs were entitled to a judgment in their favour.

The appeal must, in my opinion, be allowed with costs, and judgment be ordered to be entered in the Court below for the plaintiffs to the amount of the plaintiffs' execution, with interest, together with their costs of suit.

Appeal allowed with costs.

Solicitor for appellants: *Russell & Congdon.*

Solicitor for respondent: *Otto S. Weeks.*

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*THE GREAT WESTERN INSURANCE } APPELLANTS;
 COMPANY (DEFENDANTS)..... }

AND

JAMES G. JORDAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
 BRUNSWICK.

*Marine insurance—Loss of freight—Detention by ice—Perils insured
 against.*

A vessel on her way to Miramichi, N.B., was chartered for a voyage from Norfolk, Va., to Liverpool with cotton. She arrived at Miramichi on November 25th and sailed for Norfolk on the 29th. Owing to the lateness of the season, however, she could not get out of the bay and she remained frozen in the ice all winter and had to cancel her charter-party.

Held, reversing the judgment of the Supreme Court of New Brunswick (24 N.B. Rep. 421), Henry J., dissenting, that the loss occasioned by the detention from the ice was not a loss by "perils of the seas" covered by an ordinary marine policy.

Held, per Henry J.:—Contracts of insurance on freight differ essentially in many respects from those on vessels or goods, and when chartered freight is insured and lost through any of the perils insured against it is not necessary to shew that the vessel was damaged; that the insured is entitled to recover if the vessel is detained by any of the perils insured against whereby the chartered freight is lost.

Per Henry J.:—When a contract of affreightment cannot be carried out by reason of stress of weather or other causes beyond control within the time contemplated by the parties, there being no fault on either side, both parties are discharged; and if under such circumstances the parties agree to cancel the contract, it cannot be treated as a voluntary cancellation that will disentitle the insured to recover upon his policy of insurance against loss of freight.

*XIV. Can. S.C.R. 734.

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

APPEAL from a judgment of the Supreme Court of New Brunswick, setting aside a non-suit and directing a verdict to be entered for the plaintiff.

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By a policy of insurance dated September 26th 1882, the respondent effected insurance with the appellants upon the freight of goods and merchandise laden, or to be laden, on board the barque "Veritas," from London to Heron Island, Baie des Chaleurs, N.B., and thence to a port of discharge in the United Kingdom. The peril insured against is thus described in the policy:

Touching the adventures and perils which the said Great Western Insurance Company is contented to bear and takes upon itself in this voyage; they are of the seas, winds, waves, rocks, sands, shoals and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers or assailing thieves, barratry of the master and mariners and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel, or any part thereof, occasioned by sea perils.

On the 1st December, 1882, and before loss, the following endorsement was made on the policy:

The voyage from Heron Island is hereby changed to read Heron Island to Miramichi, and at and thence to Norfolk, Va., to load cotton for Liverpool or Havre.

Before the making of the indorsement, namely, on the 3rd November, 1882, the respondent effected a charter-party with the Compress Association of Norfolk, whereby the latter agreed to furnish a full and complete cargo of cotton for Liverpool. By the charter-party it was stated and agreed that the vessel was then due at Sydney or Miramichi, and that on receiving orders would sail direct to Norfolk in ballast.

On the 25th November the vessel arrived at Oak Point in Miramichi, and on the 27th received orders to sail for Norfolk, and on the 29th she set sail. While proceeding on her voyage to Norfolk the ice began to make and to impede her progress, and when she reached Horse Shoe Bar, a bar at the mouth of the Miramichi which she had to cross, the ice was so piled upon the bar that she could not get over

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it, and she was, therefore, obliged to put back. In endeavouring to get back she was badly cut by the running ice, and was caught in the ice and frozen in a place where it was dangerous for her to be allowed to remain, and accordingly she was sawed out and taken to a place of safety in Baie du Vin, where she remained frozen in until the 6th or 7th of May following.

When the vessel became frozen in, the plaintiff telegraphed the fact to his agent at Norfolk, who in turn informed the charterers. The charterers thereupon notified the plaintiffs' agent that in consequence of the vessel being frozen in they regarded the charter as at an end and would have to ship the cargo by other vessels. Afterwards the following indorsement was made upon the charter-party and signed by the charterers' agent, and by the agent of the plaintiff, who had effected the charter :

Dec. 19th, 1882.

By mutual agreement the within charter-party is cancelled on account of the vessel being frozen in at Miramichi.

The agent then communicated to the plaintiff what had been done, but so far as appears the plaintiff made no reply. In his declaration, however, the plaintiff alleges that in consequence of the delay he and the charterer had cancelled the charter-party.

At the trial, before Wetmore J., a non-suit, moved for on the ground that the delay was caused by the natural impediments of the season, wholly independent of the perils insured against, was granted, the court holding that the detention of the vessel was from natural causes—the ordinary and inevitable course of nature, closing up the bay, which invariably occurs.

This non-suit was set aside by the Supreme Court of New Brunswick, the court holding that there was a loss of insured freight: that what occurred was one of the fortuitous perils, and not one of the ordinary occurrences of navigation; that the underwriters had assumed the risks of a voyage in this locality at a season when perils of this kind

were known to abound, and that it was one of the risks intended to be insured against.

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Alward appeared for the appellants.

Weldon, Q.C., appeared for the respondent.

SIR W. J. RITCHIE C.J.—I am of opinion the loss was not one occasioned by the perils insured against.

STRONG J.—I am of opinion the judgment of the court below should be reversed.

HENRY J.—I am sorry to be obliged to differ from the conclusions arrived at and just enunciated by my brethren in this case. The principles involved are of great importance, not only to the parties concerned, but to the commercial public, and I shall briefly give my reasons for so dissenting.

The action is upon a policy of marine insurance, issued Dec. 1st, 1882, substantially on chartered freight on a voyage from Norfolk, Va., direct to Liverpool. In the charter there is the very common clause stating the understanding that the vessel was then fully due at Sydney or Miramichi, and that she would, on receiving orders, sail direct for Norfolk in ballast, the act of God, adverse winds, the Queen's enemies, fire, restraint of princes or robbers and all dangers and accidents of the seas, rivers and navigation throughout the whole charter-party being excepted.

The contract of affreightment must be construed as if one party had undertaken to receive the cargo, and the other to furnish it, within a reasonable time to be governed and decided upon according to the nature of the cargo and necessity to have it shipped at a comparatively early period.

It is, of course, necessary to look at the contract and determine the rights of the parties according to its construction.

The owner undertook, as I venture to define it, to have

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the vessel at Norfolk, Va., within a reasonable time. If he was guilty of improper delay the charterer would have recourse for damages, but if the ship was detained by stress of weather, or other causes over which the owner had no control, no cause of action would arise for any delay. If the ship did not reach the shipping port at the time stipulated, but without any fault of the master or owner, the latter is relieved from the operation of the contract.

This was the position in which the owner of this vessel and the charterer stood at the time that she left the Miramichi River for the purpose of commencing the voyage to earn the chartered freight.

So far the ship owner had acted in furtherance of the agreement, and while so acting the ship was prevented, by what is through an accident of the seas, river and navigation, called "the act of God," from proceeding on her voyage. We are told that as between the insured and insurer this was a risk the ship owner took. That must be considered, however, in relation to the circumstances, and the time at which the risk was taken, and with the full view and consideration of what was passing in the minds of the parties when the contract of insurance was entered into.

Until insured the risk was, of course, upon the owner, and feeling there was a risk, he insured. Against what? All the losses that might happen from the dangers of the seas. He did not insure against all the losses or injuries usually contained in a policy, but simply on the chartered freight,

As touching adventures and perils they are of the seas, winds, waves, rocks, sands, shoals and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers or of assailing thieves, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel or any part thereof occasioned by sea perils.

Contracts of insurance on freight differ essentially in many respects from those on vessel or goods where ques-

tions of total, as compared with partial, loss arise. I am of the opinion that where chartered freight is insured, and lost through any of the perils insured against, damage to the vessel is not necessary to be shewn.

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Starting out with this proposition, let us look at the case of *Jackson v. The Union Marine Ins. Co.*(a), tried in 1873 before Mr. Justice Brett. He left certain things to be found by the jury, and they found that the vessel was hindered by perils of the seas from proceeding on her voyage, and the court held, independently of the question of damage to the vessel, that inasmuch as the cargo was required for a special purpose and intended by the parties to be shipped within a reasonable time, and that having been prevented by the perils insured against, the owner was entitled to recover for loss of freight. That decision was founded on the mere detention of the vessel. I think, that on sound principles of justice, the insurer should recover if the vessel was detained by any perils insured against, and the chartered freight was consequently lost. A fair and true construction of a contract of that kind would be to indemnify the parties for the loss.

It was considered for a long time that it was necessary to shew that the ship was in such a position as to entitle the parties to recover for a constructive total loss. That is not now the case. It is sufficient, I think, if the vessel is prevented from proceeding within a reasonable time. Here is what Mr. Justice Brett says. The principles are so important that I make no apology for quoting at some length:

Upon this evidence and some other as to the value of the ship when regained I left it to the jury to say * * * whether the time was so long as to put an end, in the commercial sense, to the commercial speculation entered upon by the shipowner and the charterers. The jury answered (this question) in the affirmative.

* * * The first point raised by these arguments is whether the findings are so far against the weight of evidence as to call upon the court to set them aside. * * *

The amount of freight on which shipowners will undertake

(a) L.R. 8 C.P. 572; 10 C.P. 125.

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charters depend very much upon the time then calculated for their fulfilment. Freight rises and falls according to the variations of the freight market, and so, on the other hand, the expediency or otherwise of the export or iron or of iron rails depends upon the iron market and its fluctuations at different times. * * * The question then is whether, assuming the findings to be correct, there was a loss of freight by the perils of the sea. That question divides itself into two. First, did the injury to the ship, caused as it undoubtedly was by sea peril, make it impossible for the shipowner to earn the chartered freight? Secondly, if it did, does such impossibility so caused amount to a loss by perils of the sea within the meaning of a freight policy on chartered freight?

As to the first, the question is whether, upon an injury happening to a chartered ship in the voyage preliminary to that on which the chartered freight is to be earned, happening before the charterer has received any advantage from the contract, where the injury is caused by a peril excepted in the charter-party, where it is caused without default of the shipowner, where he has not been wanting in due diligence to arrive at the appointed place of loading, but where the injury is so great as to prevent the arrival of the ship or of her presentment to the charterer in a state fit to carry cargo within a reasonable time having regard to the business of the charterer, or within any time which could have been at the time of making the contract in the contemplation of either the charterer or shipowner as a time in any way applicable to the commercial speculation of either of them—the question is, whether the contract is not at an end, in the sense that neither party to it can enforce any obligation under it against the other. * * * There being no stipulation that the ship should be at Newport at any fixed date, the stipulation being only that she should proceed there with all convenient speed, there is no condition precedent that she should be there at any given time: *Hadley v. Clarke* (b). The cases of *Cliphsham v. Vertue* (c), *Hurst v. Osborne* (d), and *Jones v. Holm* (e), seem to me authorities for saying that there is no condition precedent though there is a contract that the ship shall arrive or be fit to be tendered within a reasonable time in regard to the charterer's business. Even a delay caused by the default of the shipowner will not of itself release the charterer from his obligation to provide a cargo: *Havelock v. Geddes* (f); *Cliphsham v. Vertue* (g). * * * In *Freeman v. Taylor* (h), Tindal, C.J., directed the jury in an action for not loading "that the freighter could not for an ordinary deviation put an end to the contract, but if the deviation was so long and unreasonable that in the ordinary course of mercantile concerns it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case

(b) 8 T.R. 259.

(c) L.R. 2 Ex. 335.

(d) 5 Q.B. 265.

(f) 10 East 555.

(e) 18 C.B. 144.

(g) 5 Q.B. 265.

(h) 8 Bing. 124.

the contract might be considered at an end." He left it to the jury to decide. The jury found for the freighter, and the court held that there was no misdirection.

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In *Geipel v. Smith*(i) Blackburn J., says:

I take it the effect of such a state of things . . . is not merely to excuse delay in the carrying out of the contract, but that after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it. . . . But whilst the contract still remains altogether executory, I think time is so far the essence of the contract as that matter provided against which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it.

Henry, J.

Mr. Justice Brett ends up his judgment in this way:

These authorities seem to support the proposition, which appears on principle to be very reasonable, that, where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. Such a state of things arises where the third question left to the jury in this case can be properly answered as the jury have answered it in this case.

In such a state of things arising under a charter-party, such as the charter-party under discussion, where no benefit of any kind has accrued to the charterer, the shipowner has lost his power of earning any part of the chartered freight. The immediate cause of such a loss is, the extent of injury caused to the ship by a peril insured against under the policy during the voyage thereby insured. Such a loss is therefore a loss caused by a peril insured against, within the policy on freight.

That case was afterwards considered on appeal by other judges(j). The head note in the Exchequer Court is:

The plaintiff, a shipowner, in November, 1871, entered into a charter-party by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight for the voyage. The ship sailed from Liverpool on the 2nd of January, 1872, and on the 3rd got aground in Carnarvon Bay. She was got off by the 18th of February and repaired, the time necessary for the com-

(i) L.R. 7 Q.B. 404.

(j) *Jackson v. Union Marine Ins. Co.*, L.R. 10 C.P. 125.

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pletion of such repairs extending to the end of August. In the meantime, on the 15th of February, the charterers had thrown up the charter and chartered another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. In an action by the plaintiff on the policy of insurance on the chartered freight, the jury found that the time necessary for getting the ship off and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers:—

Held, by Bramwell, B., Blackburn, Mellor and Lush JJ., and Amphlett, B. (Cleasby, B., dissenting), affirming the decision of the court below, that the charterers were, by reason of the delay, not bound to load the ship, and that there was therefore a loss of the chartered freight by perils of the sea.

Lord Bramwell says:

In considering this question, the finding of the jury that “the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers,” is all important. I do not think the question could have been left in better terms; but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties contemplated had become impossible, that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not indeed different as to the ports of loading and discharge, but different as a different adventure—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage.

It is manifest that, if a definite voyage had been contracted for, and became impossible by perils of the seas, that voyage would have been prevented and the freight to be earned thereby would have been lost by the perils of the seas. The power which undoubtedly would exist to perform, say, an autumn voyage in lieu of a spring voyage, if both parties were willing, would be a power to enter into a new agreement, and would no more prevent the loss of the spring voyage and its freight than would the power (which would exist if both parties were willing) to perform a voyage between different ports with a different cargo.

Thus, if a ship was chartered to go from Newport to St. Michael's in terms in time for the fruit season, and take coals out and bring fruit home, it would follow, notwithstanding the opinion expressed in *Touteng v. Hubbard* (k), on which I will remark afterwards, that if she did not get to Newport in time to get to St. Michael's for the

fruit season, the charterer would not be bound to load at Newport, though she had used all possible dispatch to get there, and though there was an exception of perils of the seas. . . .

The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say he is, I think both are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A. and B. and it was not; or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract to retire from the engagement; and, if one party may, so may the other. Thus A. enters into the service of B., and is ill and cannot perform his work. No action will lie against him; but B. may hire a fresh servant, and not wait his recovery, if his illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement; a short illness would not suffice, if consistent with the object they had in view. So, if A. engages B. to make a drawing, say, of some present event, for an illustrated paper, and B. is attacked with blindness which will disable him for six months, it cannot be doubted that, though A. could maintain no action against B. he might procure someone else to make the drawing. So, of an engagement to write a book, and insanity of the intended author. So, of the case I have put, of an exception of a strike of pitmen.

There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated. And in either case, as in the express cases supposed, and in the analogous cases put, non-arrival and incapacity by that time ends the contract; the principle being that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced.

On these grounds, I think that, in reason, in principle, and for

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GREAT-WEST-ERN INS.CO. the convenience of both parties, it ought to be held in this case that the charterers were, on the finding of the jury, discharged.

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There are other quotations from this judgment which I might, but need not, read, but they all go to affirm the doctrine that where the object of the parties at the time the contract is entered into cannot be carried out, there being no fault on either side, both parties are discharged. Otherwise it would, virtually, be making a new contract. Here is a party who virtually says:

At a certain time a cargo was to have been shipped by me from Norfolk to Liverpool. I chartered your vessel under the expectation of being able to do so. Your ship has not arrived to take the cargo within the time agreed upon. I cannot hold you answerable for damages within the terms of the contract, but I am also discharged.

Here the circumstances are not exactly the same as those in *Jackson v. The Union Marine Ins. Co.*(1). In this case the vessel was placed in such a position that it was evident she could not get out of the river in time to take the cargo as by the terms of the contract the parties determined on. Then, what does the owner of the cargo say? "That the vessel cannot arrive in time to take the cargo, and I cannot wait until your vessel can reach here next spring." Would it not be wrong to force him to keep the cargo until the time at which the object, for which he wished to ship the goods, would no longer exist, and loss occasioned for which he had no recourse?

The parties, therefore, agreed that the policy should be cancelled, and, if I am right in the construction I have given the contract, the ship owner yielded nothing but what the law would have given to the charterer. Anyone acquainted with that part of North America knows that a vessel so frozen up in the Miramichi would have little chance of making a voyage before the opening up of navigation the following spring. I, therefore, think the parties were in such a position that they might fairly cancel the

(1) L.R. 8 C.P. 572; 10 C.P. 125.

contract, and they did so. I do not consider it a voluntary cancellation, but one that was forced on the parties by the circumstances.

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In looking at the evidence we will see that it would have been impossible for the ship to have got to Norfolk in time to ship the cargo, and no matter whether or not the charterer was bound by contract to ship within a reasonable time and in view of the prices which he could expect if the cargo were forwarded as intended or expected, but could not obtain at a later period, the question is whether, under these circumstances, that party should sustain all the loss, when the contract did not specifically make him so liable. It appears to me that equity, and law as well, would relieve him. I think that the cancellation of the policy was justifiable under the circumstances, and we have now to look at the risk.

We are told that the party took the risk himself. I think that the risk was taken by the company. If they had issued the policy in the month of June or July previous, and the vessel had waited until a late season to go into the river, the circumstances would be entirely different. We are to consider these contracts by the light of the surrounding circumstances. The contract for the freight in question was entered into on Dec. 1st, and the vessel was to sail immediately. A few days after it was entered into the company undertook to insure the freight with a full knowledge of all the circumstances, and of the risks to be covered. Then would it not be monstrous to say that they did not undertake to insure against all perils incident to that particular voyage? I think they did, and, moreover, in consequence of the extra risk they received an extra premium.

Then, the next branch of the case is the damage by the ice. This policy was not against damage to the vessel or to the cargo. It was an indemnity by the company to the owners against the loss of the chartered freight. The Managers of the company, being mercantile men, must be presumed to have known everything connected with the ship-

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ment of cotton. They say to the ship owner "for a certain sum we will take the risk of your vessel getting from the Miramichi after the first of December, and of her arrival at Norfolk in time to fulfill the terms of your charter-party." I think that was the risk they ran.

But we are told that the vessel was not injured, but only prevented by the ice from proceeding on her voyage. That might as well be said of every danger that happens to a ship. Suppose that by a storm the bar on the river had been so raised that the vessel could not get out, and it would be impossible, on account of that, for her to pursue her voyage. We could not say that was the act of God, as generally understood in policies, but still it was one of the dangers to which the ship was exposed, and covered by the usual terms of a policy. The company should not be permitted to say they would not be answerable in such a case. I think that they would be answerable. That is one of the risks they ran.

I am of the opinion that if the vessel was impeded by the formation of ice, unexpectedly or expectedly, it would be just the same as if the storm had arisen, and by raising the bar prevented her from getting out. So I think the respondent is entitled to recover from the appellant company, and that the appeal should be dismissed.

GWYNNE J.—I am of opinion that the appeal should be allowed with costs, upon the ground that the freight insured was not lost by a peril insured against. The delay in the vessel arriving at the port where the freight was to be received was not occasioned by a peril of the sea within the meaning of that term in the policy.

*Appeal allowed with costs
 and non-suit restored.*

Solicitor for appellant: *Silas Alward.*

Solicitors for respondent: *Weldon McLean & Devlin.*

*JOSEPH N. GREENE (PLAINTIFF) APPELLANT; 1887
**May 3.
**June 22.
 AND
 JAMES HARRIS (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
 BRUNSWICK.

Set-off—Application to judgments—Equitable assignment—Practice.

G. and H. brought actions against each other for breaches of the same agreement. H. pleaded a set-off in the suit by G. against him, but he offered no evidence in support of such plea at the trial, and proceeded with an independent action against G. G. obtained judgment in his action against H. and assigned it to L. while H. obtained judgment against G. in his action. Upon L. proceeding to enforce the assignment of the judgment in his favour, H. sought to stay the issue of execution and to set off in the action of G. against H. the judgment in his favour, in the action of H. against G.:—

Held (Strong, J., dissenting), reversing the judgment of the Court below (25 N.B. Rep. 451) that H. had not any equity against the *bonâ fide* assignee of G. to have his judgment set-off against the judgment obtained by G. which had passed to L. *bonâ fide* and for valuable consideration.

APPPEAL from a decision of the Supreme Court of New Brunswick (*a*), upon a motion referred to the full court by the Chief Justice.

The facts of this case were as follows:—The respondent Harris entered into a contract with the appellant to build for him a number of railway cars and, as a guarantee for its fulfilment, the appellant deposited with Harris a sum of money. The appellant, considering that the respondent had not performed his contract, claimed to have his deposit

*XVI. Can. S.C.R. 714.

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

(*a*) 25 N.B. Rep. 451.

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returned and also damages for breach of the contract. In his plea in the action of Greene against Harris, the defendant claimed to be entitled to damages from the plaintiff for breach of the same contract, but offered no evidence at the trial of that action in support of his plea. He, however, instituted proceedings in an independent action and recovered judgment against the appellant on the 18th February, 1884, for \$3,179, upon the count in his declaration that after the execution of the agreement the plaintiff Harris built the cars covered by the agreement, but the defendant would not receive the same until a long time had elapsed after the time the plaintiff was entitled to have them received by virtue of the agreement.

The action of Greene v. Harris was tried in March, 1884, and a verdict found for the plaintiff for \$5,035.30, subject to the opinion of the court upon certain points, which were argued before the Supreme Court of New Brunswick and judgment delivered in Trinity Term, 1885, in favour of plaintiff Greene.

The respondent, in his action against Greene, took no steps to enforce his judgment until after the judgment in the case of Greene v. Harris had been assigned to one James E. Lynott. In June, 1885, Harris made an application to the court in the suit of Greene v. Harris for an order to set-off his judgment in Harvey v. Greene against Greene's judgment against him, alleging in the affidavit in support of his motion that the plaintiff in Greene v. Harris had given notice of taxation of costs, and would, unless prevented by the court, sign judgment against him in that suit for the sum of \$4,800 and issue execution for the full amount, and that the plaintiff resided in Bangor, Maine, and was not possessed of any property in the Province of New Brunswick out of which the applicant could realize his judgment.

The motion to set-off one judgment against the other came on to be heard before the Chief Justice, and was by him referred to the full court of New Brunswick, which,

after hearing argument, granted the application, Wetmore J., dissenting.

An appeal was thereupon taken to the Supreme Court of Canada.

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Weldon, Q.C., for the appellant. This is an application to the equitable jurisdiction of the court, and it is submitted that in deciding upon it, the principles which guide a court of equity must be looked to, and that not the legal position, but the equitable position of each party must be considered.

In the action of *Greene v. Harris* the latter could, under his plea, have proved the particulars of his claim, and if they amounted to more than the plaintiff's claim, could have had the balance certified in his favour (C.S.N.B., ch. 37, sec. 71).

It is not disputed that the right to set-off could not be barred by an assignment of his claim by *Greene*, and that *Lynott* could only take any balance remaining after deducting the claim of *Harris*. Of this legal right *Mr. Harris*, or his attorney, did not avail himself, and chose to run the risk of an equitable assignment of the claim. It is contended that, having made this election, he cannot now come before the court and ask the court, upon equitable grounds, to place him in the same position, as he had the opportunity, and could have obtained upon legal grounds which the court was bound to recognize; and *Lynott*, being an assignee for valuable consideration, having an equitable claim, the respondent can only succeed if he can shew a better equity.

Palmer, for the respondent, in his factum, although not appearing on the argument, contended that *Lynott* took under the assignment from *Greene* with knowledge of the transactions between the parties, and was subject to the right of *Harris* to set off his claim against *Greene*. The judgment in favour of *Harris* being one recovered in respect of a claim which would, if pleaded and proved at the

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trial of the first action, have constituted a legal set-off against the claim for which Greene recovered judgment, the right to set-off the one judgment against the other cannot be defeated by any assignment made by the appellant. Counsel relied upon the judgment of Lord Campbell in *Jenner v. Morris*(a).

SIR W. J. RITCHIE C.J.—The appellant Harris pleaded a set-off in the suit by Greene against him, but he offered no evidence in support of such plea at the trial, and instituted an independent action against Greene. This seems to have been overlooked in the court below, as it is not noticed in the judgments delivered.

Harris thus allowed the opportunity to pass when he had the legal right to set-off his claim against Greene's demand, and of which, in my opinion, he should have availed himself had he desired to use his debt as a set-off against Greene's claim. Greene had a right to pay his debts and to assign his claim against Harris for such purpose.

I cannot see that Harris has now any equity against the *bonâ fide* assignee of Greene to have his judgment set off against the judgment obtained by Greene, the interest in which has passed *bonâ fide* for a valuable consideration to Lynott.

As said in *Rawson v. Samuel*(b), by Lord Cottenham:—"Equity recognizes the assignee of a debt as the creditor."

In *Wilson v. Gabriel*(c), Blackburn J., says:

It is perfectly clear in equity that from the moment the assignment of a chose in action is notified to the party concerned, the assignee is the owner of that contract and all belonging to it.

If this is so, then Harris having, no doubt for good reasons, refrained from pleading his set-off at law, as he clearly might have done, by neglecting to do so left Greene in a position to deal with his claim as he should think pro-

(a) 3 DeG. F. & J. 45.

(b) Cr. & Ph. 161.

(c) 4 B. & S. 248.

per, and he, in the exercise of his undoubted right, made an assignment of it to Lynott, of which Harris was duly notified. If by that assignment Lynott became the owner of the claim and all belonging to it, how can the right of set-off be now claimed? Greene's right to the claim and the judgment thereon having ceased, and Lynott having become the person entitled thereto, upon what principle of law or equity should a right of set-off exist as against Lynott, a *bonâ fide* assignee for valuable consideration?

The claims, or contracts, in these cases, Harris v. Greene and Greene v. Harris, were clearly independent debts, and after the assignment and notice why should the claim of the assignee be subject to any new liability?

See *Middleton v. Pollock*(d), and *Watson v. The Mid Wales Railway Co.*(e).

FOURNIER J., concurred with the Chief Justice, and for the reasons given by him is of opinion appeal should be allowed.

HENRY J.—I am also of opinion that this appeal should be allowed. I think the respondent had an ample opportunity to set-off the judgment. He held out to the world that the appellant's judgment was a good judgment and treated it as such, and he cannot now complain if it was assigned *bonâ fide* to a purchaser for value. I do not think the court could exercise any such equitable jurisdiction as is contended for by the respondent, and I cannot see how the doctrine of equitable set-off can be raised in this case, as the only set-off available was a legal set-off which Harris had against Greene, and that he waived.

GWYNNE J.—On the 3rd day of July, 1880, the defendant, who is a manufacturer of railway plant, entered into an agreement with the plaintiff to build for him a certain number of railway passenger carriages, according to cer-

(d) L.R. 20 Eq. 515.

(e) L.R. 2 C.P. 593, at p. 599.

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tain prescribed specifications, and to be delivered at certain times, at certain prices to be paid as in the agreement specified, and the plaintiff then deposited with the defendant a sum of about \$5,000 as a security for the due fulfilment of the contract upon his part.

On the 2nd March, 1880, they had entered into an agreement for the building by the defendant for the plaintiff of 50 platform cars, to be delivered at certain times and for certain prices in the agreement specified.

In the year 1882 both parties insisted that the agreement of July 3rd, 1880, had been violated by the other, and they instituted, upon the same day, as is said, proceedings in the Supreme Court of the Province of New Brunswick each against the other.

The above plaintiff filed his declaration in the action commenced by him on the 13th September, 1882, and in the first count of that declaration he set out certain breaches of the agreement of the 3rd of July, 1880, which he alleged had been committed by the defendant, and in the second count he set out certain breaches of the agreement of the 2nd March, 1880, which he also alleged had been committed by the defendant. The declaration contained a third count upon the common money counts.

On the 25th of October, 1882, the defendant pleaded several pleas in answer to the alleged breaches set out in the first and second counts, and to the third count he pleaded "never indebted," and a set-off for work and labour and materials furnished, goods sold and delivered, goods bargained and sold, money paid, laid out and expended, etc., etc., etc. Nothing, so far as appears, was done in the above action during the remainder of the year 1882 or in 1883; and it was probably because of delay upon the part of the plaintiff in prosecuting that action that Harris, upon the 12th June, 1883, filed his declaration in the action brought by him against Greene. In that declaration he relied upon certain matter which, as he contended, were breaches committed by Greene of the agreement of the 3rd July, 1880;

his declaration contained also a common indebitatus count for matters identical with those which he had pleaded by way of set-off to the action brought by Greene against him.

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By a bill of particulars in this action, Harris furnished a debtor and creditor account, commencing on the 16th September, 1881, and terminating the 11th September, 1882, on the debit side of which he seems to have charged for all the work, etc., of making the carriages contracted for by the agreement of the 3rd July, 1880, and for other work, which consisted partly of extra work upon those carriages beyond what the specifications called for, and partly of other work wholly *dehors* the contract, amounting in the whole to.....\$26,885.66
 and he gave credit on the credit side for..... 23,116.97

leaving a balance of.....\$3,768.69

The amount for which Greene was entitled to credit under the agreement of the 3rd July, 1880, was \$17,000.00, so that the above balance claimed by Harris was so claimed as due to him wholly independently of the agreement of the 3rd July, 1880, and was recoverable only under the common indebitatus count of his declaration.

To this declaration Greene, upon the 19th October, 1883, pleaded specially to the first count and "never indebted" and payment to the second count.

The action of Greene v. Harris came on for trial in March, 1884, and at the trial Harris offered no evidence in support of his plea of set-off, although under that plea he might have given evidence of every sum recoverable under the indebitatus count of his declaration in his action against Greene; a verdict appears to have been rendered in favour of Greene for \$160 damages upon the first count of his declaration, and by the verdict leave was reserved to him to move the court to increase the verdict by the sum of \$4,500 on the common count if the court should be of opinion that Greene was entitled to that sum. This sum appears to have been claimed in respect of the deposit by way of

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security placed in the hands of Harris by Greene, which could be recoverable only if the payments agreed to have been made by Greene had been made.

It thus appears that at the time of the rendering of this verdict Harris voluntarily abandoned a legal right, which he had and which, of course, it was competent for him to abandon if he pleased, of claiming under his plea of set-off whatever sum was recoverable by him under the common indebitatus count in his action against Greene. That sum, whatever it was, was the subject of a legal set-off. The above verdict in *Greene v. Harris* was rendered some time in March, 1884, and on the 19th April, 1884, Greene in consideration of the sum of \$5,000, then due by him to one Lynott, assigned to Lynott the money due from Harris to Greene, for which the above verdict had been rendered, "and also the sum of money on deposit in the hands of Harris, which was sued for in the said cause, and for which leave was reserved to move the court to increase the verdict given as aforesaid, and also interest on the said deposit and also all his, Greene's, right, title and demand in and to said verdict and deposit, and to the said verdict as increased by the Supreme Court and all benefit and advantage whatever that can or shall, or may, be obtained by reason or means of the same, or any, judgment signed or execution thereupon had, sued or executed, or which shall, or may, be recovered or obtained"; and Lynott was thereby constituted the attorney irrevocable of Greene to prosecute in Greene's name, but to Lynott's own sole use, the said suit to judgment, etc., etc.

Notice of the execution of this assignment appears to have been given to Harris by a copy of the assignment being delivered to him on the 16th August, 1884.

On the 18th February, 1884, Harris appears to have recovered a judgment in his action against Greene by a confession of judgment given by Greene for \$3,179. This sum is sworn to have been confessed by Greene as part of the sum claimed by Harris in his action as recoverable

under the common indebitatus count in his declaration in that action, and that it had no relation whatever to the cause of action alleged in the first count of that declaration. That this is so, I think, might be inferred from the bill of particulars in *Harris v. Greene*. However, it is sworn to and not denied, and, moreover, if part of it was in respect of any damages recoverable under the first count, it would not affect the question before us, for a sum recoverable under that count did not constitute matter of either legal or equitable set-off to the action of *Greene v. Harris*.

In Hilary Term, 1885, but on what day is not stated, the Supreme Court of New Brunswick granted a rule to enter a verdict for Harris upon the second count and for the plaintiff for \$4,500 on the common count pursuant to the leave reserved in the action of *Greene v. Harris*.

Now, assuming Lynott to have been a *bonâ fide* purchaser for value of the rights and choses in action purported to have been assigned to him by the instrument of the 19th April, 1884, it is quite clear that Harris could not, after having voluntarily abandoned the legal right which he had of protecting himself under his plea of set-off in *Greene v. Harris*, assert afterwards as an equity the right in virtue of any judgment he might recover in the action brought by him against Greene to defeat the right acquired by Lynott as a purchaser for value, by setting off the one judgment against the other. That is a point sufficiently concluded by authority. Lynott could not upon any recognized principle of equity be deprived of the rights purported to be transferred to him by the instrument of the 19th April, 1884, if he be a purchaser for value, and the only question appears to be whether, inasmuch as the consideration for the assignment was an old debt due to him by Greene, that qualifies in any degree his right to claim as a purchaser for value. The case was not argued upon any such contention, and no case was cited to the effect that an over-due debt being the consideration would prejudice Lynott's claim as a purchaser for value, and I do not think it can. It was

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suggested in an affidavit not made by Harris, but by a person on his behalf, that the assignment to Lynott had been made for the sole purpose of trying to attach the whole amount of the Greene v. Harris judgment without deducting the amount of the Harris judgment against Greene. That, if true, would affect the *bona fides* of the transaction, but the charge is completely answered by the affidavit of Lynott, who swears that at the time of the assignment to him Greene was, and still is, indebted to him in a sum exceeding the \$5,000 mentioned in the assignment as the consideration therefor. The assignment is absolute against Greene, who could not by confession of judgment or otherwise detract in the slightest degree from the assignment so made by him.

The question before us is not one of equitable set-off at all, the doctrine of equitable set-off does not affect the question before us. The only set-off of any description which Harris had against Greene's action was a legal set-off, and that he waived and abandoned, and while it was so waived and abandoned Lynott became purchaser for value of the action and of the fruits of the action in which, but for such abandonment, Harris could have protected himself. What the defendant now claims as an equity is a right to recoup himself for his folly or his negligence in not availing himself of his legal set-off in Greene v. Harris by depriving Lynott of the benefit of his purchase for value of that action and the causes of action therein, and of the fruits of such action.

The judgment in the court below appears to have proceeded on the assumption that if Lynott, notwithstanding his being a *bonâ fide* assignee for value of Greene's action and the judgment recovered thereon, should have to bring an action upon that judgment against Harris, the latter would have a legal right to set-off his judgment in that action, as the action would be brought in Greene's name, and *Jenner v. Morris* (f) is cited in support of this proposition.

(f) 3 DeG. F. & J. 45.

Assuming, without admitting Harris to have such a legal right of set-off in the suggested case, that would not give him any claim to have the set-off allowed in the case as it now stands, for, as said by Lord Campbell, C.J., in *Simpson v. Lambe* (ff), when there are two unsatisfied judgments between the same parties we are to look at all the circumstances of the case and see whether injustice would be worked by allowing the set-off. The position that there is a strict right of set-off is wholly untenable.' To allow the set-off in the present case after the assignment for value by Greene to Lynott, who has thereby become the absolute owner irrevocably to his own sole use and benefit of the judgment in *Greene v. Harris*, would be to do injustice to Lynott, but in truth *Jenner v. Morris* (g) is not an authority for the proposition above attributed to it, and in support of which it has been cited.

The question there was:—Whether to a suit in Equity, brought upon a judgment at law, to obtain satisfaction thereof out of settled estates in which the judgment debtor had a life interest, the latter could avail himself, by way of equitable set-off, of the following facts which he had pleaded, namely, that the judgment creditor was the husband of the defendant's sister; and that he had deserted his wife without any cause and lived wholly apart from her and had not maintained her, and that the defendant had as well before as since the judgment supplied her with money wherewith she had provided herself with the necessaries of life to an amount exceeding the amount of the plaintiff's judgment against the defendant, and he claimed an equitable right to set-off the amounts so advanced by him against the relief in equity, sought by the plaintiff's bill? And it was held that as the husband had come into equity to obtain satisfaction of the judgment by execution in equity, and although no action at law would have lain at the suit of the defendant against the plaintiff under the circumstances, yet as the husband was bound under the

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(ff) 3 Jur. N.S. 412.

(g) 3 DeG. F. & J. 45.

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circumstances to have provided his wife with necessaries, the defendant, whose money had provided her with such necessaries, had such a claim in equity as entitled him to set-off the monies so advanced against the demand in equity of the plaintiff to obtain satisfaction of his judgment. The case was one simply of equitable set-off, and the plaintiff was in his own interest seeking in equity the benefit of his judgment at law. He alone was beneficially interested in that judgment. Whereas if Lynott should be suing in an action upon the judgment in *Greene v. Harris*, although the proceeding should be taken in *Greene's* name, *Lynott*, and not *Greene*, would be the party beneficially interested, *Greene's* name being used solely for his benefit.

Then as to the other point in *Jenner v. Morris (gg)*. It was there contended that at any rate the court should limit the set-off claimed by the defendant to the monies advanced by him subsequent to the commencement of the action in which the judgment against him had been recovered upon the ground that he might have, under the C.L.P. Act, pleaded the monies theretofore advanced by him as an equitable set-off to the action. Lord Justice Turner gave a concise, but complete, answer to that contention.

It is (he says) quite new to me that the creation of a jurisdiction in the courts of law can oust the jurisdiction of this court in matters originally within its cognizance.

And Lord Chancellor Campbell said:

If the defendant had a *legal* set-off he was not bound to avail himself of it. He might have reserved it as the subject of a cross action, or he might have availed himself by way of set-off in any subsequent action for a debt which the plaintiff might have brought against him. The equitable set-off might equally be reserved and may now be rendered available in this equitable suit as if, being a legal set-off, it might have been used in any action at law upon the judgment although the debt to be set-off might have accrued before the commencement of the original action.

Lord Campbell is here alluding to an action at law brought by the judgment creditor upon his judgment *in his own*

interest and for his own benefit; to such an action no doubt the legal right would exist of setting off a debt which might have been, but was not, set-off in the action, but this is by no means an authority for the proposition that if Lynott should be obliged to sue for *his own benefit*, but in Greene's name upon the judgment in *Greene v. Harris*, that Harris could to Lynott's prejudice set-off the judgment recovered by him against Greene.

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Simpson v. Lamb (h) is the authority which is more in point upon the question before us, and as it would, in my opinion, work a manifest injustice to Lynott, the *bona fide* assignee of Greene's judgment and the absolute owner thereof to his own use, to allow the Harris judgment to be set-off against it, the appeal should, in my opinion, be allowed with costs and the rule in the court below discharged with costs.

Appeal allowed with costs.

Solicitors for appellants: *Weldon, McLean & Devlin.*

Solicitor for respondent: *Charles A. Palmer.*

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 **Feb. 17. *JOHN E. HARDMAN AND FREDERICK } APPELLANTS;
 TAYLOR (DEFENDANTS) }
 **Feb. 18. —————
 AND
 WARREN E. PUTNAM (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trial—Mis-direction—Judge's charge—Language calculated to prejudice one of the parties—Practice—Motion for new trial—Disposal of whole case.

In an action for a partnership account the plaintiff claimed to be a partner in a gold mining business with the defendants H. and T., and alleged that he had been fraudulently induced by the defendants to surrender mining leases which were in the name of himself and T. by the statement made by H. that it was necessary so to do to obtain new mining leases of the same property from the Crown, and that without his knowledge or consent, T. obtained the new leases to be granted to himself without any mention of the plaintiff. The defendants claimed that the agreement for partnership was conditional upon certain money advances to be made by the plaintiff, and that he having failed to carry out this condition, the plaintiff's membership in the partnership was put an end to. In charging the jury the trial judge in vigorous language made it clear that he believed the plaintiff's story, but concluded his charge by expressly telling the jury that they were not to be influenced by his view of the facts.

Held, reversing the judgment of the court below, that the motion for a new trial should be granted and the judgment below set aside.

Per Strong and Gwynne JJ., that in a case tried by a jury an appellate court might finally dispose of the case upon the facts without sending it back for a new trial.

Per Ritchie C.J.:—The Supreme Court, as an appellate court for the Dominion, should not approve of such strong observations being made by a judge as were made in this case, in effect

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charging upon the defendants fraud not set out in the pleadings and not legitimately in issue in the cause.

Per Strong, Fournier, Taschereau, Gwynne and Patterson JJ., that the case was essentially an equity case and one in which a jury could advantageously have been dispensed with.

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APPEAL from a judgment of the Supreme Court of Nova Scotia, affirming a judgment in favour of the plaintiff entered at the trial upon the findings of a jury.

In his statement of claim the plaintiff alleged that in October, 1884, he and defendants entered into an oral contract or agreement for the working of certain gold mining properties in the Province of Nova Scotia; that by the agreement it was provided that the plaintiff and the defendant Taylor should furnish all the money required to provide a working capital not to exceed \$10,000; that all real property purchased or procured in connection with the joint undertaking should be conveyed to them and be held in their names jointly, and that the defendant Hardman should manage the property and should make reports of progress to the plaintiff; that valuable properties were purchased and taken in the names of the plaintiff and Taylor, and large sums of money were advanced by the plaintiff pursuant to the said agreement; that the defendant Hardman falsely and fraudulently represented to the plaintiff that owing to an Act of the Legislature of Nova Scotia, then recently passed, it had become necessary to surrender the gold mining leases, and to take up new leases in place thereof, and induced the plaintiff to execute a power of attorney to the defendant Hardman, authorizing him to make the surrender; that the defendants, conspiring to defraud the plaintiff, surrendered the leases and, without the plaintiff's knowledge or consent, obtained the new leases to be issued to the defendant Taylor, omitting all mention of the name of the plaintiff.

The defence substantially was that the defendants agreed to admit the plaintiff into their partnership to the extent of a one-third interest for three years from the

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26th October, 1884, provided the plaintiff should within one year furnish the money required for purchasing and paying for mines and mining properties acquired, or to be acquired, by the company, and \$10,000 for working, carrying on and developing the same; that the plaintiff did not furnish the money so required or any part thereof, and for this reason never was admitted to the partnership.

The trial Judge was very much impressed by the evidence in favour of the contentions of the plaintiff, and charged strongly in his favour. At one place, counsel for the defendants having said that it was idle for the plaintiff to pretend that he did not know that there was \$50,000 made out of the mine, the learned judge said:

Now, if it was idle to pretend that Putnam did not know it, I take it that it is an admission that Taylor knew it, he having come down here over and over again and communicated with Hardman who had concealed it from Putnam, and perhaps you may say fraudulently concealed it from him. The learned counsel says that I could not put that question to you because it is not raised in the pleadings, but I find it involved in the pleadings.

Again, the trial judge said, in his charge:

I am going to ask you afterwards to say whether you do not believe this to be a fraud and whether you will not stamp the defendant Hardman with committing fraud. This is a matter to be left to you entirely. But that I should give one word of endorsement to such conduct as is disclosed here, or that such conduct should be tolerated in the business world would be extraordinary.

In concluding his charge the trial judge said:

I suppose I must have shewn you what my leanings are in regard to this matter. Probably I was not able to conceal them. I want you to understand that you are not to be guided by what I say as to the facts. I am to have no influence with you in regard to your answers to the question at all. I may be all wrong. I am not even one juror in this matter. I may point out to you how the evidence bears on the matter. I have an absolute right to express to you what I would find in regard to every one of these issues, but I refrain from directly saying so, and am inviting you to disregard any leanings I may have.

The jury answered all the questions in favour of the plaintiff, and judgment was entered in his favour.

The Supreme Court of Nova Scotia *en banc*, upon a motion for a new trial, held that, although the trial judge had used language which made it very apparent to the jury that the evidence had strongly impressed him in favour of the plaintiff, he had, nevertheless, left the case with them with the distinct instruction that it was their business to find out the questions submitted to them irrespective of any opinion expressed by him, and that in view of the wide latitude which the practice of the courts permitted to a judge in his directions to a jury on the facts, the court could not say that his observations unduly biased the minds of the jury, or that their conclusions would have been different had the facts been submitted for their consideration without comment.

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Sedgewick, Q.C., and *Newcombe*, Q.C., appeared for the appellants.

Russell, Q.C., appeared for the respondent.

SIR W. J. RITCHIE C.J.—I think the broad and general principle that the minds of the jury trying a case should be confined to the real issue was not carried out in this case. The crucial issue was whether the contract of co-partnership was proved, as claimed by the plaintiff, or whether such contract was subject to a forfeiture as alleged by the defendants. I cannot say that in the way in which the case was tried justice was done to the defendants. Numerous issues not material to the real issue on which the case should have turned, having been introduced into the discussion and questions thereon submitted to the jury, with very strong observations by the learned judge, as appears from the charge, calculated materially to affect injuriously the determination of the real question; therefore, I think, the case requires further investigation and the appeal should be allowed.

While I cannot approve of the manner in which the case was submitted to the jury, I do not in any way im-

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pugn the integrity or motives of the learned judge. But I am bound to say that this court, as an appellate court for the whole Dominion, should not approve of such strong observations being made by a judge which, in effect, charge against the defendants upon whose testimony the establishing of the contract, set up by them, chiefly depended, fraud not set out in the pleadings and not legitimately in issue in the cause. Under these circumstances, I think the case should go down for a new trial. I express no opinion as to how the case should be tried, whether by a judge or a jury, this being a matter for the judge or the court below to determine, in his or its discretion.

The judgment of this court will be that the appeal is allowed, with costs of the appeal to this court, the decree set aside, and a new trial ordered, the costs of the appeal in the court below to be costs in the cause.

STRONG J. (oral).—I entirely concur as to what has been said on the merits of the case. I think, on the motion for a new trial under Rule 476 of the Nova Scotia Judicature Act (Revised Statutes of Nova Scotia, 5th series, page 900), as under the corresponding Rule 755 of the Ontario Act, the court can take a case which has been tried by a jury into its own hands, and dispose of it upon the evidence if it considers all proper and necessary materials on which to decide are before it; and I think a court on appeal can do what the original court could have done. This course has been followed in England: *Hamilton v. Johnson*(a). It is true, that in the case of *Metropolitan Ry Co. v. Wright*, in the House of Lords, the Lord Chancellor seemed to disapprove of the practice, but this was only a dictum. (See the late case of *Alcock v. Hall*(b)).

I do not think, however, we have now before us all the materials requisite to enable us to pronounce a final decision.

The action is one to wind up the affairs of a partnership.

(a) 5 Q.B.D. 263.

(b) (1891) 1 Q.B. 444.

and it is, therefore, a case which, before the Judicature Act, would have been within the exclusive jurisdiction of a court of equity. The whole case (which was so fairly argued by Mr. Russell) rests upon the question whether there was or was not a partnership between the respondent and the appellant. That the plaintiff made out a *prima facie* case of partnership cannot be reasonably doubted. One of the parties put all the money into the enterprise, and it must be presumed that he had a share in the business. On the other hand it is said that, admitting there was originally a partnership, it was put an end to by a verbal agreement. At the trial one of the parties affirmed this agreement and the other denied it. Now, how it is possible for us to say which of these witnesses tells the truth? We have not the witness before us and we cannot say which is the veracious and which is the unreliable witness, and, therefore, not having before us the materials essential to a final disposition of the case, it must go down for a new trial, and the judgment which has been indicated by the Chief Justice must now be pronounced.

I have no hesitation in saying that I think this is a case in which a jury might be advantageously dispensed with. The appeal should be allowed with costs. The costs of the motion to the court *en banc*, and of the new trial, should, however, follow the event, for the reason that it is not owing to any default of the respondent that the case has to be retried.

FOURNIER and TASCHEREAU JJ., concurred.

GWYNNE J.—In my opinion the learned judge erred in not deciding the case upon his own view of the evidence. It was wholly an equity case and not one for a jury at all. I am of opinion that this court is bound now (unless either party desires to give further evidence) to render the judgment upon the evidence as it stands, which the court below ought to have given.

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PATTERSON J.—I think that the verdict, under the circumstances which have been so fully argued on both sides, is not satisfactory, and that there ought to be a new trial. I quite agree that this is essentially an equity case, which should be tried by a judge without a jury.

Appeal allowed with costs in the Supreme Court and in the court below.

Motion for a new trial made absolute and the decree set aside.

Solicitors for the appellants: *Meagher, Drysdale & Newcombe.*

Solicitor for the respondent: *John T. Ross.*

MARY ELLEN CANNON.....APPELLANT;

AND

W. P. HOWLAND & COMPANY.....RESPONDENTS;

AND

WILLIAM H. OATES.....PLAINTIFF.

1889
*April 1.
*June 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Administration proceedings—Statute of Limitations—Champeritous agreement—Practice.

O., a creditor against the estate of A. M. C., a deceased intestate, obtained an order for the administration of the estate of the intestate. On the proceedings in the Master's office, a claim which O. made to have an account of the firm of which he was a member allowed was refused, but a further claim presented by him as the assignee of certain promissory notes made in favour of H. & Co. was allowed. The present appellant, wife of the intestate, presented a petition to the court to set aside the administration order on the ground that O. at the time the order was made was not a creditor of the deceased intestate, as the assignment of the notes of H. & Co. to him was part of a champertous agreement. The court held that the judgment for administration enured to the benefit of all the creditors, and as one at least had established a claim under it, the order could not be set aside, but that O. was not entitled to be allowed in the Master's office his claim on the notes, as the transaction between him and H. & Co. in connection therewith was a champertous one. O. re-transferred the notes to H. & Co., and the latter obtained leave to prove the claim thereon in the Master's office, and on appeal from the Master's ruling, it was held that H. & Co. might now assert their title to the notes and prove on them notwithstanding the former champertous agreement with O., and that the order for administration was a bar to the Statute of Limitations running against the notes from the date of that order. Upon appeal this judgment was affirmed by the Court of Appeal.

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

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Held, that the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

Held, per Gwynne J., that the maker of an unquestionably valid note could not in proceedings taken by the payee to recover upon the note institute an inquiry as to what the payee may have done with the note in the interval elapsing between the making of the note and the proceedings taken to recover payment of it, and that the transaction between O. and H. & Co. was not champertous.

APPEAL from the decision of the Court of Appeal for Ontario, affirming the judgment of Proudfoot J., one of the justices of the Chancery Division of the High Court of Justice.

Howland & Co., holders of promissory notes in their favour, made by A. M. Cannon, deceased, made an agreement with W. H. Oates, a member of the firm of Taylor & Oates, as follows:

Toronto, Feb. 28th, 1884.

I have this day bought from Messrs. W. P. Howland & Co. three promissory notes made in their favour by A. M. Cannon, one for \$1,000, due one year after date; one for \$3,218, due two years after date; and one for \$3,218, due three years after date, all three bearing date Sept. 5th, 1877, in consideration for which I agree to pay the said W. P. Howland & Co. one-half of the net amount I receive on account of the said notes, and I agree to use my best endeavours to collect the same, and if, at the expiration of two years, I have been unable to collect any portion of the said notes, I hereby agree to return them to the said W. P. Howland & Co. free from any costs or charges incurred by me. But, if at any time previous to the expiration of the two years above mentioned I have succeeded in collecting any portion of the said notes, then their portion above mentioned will be due and payable to the said W. P. Howland & Co.

WM. H. OATES.

During the currency of that agreement Oates obtained on 19th September, 1884, an order for the administration of the estate of A. M. Cannon, of whose personal estate M. E. Cannon (appellant) was administratrix. The usual advertisement for creditors was published, and one Taylor proved a claim under the reference as a creditor of the deceased, and his claim had been duly allowed by the Master prior to October, 1886. M. E. Cannon applied to have the claim of

Oates upon the promissory notes disallowed, on the ground that the title by which he claimed was champertous and void. Proudfoot J., adjudged that Oates' title to the notes, under the agreement was champertous and void, and that he could not prove in the administration by virtue of his title thereto, but he held that the administration order of 19th September, 1884, was for the benefit of all the creditors of the estate, one of whom had proved a claim and therefore he refused to set it aside(*f*). Neither party appealed from this order. Thereupon Oates re-delivered the notes to Howland & Co., who up to this time had been in no way party or privy to the proceedings for administration. The six years' allowance by the Statute of Limitation had expired before the notes were re-delivered, but not before the date of the administration order. The reference had not been concluded nor any report made by the Master. Howland & Co. applied for liberty to come in and prove their claim on the notes, and the Master allowed them to do so. From this ruling the appellant appealed. While the appeal was pending the respondents came before the Master to prove their claim, pursuant to leave granted, and the Master allowed their claim upon the promissory notes. From this allowance the appellant appealed, and the last mentioned appeal came on for argument at the same time as the appeal from the Master's exercise of discretion in granting leave to the respondents to prove their claim. Both appeals were dismissed by Proudfoot, J., who held that the order for administration prevented the bar of the Statute of Limitations; and that Howland & Co. might assert their title to the notes and prove on them, notwithstanding the former agreement with Oates, which he had already held to be champertous. His judgment was as follows:

February 23, 1887.

Proudfoot, J.—Some time ago (29th October, 1886) I held that Oates had not established a legal title to the promissory notes upon

(*f*) *Re Cannon*, 13 O.R. 70.

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which he had applied for and obtained an order for the administration of A. M. Cannon's estate; and I would have set aside the order but for the fact that one Taylor, a creditor of the intestate, had proved a claim under it. The objection to Oates' title to the notes, which I sustained, was that they were obtained by him under a champertous agreement, or an agreement savoring of champerty, with W. P. Howland & Co., the original holders of the notes. The agreement between these parties was not produced before me on the former occasion, but it has now been produced, and I notice that it differs in some particulars from the account given of it by Oates in his examination and upon which the parties were content to rely. One statement that Oates was careful to emphasize was, that he was not to give Messrs. Howland & Co. one-half of what might be recovered upon the notes, but a sum equal to one-half; while the agreement itself provides for the payment to them of "one-half of the net amount I receive on account of the said notes."

Since my decision on the 29th of October, and in the month of November, 1886, I think, the notes were handed back to Messrs. Howland & Co.

Messrs. Howland & Co. then, on the 30th of November, 1886, obtained leave from the Master to come in and prove their claim on the 13th of December last.

The Master certified on the 13th of September last that he had advertised for the creditors of A. M. Cannon, and that the time for sending in claims expired some time before that date.

The defendant, the administratrix, appeals from the order of the Master upon a number of grounds, several of which I overruled at the time of the argument.

The principal arguments for the defendant at the hearing were, that at the time of the order for administration being made Messrs. Howland & Co. were not the holders of the notes having transferred them to Oates: that Howland & Co. were bound by the decision against the notes in Oates' hands: that before they got back into Howland & Co.'s hands the notes were barred by the Statute of Limitations, and therefore no order should have been made allowing them to prove upon them. And lastly, that the notes were barred by the statute. The two last may be considered together.

To understand these arguments it will be necessary to refer to the original agreement between Oates and Howland & Co., and the dates of the several matters involved.

The agreement between Oates and Howland & Co. is in the following terms:

"Toronto, February 28th, 1884.

"I have this day bought from Messrs. W. P. Howland & Co. three promissory notes made in their favour by A. M. Cannon, one for \$1,000, due one year after date, one for \$3,218, due two years after date, and one for \$3,218, due three years after date, all bearing date September 5th, 1877, in consideration for which I agree to pay

the said W. P. Howland & Co. one-half of the net amount I receive on account of the said notes, and I agree to use my best endeavors to collect the same, and if at the expiration of two years I have been unable to collect any portion of the said notes I hereby agree to return them to the said W. P. Howland & Co. free from any costs or charges incurred by me. But if at any time previous to the expiration of the two years above mentioned, I have succeeded in collecting any portion of the said notes, then their portion, above mentioned, will be due and payable to the said W. P. Howland & Co.

"WM. H. OATES."

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The order for administration was made on the 19th of September, 1884, upon the application of Oates, swearing that the estate was indebted to him upon these promissory notes. Upon the 14th of April, 1885, Oates filed an affidavit proving his claim upon these notes, and also a claim for \$200 or \$300. This last claim the Master has found against him.

The notes were all dated the 5th of September, 1877, payable at one, two and three years respectively; as to the first one the time for payment was enlarged at A. M. Cannon's request and by his promise to pay it, till the 1st of May, 1879. So that six years elapsed after the first note was due on the 1st of May, 1885, after the second note on the 5th of September, 1885, and after the third note on the 5th of September, 1886. So that the Statute of Limitations had not run as to any of the notes when the order for administration was made on the 19th of September, 1884, nor when Oates attempted to prove upon them on the 14th of April, 1885, but it had run as to all before the notes got back into the hands of W. P. Howland & Co.

It does not appear when the claim of the creditor who came in under the decree was proved, but it is not perhaps material; for although but for his claim I would have set aside the administration order, yet I think I cannot treat the date of that proof as the date of the order; if the proof saves the order it saves it from the date of the order.

Upon the former occasion I held that Oates had not established a title to the notes, because of the vice of the agreement under which he held them, but nothing was decided as to the right of Messrs. Howland & Co. upon them. The order was not obtained by Oates as agent for them, but on his own right as owner. That title was defective, but it did not make him the agent of the real owner, because he could not shew title in himself. The title remained in Messrs. Howland & Co., and it seems to be established by *Hilton v. Wood* (a), that they might assert their title notwithstanding the agreement with Oates. It is said that they had parted with the ownership, or at all events the control of the notes, and were not entitled to, or at least did not, get them back again till after the statute had run. But the

(a) L.R. 4 Eq. 432.

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two years within which Oates might sue upon them was a term of a void agreement, which Oates could not have enforced against them, and Messrs. Howland & Co. might notwithstanding have proved upon the notes in the administration suit. They indeed allowed the time fixed by the Master for the proof of claims to elapse, but while the estate remained unadministered, and before the Master has in fact made his report, I apprehend that it was in the Master's power to enlarge the time for proof.

The administration order directed that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the administration and final winding up of the personal and real estate of the intestate, and for the adjustment of the rights of all parties interested therein.

It was therefore for the benefit of all creditors of the intestate; and Lord Redesdale, in *Largan v. Bowen* (b), says that from the moment of the decree the court proceeds on the ground that the decree is a judgment in favour of all creditors, and that all ought to be paid according to their priorities as they stand.

The case of *In re Greaves, Bray v. Tofield* (c) to which I was referred, does not apply to this, for there the statute had run before the decree in the creditor's suit was made, while in the present case the order or decree for administration was made before the statute had run. What Sir George Jessel decided was, that the pendency of an action did not now save the statute, as had been decided in *Sternedale v. Hankinson* (d). But he says nothing against the effect of a decree in saving the statute, and I apprehend that *Largan v. Bowen, supra*, declares what is still the law of the court. See Kerr on Injunctions, 1st ed., 107.

I have considered this case with attention, for my impression at the argument was rather inclined to the position that the remedy upon the notes was barred. But in *Hilton v. Woods* (e) I find Martin, V.C., saying: "But no authority was cited, nor have I met with any which goes the length of deciding that where a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between the plaintiff and Mr. Wright amounted to maintenance, and if the latter had been the plaintiff suing by virtue of a title derived under that contract, it would have been my duty to dismiss his bill," every word of which applies to this case. Messrs. Howland & Co. had the title to the notes, the agreement with Oates I have held to be champertous, and accordingly refused relief to him upon the notes, but that does not affect the title of Howland & Co., who might, notwithstanding that agreement, assert their original title. They were therefore creditors

(b) 1 Sch. & L. 296.

(d) 1 Sim. 393.

(c) 18 Ch. D. 551.

(e) L.R. 4 Eq. 432, 439.

when the order to administer was made, and before the statute had run.

I must therefore dismiss the appeal, and with costs.

The judgment of Proudfoot J., was affirmed by the Court of Appeal, the following being the reasons for judgment delivered in that court (unreported) :

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Burton J.A.—I think the judgment below should be affirmed and this appeal dismissed.

It does not very distinctly appear whether upon the motion to disallow the proof of Oates' claim there was any motion to set aside the order in the administration action, but if there was, the judgment on that point was not appealed against, and it now stands as a decree or judgment in which all the creditors of Cannon may be said to have an interest, and after such a judgment no creditor can bring a suit to enforce payment of his own debt, it follows therefore as a consequence that the Statute of Limitations will not run against a creditor after the judgment is entered.

If the time for creditors to come in and prove their claims had not expired, Howland & Co. having received back the notes could have proved without leave, and as they could have recovered in an action but for the statute, their proof must have been allowed if the judgment was obtained before the notes were barred. They had, however, to apply for leave, and the Master in his discretion granted it, and they then sought to prove and the Master allowed the proof. The learned Judge below affirmed both these decisions, and I cannot say he was wrong; on the contrary, I do not well see how he could have done otherwise.

The appeal should, I think, be dismissed.

Osler J.A.—I have not been able to feel any doubt that the decision of Proudfoot, J., is right. Judgment was obtained in the action 19th September, 1884. It was the usual administration order. That judgment has never been set aside, and has always stood and now stands for the benefit of the creditors of the deceased Cannon. It is true that Oates, at whose instance the judgment was obtained, failed to prove any debt, but another creditor did so. It is said that this creditor's claim is a limited one, being merely a judgment of assets *quando*, but the answer to this is that the administration is general of the real and personal estate of the debtor, and it is impossible for anyone to say, as the case is presented to us, that there are no real assets or personal assets unadministered which came not to the hands of the administratrix in which that judgment creditor will be entitled to share. But then it is said that the debt on which Howland & Co. have proved is the very same debt in respect of which the claim of Oates was disallowed. It was nevertheless a real debt

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due by the debtor either to Oates or to Howland & Co. Oates could not prove for it, and his claim was disallowed because of the champertous agreement between himself and Howland & Co. Then did it not remain the debt of Howland & Co., and had not they always the title to it? As between Oates and Howland the latter might have had a difficulty in consequence of the illegal agreement in asserting a title, but if Oates does not interfere the defendant has no answer to the claim. Nothing has been decided except that Oates cannot prove; if Howland & Co. are, and always have been, the real creditors, I am unable to see how that prevents them from doing so or from relying upon the administration order as a judgment in their favour from its date which prevents the application of the Statute of Limitations. If Taylor's proof obviated the necessity for reviving the proceedings in an action of this kind (and we have been referred to no authority to the contrary), what is complained of is in all respects regular, and the appeal should be dismissed for the reasons assigned and the cases referred to in the judgment below. Under the circumstances I think the appeal should be dismissed without costs.

The widow of the intestate appealed to the Supreme Court of Canada from the judgment of the Court of Appeal.

Dr. McMichael, Q.C., and *Hoskin*, Q.C., for the appellant.

Arnoldi, for the respondent.

FOURNIER J.—I am in favour of dismissing this appeal with costs, for the reasons given by the judges of the Court of Appeal.

TASCHEREAU J.—I concur with my brother Gwynne that the appeal should be dismissed.

GWYNNE J.—There is an administration order in force in the Chancery Division of the High Court of Justice for the Province of Ontario for winding-up the estate of one Andrew M. Cannon, deceased; the respondents proffered proof under that order of their promissory notes made payable to their order by the deceased in his life time. There has been no question made affecting the *bona fides*

and validity of the notes, but the administratrix of the deceased, the above appellant, objected to the proof being received upon the ground merely that the administration order was obtained on the application of one Oates as the then holder of the notes for which the defendants claimed a right to prove, and that Oates' tender of proof upon these same notes was refused upon the ground that he was deemed by the court to have become holder of the notes under a champertous agreement with the respondents. The Master received the respondents' proof of the notes, and his decision has been upheld by the courts in Ontario, from the judgment of which courts the administratrix of the maker of the notes appeals.

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I am unable to perceive upon what right the maker of an unquestionably valid note, or his personal representative, can in any proceeding taken by the payee to recover upon the notes, institute an enquiry as to what the payee may have done with the note in the interval elapsing between the making of the note and the proceeding taken to recover payment of it. Howland & Co., who are the payees of the notes, cannot, as it appears to me, be affected by the adjudication in the proceeding instituted by Oates, to which they were not a party, and while the administration order remains in force, they are entitled to prove the debt represented by the notes and to the benefit of that order in preventing the Statute of Limitations to run. If a champertous dealing in respect of the notes between Howland & Co. and Oates could affect their right to prove, they must have a right to insist that the dealing was not affected with the vice of champerty, notwithstanding the adjudication on the tender of proof by Oates; and if it were necessary to decide that point, I should be of opinion that in the transaction with Oates there was no champerty. A promissory note in the hands of the payee is as much a piece of property as an acre of land or a horse, a quantity of merchandise, or any other chattel, and the agreement made between Howland & Co. and Oates in respect of the notes

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upon the occasion of their being transferred to him under the special agreement in evidence, was no more champertous than would a like agreement have been in case the property transferred had been an acre of land, a horse, a quantity of merchandise, or any other chattel. Moreover the matter of the note or his personal representative, who did not dispute their liability upon the notes, had no right, as it appears to me, to institute an enquiry as to what were the terms as between the payees and their transferee, upon which the notes were transferred to the holder. I am of opinion, therefore, that the appeal must be dismissed with costs.

PATTERSON J., took no part.

Appeal dismissed with costs.

Solicitors for appellants: *McMichael, Hoskin & Ogden.*
Solicitors for the respondents: *Howland, Arnoldi & Bristol.*

*JOHN HARVEY (DEFENDANT) APPELLANT;

AND

THE BANK OF HAMILTON (PLAIN- }
TIFFS) } RESPONDENTS.

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**Mar. 16.

**June 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Negotiability—Indorsement—Liability of maker.

H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the bank that discounted it and paid over the proceeds to the company. H. knew that the note was discounted, and before it fell due he had in writing acknowledged his liability on it. In an action on the note by the bank against H.:

Held, affirming the judgment of the Court of Appeal and of the trial judge (Strong J., dissenting), that although the note was non-negotiable on its face, this afforded no defence to the plaintiffs' action in view of what took place between the defendant and his co-makers and between the defendant and the bank.

Held, per Gwynne J., although, in fact, the note was not negotiable, the bank, in equity, was entitled to recover, it being shewn that the note was intended by the makers to have been made negotiable, and was issued by them as such, but, by mistake or inadvertence, it was not expressed to be payable to the order of the payees.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the judgment of the Honourable Mr. Justice Galt in favour of the respondents.

The "Dominion Salvage and Wrecking Co.," of which the appellant was a director and shareholder, being in want of funds for the purposes of the business, procured

*XVI. Can. S.C.R. 714.

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

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the appellant and three others, who were also shareholders in the company, to make a promissory note for the accommodation of the company, in order to borrow money thereon for the purposes of the company by discounting the same. The note was in the words and figures following:

\$7,500.00.

13th April, 1883.

Six months after date we jointly and severally promise to pay to the Dominion Salvage & Wrecking Company, \$7,500 at the Union Bank of Lower Canada office in Montreal, with interest, for value received.

(Sgd.) | H. HERIMAN.
 " | F. W. HENSHAW.
 " | F. R. BATTERBURY.
 " | JOHN HARVEY.

The note was discounted with the Bank of Hamilton, whose officials failed to observe the note was not negotiable by endorsement. The appellant alleged that he knew the note was non-negotiable when he signed it, but concealed his knowledge from his co-makers; that he left the note in the hands of his co-makers to be discounted by them as a negotiable instrument, and for the purpose of enabling the company to raise money for its operations; that he was aware that the proceeds had been received by his co-makers and by them applied as was intended.

The appellant did not repudiate the note or disclaim his liability until the company's business had proved a failure and the respondents were proceeding to recover upon the note. Letters were written by the appellant to his co-makers and to the bank, in which he treated the note as the property of the bank, and for which he was liable as a joint and several maker, and procured the bank to abstain from suing upon the note for several months.

The appellant demurred to the statement of claim because it shewed no privity between the plaintiffs and the defendant, nor any law by which a promissory note not negotiable could be assigned to entitle the assignee to maintain an action upon it.

The demurrer was argued before Wilson C.J., who gave judgment(a) for the respondents upon the demurrer on the ground that the appellant and his co-makers signed the note in order that it should be discounted by the company for a purpose in which the makers, as directors of the company, were beneficially interested, and the respondents discounted the note, and with the knowledge and consent of the appellant paid the company the proceeds of the note, and because the appellant had expressly admitted his liability by giving security therefor to the respondents.

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The appellant was allowed to defend, and the action went down to trial before Galt J., who gave judgment for the plaintiffs as follows (unreported):

GALT J.—The makers of the note were directors or officers of the Dominion Salvage and Wrecking Co. The company had entered into a contract to raise the "Phoenix," a ship of war that had been wrecked on the coast of P. E. Island. To enable them to provide the necessary appliances for this undertaking, it was necessary to raise a sum of \$15,000. The company borrowed \$7,500 from a gentleman of the name of Ross, in Quebec, and this note was made by the above named makers, who were largely interested in the company. To enable the company to raise the other \$7,500, in order to secure Mr. Ross and the makers of the note, the company executed two mortgages for \$7,500 each, one to Mr. Ross and the other to the makers of the note. These mortgages, as I understand from the evidence, were to rank equally. The note in question was discounted by the plaintiffs, at the request of Mr. Gregory, who was the manager and a director of the wrecking company, and the proceeds were received by them. The undertaking to raise the warship "Phoenix" was unsuccessful, so far at any rate as the pecuniary affairs of the company were concerned. The vessel employed by the company was the "Relief," which had been mortgaged to Mr. Ross and the makers of the note, when the \$15,000 were raised. I gather from the evidence that in the course of the efforts of the wrecking company to raise the "Phoenix," certain debts were contracted by them, and the "Relief" was attached in the Admiralty Court at Halifax. It is to be observed that the note now in question is not negotiable, and it is on this ground that the defendant disputes the plaintiffs' claim. When the proceedings took place in the Admiralty Court, the defendant came forward and claimed title to the "Relief" under his mortgage, and in an affidavit made by him in support of his claim, sup-

(a) 9 O.R. 655.

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posed that he was responsible to the Bank of Hamilton, on this note, and in consequence a decree was made in his favour, so far as his mortgage is concerned. After having done this, and after in the most solemn manner inducing the court to believe that he was liable on this note, in my opinion he is estopped from denying his liability. I give judgment in favour of the plaintiffs with costs. As several payments have been made on the note, a reference must be had to Mr. Ghent to ascertain the amount now due.

An appeal from this judgment to the Court of Appeal for Ontario was dismissed upon an equal division of opinion (unreported). The following were the reasons for judgment:

HAGARTY C.J.O.—The facts of this case appear to me to be very plain.

They may be gathered from the defendant's own letters and affidavits, and he need hardly complain or feel any surprise if, under the very peculiar aspect of this case, we prefer giving credence to them whenever they conflict with his oral testimony at the trial.

He was a director and member of the executive committee of the wrecking company.

The latter wanted money, and for the avowed purpose of meeting this want the defendant and three other directors made the note in question.

Herriman was president and managing director.

Henshaw, secretary-treasurer.

Apparently by an oversight the note was not in a negotiable form.

I think it clear from the evidence that the note was offered for discount at the plaintiffs' bank by the company's agent, Gregory, with the knowledge and assent of the defendant and his co-makers. He may not have known at the moment of its being discounted by the plaintiffs, but we must assume that as it was made for such purpose generally, that the defendant cannot be heard averring it was so discounted without his assent. He was a director and member of executive committee, and there is no shadow of evidence for believing that the secretary, Henshaw, a co-maker of the note, was not acting under the board's authority.

The non-negotiability was not noticed at time of discount.

The proceeds were received by the payees, the company, and duly applied for their business purposes.

The indorsement was "Pay to the order of the Bank of Hamilton
 "Dominion Salvage and Wrecking Co.

"F. W. Henshaw, Secy. and Treasurer."

"S. E. Gregory,

"General Agent, Dom. S. & W. Co."

I hold it proved on Gregory's evidence that it was explained to the bank manager the purpose for which the note was given, viz., to enable the company to raise money. He shewed him communications from the head office respecting the note.

That they had the contract for raising the "Phoenix," that the company wanted the money for that.

He gave him some information about the company, who the directors were, that the defendant was one of them.

It seems to me perfectly clear that the bank advanced the money directly to the company for their purpose with full notice that the note was given for the express purpose of raising the money for such purposes.

The defendant's subsequent letters and his evidence generally fully support this conclusion.

It was much discussed whether this document was legally transferred to and vested in the bank as a security for this money advanced to the company.

A great part of the argument rested on the ordinary law as to bills and notes and their transfer.

We can treat this instrument as a non-negotiable note.

It being in the common form of a note in other respects need not, I think, create difficulty.

It is, at all events, a clear admission of a debt due by the makers to the payees, and when in pursuance of the object of its making, money is borrowed by the company on the faith of it, and it is delivered to the lenders with the intent of vesting in them a property in the instrument, the makers cannot deny their debt to the company, and that the document truthfully represents that state of facts. In this view, so long as it plainly imports that the sum therein mentioned is due to the company, payable at a named date, it matters little, in my mind, what its legal form may be.

If there be any informality wanting to completely vest the security in those who advanced the money to the company, the latter would, as I take it, be compellable to execute any necessary instrument to complete the lender's title.

While the note was current in the plaintiff's hands, the evidence shews that the defendant was aware thereof.

Sometime in May, 1883, the note was discounted by the plaintiffs. It was sent to Mr. Gregory, the company's agent in Hamilton, by Henshaw, one of the makers and secretary-treasurer, for the express purpose of being offered for discount at the plaintiff's bank.

The defendant admits that he knew of this discount in July, 1883, and that the company had got the proceeds.

The note matured about 16th October, 1883. A fortnight before he writes to Batterbury, a co-maker, as to this note, and that it falls due 16th Oct., and he speaks of his unpaid stock in the company, \$15,000, being applied in part payment.

See also his letter to Herriman, Oct. 22, 1883, much to same

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effect, in which he speaks of this note held by the plaintiffs on which he is liable. Also letter to Henshaw as to the proposed renewal of this note.

On 25th May, 1883, about the time of the discount, or rather a little later, the company executed a mortgage on the steamer "Relief," in consideration of \$7,500 lent to them by the four makers of the note, not mentioning the note, but covenanting absolutely to pay them the \$7,500 and interest on 13th October next.

November 21st, 1883, Henshaw writes a letter to the defendant to be shewn by him to the plaintiffs.

He then speaks of the joint note in the hands of the bank, asking for time and offering security from each.

The defendant writes to the bank endorsing Henshaw's letter. Defendant says that the bank is perfectly secure and will be paid, and he transfers shares to them in Hamilton Provident stock in security, and also scrip for paid-up stock from Herriman and Henshaw. He then speaks of the mortgage for \$7,500 on the vessel, and that the stock, etc., could be held as collateral security in addition to that mortgage, and is also held for the payment of the note.

In consequence of the mortgaged vessel being seized by admiralty process for debt at Halifax, it became advisable to claim under the mortgage thereon in that court.

After action the plaintiffs agreed to accept an assignment of that mortgage "without prejudice to the rights of the parties to the note or of the bank."

This suit has been commenced 14th February, 1884.

On 4th June, 1884, a transfer of the mortgage was executed by the defendant and the other mortgagees to the bank in consideration of \$7,500 due by them to the plaintiffs on this note.

On June 28th, 1884, the defendant makes affidavit in the Admiralty Court fully setting out the whole transaction. States that the mortgage was given to him and the others to protect them on this note, and that the bank holds him personally liable thereon.

This affidavit and the defendant's letters present a painful contrast to his evidence at the trial.

We are not to consider the fact of the bank taking this assignment of the mortgage as evidence against the defendant.

But I can conceive no reason whatever to extend any privilege to the proceedings taken in the Admiralty Court, and the history of the facts of the case contained in the defendant's affidavit.

The claim in the Admiralty Court might have been open to the makers of the note on their mortgage without assignment to the bank.

My learned brother, Wilson C.J., deals with the general question in his judgment overruling the defendant's demurrer to the plaintiff's statement of claim (b). Of course all the obligations were admitted, and one of them was that the company "duly endorsed, transferred, assigned and delivered" the note to the bank.

(b) 9 O.R. 655 at p. 657.

It was argued before us that, not being negotiable, there was no priority between the present litigant parties.

In the defence there is no denial of the company having duly endorsed, assigned and delivered the note to the bank.

It merely states that it was not negotiable, and that he did not authorize or assent to the discount thereof.

I do not see that the judgment of the court of first instance was asked or given on this point.

In the reasons of appeal it is not taken; it is said that it was not negotiable, and that there was no privity.

But the case must not turn on the non-negotiability of the note. Apart from all rules as to bills and notes, the property and beneficial interest in this instrument as a chattel and chose in action can be transferred to and vested in parties who, on its faith, and the faith of its being legally assigned and delivered to them, pay the full amount thereby secured.

I think the defendant in no part of his defence denies the right of the bank to the ownership and beneficial interest in this document. He insists it is not negotiable, and, therefore, on the grounds set forth, he is not liable. He could truthfully assert the same if it had been a bond, or covenant, or agreement to pay money to the company.

But, nevertheless, the whole beneficial interest, property and ownership could be legally vested in an assignee.

During the currency of the instrument full notice was given to the defendant of the bank's claim, and he, at his peril, would have paid the original payees.

If it were necessary for the perfecting of the plaintiffs' title, the company, the payees, or their trustee, or liquidator, could be compelled to execute any formal instrument of transfer.

If an action were brought in the company's name on this instrument, if the latter attempted to release their action, their release would be set aside as fraudulent under the old system of law.

There would, of course, be the difficulty in a suit against the defendant in the name of the company as to consideration.

I rest my decision on the ground:—

1. That this instrument was made for the express purpose of raising money upon faith of it for the company's benefit, and security was taken from the company to secure the defendant against his liability.

2. That on the evidence we must assume and hold that it was with the defendant's knowledge and assent that the security was offered to the plaintiffs, and the advances obtained from them on the faith thereof. He was a director and one of the executive committee.

3. That the money advanced was received by the company and used for their benefit with the defendant's assent and knowledge.

4. That the defendant repeatedly acknowledged his liability to the plaintiffs, and promised to pay and made payments on account.

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5. That against the bank he cannot be heard to deny the validity of the instrument he signed with his co-directors.

I find on the evidence, without hesitation, that the defendant is not correct in asserting that he signed the note knowing that it was not negotiable. I hold it to be an accidental mistake.

I cannot believe that the law is so lamentably defective as to exonerate from liability in a case such as we have now before us.

My view may be thus summed-up:—

I find that the defendant signed an acknowledgment of debt due by him to the wrecking company for the express purpose that it should be used to induce the plaintiffs, or any other lenders, to advance money on it; that, with his knowledge and sanction, it was so offered to plaintiffs, and they advanced the money to his company on his and his co-signers' responsibility; that he repeatedly admitted his liability, and cannot now be heard to deny it or to urge a non-liability on his part to the company as a defence against the plaintiffs.

I think their equity is clear as against him, and also (if necessary) to require the company or its liquidators to execute a valid transfer to them of the chose in action evidenced by the note.

Burton J.A.—It may be that if the facts stated in the plaintiffs' statement of claim had been established in evidence they might have warranted a recovery against the defendant. They were, however, not established, and I offer no opinion as to what the relative rights and liabilities of the parties would have been under that state of facts.

If there can be a recovery on the facts proved in this case, then I can imagine no case in which a party to a non-negotiable note, given with the knowledge that the payees intended, if possible, to raise money on it, would not be liable. It may be that as a matter of ethics it would be proper that he should be liable, but with that, fortunately, we have nothing to do. I notice that a change has recently been made in England whereby all notes, although not expressed to be payable to bearer or to the order of the payee, are now negotiable, but it required an Act of Parliament to effect the change, and I think we shall act wisely in leaving that extension of the liability of parties upon commercial paper to the Legislature, and not allow our ideas of any supposed hardship to unsettle the well-established principles of law applicable to such instruments.

It is abundantly evident that the discount of this piece of paper with the bank was made without the privity or knowledge of the defendant, and the money was advanced, not to the defendant, but to the wrecking company.

I cannot agree in the view that the delivery of the note in this case can be treated as an equitable assignment of the debt apparently secured by it. One of the peculiarities of a mercantile instrument like this is that consideration is presumed, so that if properly transferred to a *bonâ fide* holder for value he can recover, although in

point of fact, there could have been no recovery between the immediate parties; but this can only be where the note has been duly transferred in the form and manner prescribed by the law merchant.

But, assuming that we were at liberty—which, in my humble judgment we are not—to ignore the fact that this was a commercial instrument, and we could treat it as a mere acknowledgment of a debt, if no debt in fact existed, such an instrument could not create one, nor put the transferees in a better position than the original payees, and they could not recover if it were shewn that it was given gratuitously. Any more formal assignment, therefore, would not assist the plaintiffs.

The reference to Chalmers, made by Mr. Robinson, applies to a very different case, viz., to the case of a bill, payable to order, which has been transferred for valuable consideration without endorsement. There the bill being negotiable, the transaction operates as an equitable assignment of the bill, and the transferee has the right to compel the endorsement, and he then becomes vested with all the rights of an endorsee, but only from the time when the actual endorsement is given; and the case cited by Mr. Martin, *Whistler v. Forster* (c), appears to be fatal to his contention on this branch of the case, as the court here held that until the title was completed by enforcement the transferee had no better title than the person from whom he obtained the bill.

Here the bill was not negotiable and could not be transferred so as to vest in the plaintiffs a right to sue upon it; and in the other view, that it might be treated as an acknowledgment of the debt, it is shewn that no debt existed, and the defendant is not estopped from shewing that, as he made no representation to the plaintiffs to induce them to change their position.

The fact that the plaintiffs signed the note with the knowledge and with the intent that the company should raise money on it, does not assist the plaintiffs unless some representation was made to them by the defendant whereby they were induced to change their position. It is clear that he made no representation directly, and the note being non-negotiable was, if notice of any thing, notice that a person taking it would do so at his peril.

The defendant repudiated all liability upon the bill before it matured, and I am unable to discover anything in any subsequent transaction sufficient to fix him with a legal liability.

The transfer of the mortgage was made upon the express understanding that its execution should not affect either the rights of the makers of the note or the bank, the note being then in suit and the defendant denying his liability. It would be strange indeed if the transfer of the stock could have any such effect. The defendant owed \$1,500 upon his stock in the wrecking company, and this he agreed—provided he could obtain the assent of the wrecking company—to apply *pro tanto* on the note, and this was done by a transfer of the

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stock in the loan company, first as security that he would pay the \$1,500 on obtaining the consent of the wrecking company, and on that consent being obtained, in payment.

After the transfer of the mortgage to the bank, admittedly done with the knowledge on the part of the bank that the defendant disputed his liability—and upon the express understanding that that transfer should not affect the legal liabilities of the parties, the defendant, I assume in the interest of the bank, made an affidavit which was very naturally commented on with much severity by counsel, but I am unable to see how a statement of that kind, made either with or without the additional sanction of an oath, can, under the circumstances, create any liability on the part of the defendant to the bank in whose interest he was acting.

I say nothing upon the question so much argued at the bar as to whether this affidavit, made for the purpose of enforcing the bank's claim under the mortgage assigned upon the understanding I have mentioned, ought, or ought not, to have been tendered or received in evidence; but, assuming it to have been properly received, I am at a loss to understand upon what principle it is contended that it creates a liability not previously existing on the part of the defendant to the bank. See *Mayenborg v. Haynes* (d).

I can see nothing in this case but an attempt to enforce a non-negotiable note as if it had been negotiable and duly endorsed in the manner required by the law merchant, or to extend the law of estoppel beyond all reasonable limits, there being nothing on either side to shew that any representation was made by the defendant to the bank to induce them to alter their position, but it being shewn on the contrary that the defendant was in no way privy to their negotiation of the bill.

My brother, Patterson, thinks it may be treated as a direct loan to the company at the defendant's request, or a loan to the company guaranteed by the defendant. I should be glad to see my way to either conclusion, but I think they are not warranted upon any principle of law or equity that I am aware of, and no case is cited in support of either.

I am of opinion, therefore, that the appeal should be allowed, and judgment entered for defendant with costs.

PATTERSON J.A.—I see no reason for entertaining any serious doubt of the defendant's liability for the unpaid balance of the \$7,500 borrowed from the plaintiffs on the 4th of June, 1883.

Whatever room for argument there is seems to me to arise only from looking at the transaction as a discount of the note made by the defendant and three other gentlemen on the 13th of April, 1883, and discussing the claim as one depending on that note as a mercantile instrument.

According to the defendant's evidence he did not become a party to the note on any such understanding. He tells us that he knew from the first that it was not negotiable.

The four makers promise jointly and severally to pay to the Dominion Salvage and Wrecking Co. \$7,500, which they did not owe the company.

Clearly the note created no legal obligation enforceable by the company, and whatever the other makers of it may have thought, whether or not they overlooked the omission of the words necessary to make the note negotiable—as the cashier of the bank says he did when he took the note—we have the defendant's own evidence that he was under no misapprehension.

The note was made payable at the Union Bank of Lower Canada, in Montreal, but that is an immaterial incident as it was not payable to that bank.

The first question of fact is, did the defendant join in making the note for any purpose beyond mere amusement?

No one reading the evidence can have a doubt that it was signed for the purpose of aiding in raising money for the use of the company; and the defendant, after much cross-examination, and after the question was put directly to him by the presiding judge at the trial, added his testimony on the fact to the other evidence.

The company was pressed for money to meet an emergency, and in order to raise \$7,500—which was half the amount required—this note was signed by the four gentlemen, all of them being directors and interested as stockholders in the enterprise for which the money was wanted.

The note is at least important evidence, to be taken with the other evidence, of authority to pledge the credit of the makers for the money borrowed.

The first idea seems to have been to obtain the money from the Union Bank of Lower Canada, which accounts for the name of that bank appearing on the paper, but that was a matter collateral to the purpose of the note.

The money was obtained from the plaintiffs, but not until June, and was applied to the purposes of the company.

The defendant says he was not aware at the time of the borrowing of the money that it was being obtained from the plaintiffs. In fact, if I correctly apprehend his evidence, it is that he did not know that the loan had been effected at all until some time after it had been done. He knew, however, long before the note was due. He says he thinks he knew in July that the note had been discounted at Bank of Hamilton. It fell due on 13-16 October. He made no communication to the bank, although he lived in Hamilton, until after the note was due, and then he pointed out to the cashier that it was not negotiable, and claimed on that account to be free from liability.

There are other very important facts in evidence.

The date of the note, it will be remembered, was the 13th of

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April, and the defendant did not know till July that it had been made use of. It was not, in fact, made use of until June. But on the 25th of May the company made a mortgage of a steam vessel called the "Relief" to the defendant and his co-makers of the note. The consideration is stated to be \$7,500 lent to the company by the four mortgagees, and the company covenanted to pay to them that sum with interest at seven per cent. per annum on the 13th of October, so far following the tenor of the note, but further covenanting to pay interest at that rate while the principal remained unpaid.

A similar sum of \$7,500 had been borrowed from or through a Mr. Ross, of Quebec, and the mortgage is said to have been for his security *pari passu* with the others, or rather, I believe, there were two similar mortgages made.

The company was unfortunate, and the relief was seized at Halifax under admiralty proceedings. I do not know when these proceedings began, but in June, 1884, an affidavit in connection with them was made by the defendant which is important.

In the meantime he had written several letters, which are in evidence, to the other makers of the note. In one to Mr. Batterbury, dated the 2nd of October, 1883, he said: "The joint note for \$7,500, re Dominion Salvage and Wrecking Co., falls due on the 16th inst. Has the company any means of paying it, or what is to be done about it, as we agreed to hold the balance of our payment against the note? How much will you pay on account of it? I will pay the balance of mine, \$1,500. I wish to see this note paid. My impression is that we have no security; not that the mortgage is not good as against a judgment creditor, as it was not authorized or assented to at a meeting of shareholders, and directors cannot mortgage the property without consent of the shareholders, especially to themselves. . . . If we had not had our stock to pay up, I would not have signed the note without looking into the matter fully."

In a letter to Captain Herriman, who was president of the company, dated the 22nd October, 1883, he said: "You have my letter of 2nd October as to proposed payment of my stock, but this note held by the Bank of Hamilton has to be reduced on which I am liable." And letters to Mr. Henshaw, the secretary, written in the same month, urge arrangements for protecting the note.

One thing done was to assign to the bank the mortgage on the relief. That was done on the 4th June, 1884, seven or eight months after the note was due. I do not think anything turns upon it, particularly as the defendant seems to have before that time set up the dispute as to the non-negotiable quality of the paper, and the assignment was not to prejudice legal rights. The importance of the mortgage as evidence is in the fact that it was made to secure this money, and that although the defendant says he was not consulted about it at the time, he fully recognized and accepted it.

The date of the affidavit in the admiralty proceedings is the 28th

of June, 1884, and the object of the defendant was to shew his superior title as against other claimants to the purchase money of the relief which remained in court after paying the debts for which she was sold. I need not read passages from the affidavit. It is sufficient to say that the point is very clearly made, and more than once, that the defendant is liable on the overdue note held by the Bank of Hamilton, having had no security except the mortgage which had been assigned to the bank, and that he is apprehensive, from the circumstances of the other makers of the note, of having to pay the whole.

Now recurring to the fact that the defendant was perfectly aware that the note was not negotiable; that he had pointed that out to the cashier of the bank; and that, as he tells us, he knew it all along; so that no such question can arise as might honestly be made by one who has been led into liability under the belief that the law merchant gave him a remedy against other parties to a mercantile instrument, the conclusion of fact is, as it seems to me, imperative that the money was borrowed from the plaintiffs upon the credit of the defendant (with the others, but with several liability by the terms of the contract as well as by its legal effect) and by his, authority and procurement.

It may not make any difference whether it was in form money lent to the company by the plaintiffs at the defendant's request or a loan to the company guaranteed by him. The only question would be under the Statute of Frauds, and we have in the evidence to which I have adverted, ample statements in writing signed by the defendant to satisfy the statute.

A verdict that the plaintiffs lent the money to the defendant and his three co-directors, and that they lent it to the company would not be unsupported. The mortgage contains a tolerable direct statement to that effect, and there is plenty of evidence of the defendant's adoption of the mortgage.

In one of these ways, and it really matters very little which it is, the defendant, is in my judgment, liable by direct contract with the plaintiffs for the money in question.

The principles governing assignment of choses in action, or those concerning equitable assignments, are to my apprehension no more in question than the doctrines of the law merchant.

The learned judge at the trial spoke, in the judgment now under appeal, of the defendant being estopped by his affidavit.

If the expression is correctly reported, it can scarcely have been intended to put the judgment on the strict ground of estoppel as taught in the cases of which we usually regard *Pickard v. Sears* (dd) as the leading case, though, finding the defendant in his evidence professing to have been acting as well for the interest of the plaintiffs as for his own interest in the competition with the other claimants

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in the Admiralty Court, including, it seems, the Bank of Halifax which held the other mortgage as I understand, I am not prepared to say that he could be now heard to assert as against the plaintiffs the contrary of what he asserted at Halifax. But without dwelling on that inquiry, the statement in the affidavit as well as those in the letters, and the transactions in taking and afterwards dealing with the mortgage, are all legitimate and convincing evidence of the real nature of the relation between the defendant and the plaintiffs as it stood from the beginning, namely, that of borrower and lender.

I think we should affirm the judgment and dismiss the appeal with costs.

OSLER J.A.—The plaintiffs right to recover must rest either in contract or on estoppel. As to the former it appears to me to present the simple case of one who has become the transferee of a non-negotiable promissory note or of any other contract or agreement to pay money, which is not negotiable by the law merchant. The instrument is assignable but the transferee obtains no higher title than the person had from whom he received it. "It is clear," says Tindal, C.J., in *Plimley v. Westley* (e) "that a bill or note cannot be enforced against the original maker by a person who takes by endorsement unless the instrument contains words which authorise the endorsement." See also *Wain v. Bailey* (f); *Gwinnell v. Herbert* (g), and *Picker v. London and County Banking Co.* (h).

If there be an assignment of the instrument or the endorsement is treated as equivalent to an assignment, the assignee may, no doubt, recover, and now probably in an action in his own name, if, and so far as the assignor could have maintained one. On this branch of the case it is only necessary to say that the Wrecking Company could have maintained no action against the defendant upon the note as there was no consideration for making it, and it was, at the highest, intended merely for their accommodation.

I am unable to adopt the view that there was a contract of any other nature between the parties, such as a contract for the loan of money to the company. The mode of dealing between the company and the bank is not consistent with that view. They did no more than discount for the company a note which in consequence of their omission to examine it they supposed was a negotiable one. They dealt with the company, and with the company alone, not knowing the makers of the note, further than as they believed without reading it they were acquiring a title against them by endorsement.

Therefore, I hold that there was no contractual relation between the bank and the defendant.

Have they then acquired any right against him by estoppel? The instrument even if it be looked at as a mere contract, having

(e) 1 *Hodges* 324; 2 Bing. N.C. 249.

(g) 5 A. & E. 436.

(h) 18 Q.B. D. 515.

(f) 10 A. & E. 610.

none of the characteristics of a note, does not, on the face of it, profess to be assignable or transferable to bearer or order. There is no holding out by the defendant to the bank or to the public that he will pay to order or to bearer, and therefore as regards the form of the instrument alone there is no room for the application of the principle acted on or discussed in such cases as *Higgs v. Northern Assam Tea Co.* (i) ; *Re Blakeley Ordnance Co.* (j) ; *Re Agra and Masterman's Bank* (k) ; *Re Natal Investment Co.* (l), that the rule which makes assignments of choses in action subject to the equities existing between the original parties to the contract must yield when a contrary intention appears from the nature or term of the contract. And as regards the conduct of the defendant in other respects, the dealing was as I have said between the bank and the company or their agent alone. They had no communication with the defendant, and the only representation he can be said to have made up to the time they advanced their money is that which appears on the face of the note, namely, that it was not a negotiable one, and that although even as such consideration might be presumed as in the case of a negotiable note, yet that if there was no consideration the bank would take no better title than their assignors. Nothing that the defendant said or did or refrained from doing induced the bank to deal with Gregory, and his subsequent conduct, though censurable, cannot, as I think, set up a legal liability which was then wanting.

I think the appeal should be allowed.

From this judgment of the Court of Appeal the defendant appealed to the Supreme Court of Canada.

D'Alton McCarthy, Q.C., and *Muir*, for the appellants. The instrument sued upon is clearly not negotiable: *Plimley v. Westley* (m) ; *Picker v. London and County Banking Co.* (n) ; *Wain v. Bailey* (o) ; *Charnley v. Grundy* (p) ; *Shand v. DuBuisson* (q) ; that the respondents could not invoke the doctrine of estoppel as its essential elements were wanting: *Walker v. Hyman* (r) ; *Goodwin v. Roberts* (s) ; *Merchants Bank v. Lucas* (t) ; *Johnson v. The Credit Lyon-*

(i) L.R. 4 Ex. 387.

(j) 3 Ch. App. 154.

(k) 2 Ch. App. 391.

(l) 3 Ch. App. 355.

(m) 1 Hodges 325; 2 Bing.

N.C. 249.

(n) 18 Q.B.D. 515.

(o) 10 A. & E. 616.

(p) 14 C.B. 608.

(q) L.R. 18 Eq. 283.

(r) 1 Ont. App. R. 345.

(s) 1 App. Cas. 476

(t) 13 O.R. 520.

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nais Co. (u); that the appellant was not liable because there was no privity of contract expressed or implied between the parties: *Hill v. Royds (v)* *Moore v. Bushell (w)*; *Goslin v. Agricultural Hall Co. (x)*.

Christopher Robinson, Q.C., and Martin, Q.C., for the respondents. That upon the facts there was ratification and estoppel: Roe v. Mutual Loan Fund, Ltd. (y). That regarding all the facts and circumstances, a valid cause of action was established against the appellant: Buck v. Hurst (z).

SIR W. J. RITCHIE.—I am of opinion the appeal should be dismissed with costs.

STRONG J.—I am of opinion that the appeal should be allowed and the judgments of the courts below reversed and the action dismissed.

FOURNIER J.—I also agree in the dismissal of the appeal.

TASCHEREAU J.—I would dismiss this appeal for reasons given by Patterson, J., in court below.

GWYNNE J.—In order to determine whether the defence set up to this action by the defendant is or is not available to him, it seems to be only necessary that we should thoroughly understand the circumstances under which, and the purposes for which the promissory note, which is the foundation of this action, was made, and the use which was made of it by the makers of it, of whom the defendant was one, and what was done by the respondent in relation to it before and after it fell due.

(u) 3 C.P.D. 32.
 (v) L.R. 8 Eq. 290.
 (w) 27 L.J. Ex. 3.

(x) 1 C.P.D. 482.
 (y) 19 Q.B.D. 347.
 (z) L.R. 1 C.P. 297.

The Hon. J. G. Ross, of the city of Quebec, one Capt. Donelly, a Capt. Mariett, of the city of New York, H. Herriman and F. W. Henshaw, of the city of Montreal, F. R. Batterbury, of Point Claire, in the Province of Quebec, one S. E. Gregory and the defendant, both of the city of Hamilton, in the Province of Ontario, were in the month of April, 1883, shareholders in and directors of a certain company called "The Dominion Salvage & Wrecking Company," the head office of which was at the city of Montreal. The above named H. Herriman was President and Managing Director; F. W. Henshaw, Secretary-Treasurer of the company, residing at Montreal, and S. E. Gregory, general agent of the company, residing then at Kingston.

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The president and secretary-treasurer and the defendant seem to have formed what was called the Executive Committee of the Board of Directors, of whom the two former, as already said, resided at the headquarters of the company in Montreal, and the latter at the city of Hamilton aforesaid. The company having entered into a contract to raise the "Phoenix," a ship of war that had been wrecked on the coast of Prince Edward Island, required the sum of \$15,000 to enable them to complete their contract. In order to procure this sum the directors arranged to borrow one-half, or \$7,500, from one of their number, namely, the Honourable J. G. Ross, and in security therefor undertook to give him a first mortgage for the above amount and interest upon a wrecking steamer called the "Relief," the property of the company, and for the remaining \$7,500 the directors Herriman, Henshaw, Batterbury and the defendant agreed to give their promissory note for that amount in favour of the company payable six months after date, for the purpose of having it discounted at some bank or elsewhere, and the amount to be obtained upon such discount applied in the carrying out of the contract for raising the "Phoenix," and that a second mortgage upon the company's steamer "Relief" should be executed to them, the said Herriman, Henshaw, Batterbury and the defendant, to secure them as

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makers of such note in re-payment of the amount thereof with interest. At a meeting of the Board of Directors, at which the defendant was present, held on the 12th April, 1883, a resolution was passed approving of the above arrangement and authorizing the steamer "Relief" to be mortgaged for the above purpose. Accordingly the joint and several promissory note of the directors Herriman, Henshaw, Batterbury and the defendant was made and signed by them, bearing date the 13th April, 1883, for the payment of the sum of \$7,500 with interest for value received to the Dominion Salvage and Wrecking Company at the office of the Union Bank of Lower Canada in Montreal. The note, when made, was left by the makers in the hands of the President, Herriman, and of the Secretary-Treasurer, Henshaw (the members of the Executive Committee residing at Montreal), who were authorized to discount the note and to receive and apply the proceeds of such discount in fulfilment of the contract for raising the "Phoenix."

These being the circumstances under which and the purpose for which the note was made, it is manifest that it was intended by all the makers thereof to have been a negotiable promissory note, but by mere oversight and mistake it was not expressed to be payable to the order of the company, who were made the payees thereof by the Directors of the company, the makers of the note, and this mistake does not appear to have been discovered by any of the makers thereof, nor by the bank at which it was subsequently discounted until after the note fell due. I have said that the defect in the note does not appear to have been discovered by *any* of the makers until after the note fell due, because all the written evidence contained in several letters which passed between the defendant and his co-makers, and his whole conduct both before and after the note fell due leads only to that conclusion. The defendant now says that *he* knew it when he signed the note, and there is evidence that at an interview which he had upon, as he himself says, the 31st October, 1883, with the cashier of the

Bank of Hamilton, who had discounted the note as a good negotiable note, not having observed the defect, he pointed out to the cashier that the note was not negotiable before the cashier had produced the note, but it appears to me to be more consistent with all the written evidence and with the whole of the defendant's conduct in relation to the note that the protest which, upon non-payment of the note at maturity, he must have received on the 16th or 17th October, gave him the information to which he drew the cashier's notice upon the 31st October, and which by mistake he has dated back to the time when he signed the note. But assuming him to have then had knowledge of the defect it matters not in the view which I take, for he concealed his knowledge from his co-makers and kept it wholly to himself, and, notwithstanding, left the note in the hands of his co-makers Herriman and Henshaw to be dealt with by them and discounted as a negotiable instrument and for the express purpose of enabling them as members of the Executive Committee residing at Montreal to receive and have the disposal of the proceeds in fulfilment of the contract which the company had for raising the "Phoenix," and although after the note was discounted he was aware of that fact, and that the proceeds had been received by his co-makers Herriman and Henshaw and by them applied as was intended, he not only did not then repudiate the note or disclaim his liability in the terms thereof, but on the contrary accepted into his own hands and received the benefit of the mortgage upon the "Relief," which had been contracted for by himself and his co-makers to protect them against the joint and several liability which, by making the note, they had intended to incur. Of these facts there cannot, I think, be entertained any doubt whatever, so that the position of the defendant is, under the circumstances, the same whether he did or not in point of fact know when he signed the note and issued it for the purpose of being treated and used as a negotiable promissory note, that the essential characteristic of negotiability was wanting.

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On the 21st May Henshaw, by authority of the members of the Executive Committee residing in Montreal, in whose hands the note, when signed by the defendant, was left for the purpose of being discounted at their discretion, sent the note to the aforementioned S. E. Gregory, then in Hamilton, empowering him to negotiate the note at his banker's, the Bank of Hamilton. On the 25th May the mortgage upon the "Relief," which had been agreed to be executed by the company in favour of the makers of the note, was executed under the corporate seal of the company and was signed by Herriman as President and Henshaw as Secretary-Treasurer of the company. This mortgage had to be sent to Newfoundland to be registered upon the "Relief," and was duly registered there upon the 9th July, 1883. The note was discounted by the Bank of Hamilton on the 4th June as a negotiable note, it not having then been observed that it had not been expressed to be payable to the order of the company, and on that day the proceeds were remitted by the Bank to Henshaw, who, in due course, received the amount into his hands under the control of himself and Herriman, as members of the Executive Committee residing at Montreal, and the amount was applied by them to the purpose for which the note had been made and left in their hands. The defendant was aware in the month of July that the note had been so discounted by the Bank of Hamilton, and that the proceeds had been received by Herriman and Henshaw, and applied by them as above stated. The note fell due on the 16th October, 1883. Upon the 2nd of that month the defendant wrote to his co-makers of the note, Henshaw and Batterbury, and again on the 13th to Herriman and Henshaw, urging them to make preparations to meet or renew the note at its maturity, and saying what he himself was prepared to do.

On the 16th October he received the mortgage on the "Relief," which had been registered at St. John's, Newfoundland, in the month of July, and on the same day he wrote again to Henshaw, complaining that he had not

answered the letter of the 2nd of October, and saying that although Mr. Gregory had on the previous Saturday brought him a note to sign by way of renewal, that the defendant had not signed it because it had not been endorsed by secretary-treasurer, without whose endorsement no use could have been made of it. In this letter he complains in strong terms of the neglect of Herriman and Henshaw in not having completed arrangements to protect the note, the result being, as he there says:—

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The note is protested—the credit of the company tarnished, all of which could have been avoided by careful attention, and you were notified in time so as to have matters arranged. (and he adds) As a director and member of the Executive Committee, I claim the right of being consulted in important business, and when I ask for information I want to get it.

On the 22nd October he addressed another letter to Herriman, in which he says:

You have my letter of the 2nd October as to proposed payment of my stock; *but this note held by the Bank of Hamilton must be reduced, on which I am liable.*

On the 24th October he wrote to his co-maker, Batteredbury, a letter in which he refers him to the letters he had written to Herriman and Henshaw, thus:

You will see my letters to Mr. Henshaw and also to the president. I have asked for information as to who have paid up; will you see that I get it; as to stock list calls and how paid and who are in arrears; as stated to you in Montreal before note was signed, we owe so much on stock, which we hold *as collateral on note to the company by way of loan and we have that much in our hands to apply on note.* I saw the cashier of the Bank of Hamilton; he will not renew *in full at all events:* If we could give him *individual collateral to the amount we owe on stock, and keep the amount as stated in mortgage it might be done.*

On the 1st November he wrote to Henshaw as follows:

I saw the cashier Bank of Hamilton yesterday by his request, and he told me he would not renew the paper, as they had been deceived very much in the matter, as they were promised circulation in the Lower Provinces, and the whole amount was deposited in the Bank of Montreal, and he feels sure on this point, *and he was going to put it in suit but I told him not to do so, that I would transfer*

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to him securities for fifteen hundred dollars, being the amount of balance on my unpaid stock which will make it fully paid up; and if he would renew note being secured by mortgage which I would deposit with him, would make the bank secure enough; but he said he did not want that, but I have made the transfer of securities to the bank though he has not accepted them so far. Cannot you send up \$1,500 or \$2,000 cash, or security to that amount. If so I think, if this is done promptly I might be able to get him to renew the balance for three months, but it must be done promptly and not delayed.

On the 21st November Henshaw wrote to the defendant a letter for the purpose of its being laid by the defendant before the bank in which is the language following:

Now regarding that joint note of ours with the Bank of Hamilton, we are all most anxious to have it arranged to the satisfaction of the bank, if it can possibly be done and avoid the threatened proceedings notified to us. And again, "*We want time and if the bank will grant it we believe all will be right... Meantime we are prepared to secure them on mortgage and by the transference to them of \$1,000 of paid up shares by Capt. H. and myself, besides which, as I understand, you will guarantee them the amount of your unpaid calls, so that as far as security is concerned the bank is perfectly safe.*"

On the 22nd November the defendant enclosed the above letter to the cashier of the bank, and in his own letter accompanying it explains the purpose for which the note was made, thus:

In order to get new chains and to put the company in a better condition the Vice-President, Jos. G. Ross, Esq., of Quebec, advanced to the company \$7,500, and the other directors whose names are on the note you hold for \$7,500 raised this amount, taking security on the company's steamer "Relief" pumps and plant by way of mortgage. Captain Herriman, the president, has sent me script paid up for \$1,000. Mr. Henshaw has also sent me script paid up for \$1,000 and the 12 shares Hamilton Provident stock which I transferred to you, value \$1,500 can be held as collateral security in addition to the mortgage already mentioned on steamer "Relief" which ranks equally (pro rata) with the mortgage of Mr. Ross on "Relief," and is also held for payment of that note.

Then on the 22nd December, 1883, Herriman wrote another letter to defendant in which he says:

Regarding our joint note in the Bank of Hamilton, *will you please see the bank and ask a little more time* in order that we may collect from our outstanding accounts, and again, "I trust in a short time to be able to remit you \$2,000 to \$3,000 to pay on account of our note in Hamilton Bank."

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On the 3rd January, 1884, in a letter of that date to Henshaw, the defendant, among other things, thus refers to the contents of the above letter of the 22nd December :

I wrote the president as to the payment out of the account of Pacific Railway Salvage account as proposed in his letter of 22nd December, 1883, and \$1,000 out of Typo. account, *then I think I can get them to give us time until calls come in from other parties. But to keep faith with the bank to whom I shewed Mr. Herriman's letter of 22nd December, this must be done.* I understand Pacific account is paid. This \$2,000 should be remitted, send me marked cheque without fail and see my letters to president are answered.

Now, up to this time, it is perfectly plain that the defendant regarded, and dealt with, the note as a good note, the property in which was in the bank, to whom the defendant was liable as a joint and several maker, and that he negotiated with the bank to procure it, and did procure it, to abstain from suing upon the note for several months, for it was not put in suit until the 14th February, 1884; and all this took place at a time when, as the defendant now asserts, the bank, if it had carried into execution its original threat of suit, could have readily realized payment out of the assets of the company. Then in June, 1884, in order to prevent the Bank of Halifax obtaining satisfaction of a claim they had against the "Relief," which was libelled in the Vice-Admiralty Court at Halifax, the defendant intervened and claimed under the mortgage executed in favour of himself and his co-makers of the promissory note of the 13th October, and succeeded in such intervention and claim. In the course of the proceedings in the Vice-Admiralty Court he made the affidavit, referred to by Chief Justices Hagarty and Galt in the courts below, which states the circumstances attending the making of the note and the position in relation and the fact of its being negotiated with and

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discounted by the Bank of Hamilton, to whom the defendant was liable as a joint and several maker substantially as I have above stated the facts to be. I omit all mention of the contents of the assignment of the mortgage itself to the bank, because that assignment was executed by the mortgagees and accepted by the bank without prejudice to the rights of either of the parties to such assignment. Upon the above state of facts of the case, there can be no doubt that the defendant's co-makers acted in the negotiation of the note to the bank, and in the receipt and disposition of the proceeds arising from the discount of it, by and with the authority and concurrence of the defendant, and that he therefore is as responsible for their acts to the same extent as if he had himself personally procured the bank to discount the note, and had himself received the proceeds and had applied them as they were applied in the interest of the company, of which the makers of the note were the directors, agents and managers. The case, therefore, is simply one in which, as the note cannot be declared upon in an action at the suit of the bank as a negotiable instrument and by the *lex mercatoria* transferable by endorsement, equitable relief is sought as upon a promissory note intended by the makers to have been made as a negotiable note, but which by mere inadvertence and mistake was not expressed to be payable to the order of the payees, and was issued by the makers as negotiable, and was disposed of as such by them with the payees' endorsement thereon to the plaintiffs, who, without having observed the defect in the note, discounted it as a negotiable promissory note and paid the proceeds into the hands of the makers who had the disposition thereof. Under such circumstances I can entertain no doubt that a court administering equity must grant the relief sought and will not permit the defendant to say that a note so issued and negotiated was not negotiable. The case of *Graham v. Johnson* (a) has been relied upon as an authority in favour of the defendant's contention that he

(a) L.R. 8 Eq. 36.

can dispute all liability to the plaintiffs, but the circumstances of that case are very distinguishable from the present. The bond, which was the instrument upon the faith of which the monies were advanced by the assignee, was never intended to be a negotiable instrument, nor was it dealt with by any of the parties as if it was. Nor were the monies advanced upon it by the assignee negotiated for by the obligor with the assignee, nor were the monies which the assignee advanced upon the bond paid by him into the hands of the obligor for the purpose of reaching through him the assignor and obligee; as the monies in the present case were paid by the bank into the hands of the makers of the note, which they discounted with the plaintiffs as a negotiable instrument.

The appeal must, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Crerar & Muir.*

Solicitor for the respondent: *G. S. Papps.*

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*Mar. 18.	JAMES J. O'DONNELL, ADMINISTRATOR (PLAINTIFF) }	} RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance—Policy—Memo. on margin—Want of countersignature—Effect of—Evidence—Admission of a deceased agent against interest of the principal—Secondary evidence—To contradict evidence of deceased witness at former trial.

A policy of life insurance sued on had in the margin the following printed memo.: "This policy is not valid unless countersigned by agent at Countersigned this day of Agent." This memo. was not filled up, and the policy was not, in fact, countersigned by the agent. The case was first tried before McDonald C.J., without a jury, and a judgment entered in favour of the plaintiff was affirmed by the Supreme Court of Nova Scotia, but on appeal to the Supreme Court of Canada the judgment was set aside and a new trial ordered (10 Can. S.C.R. 92). The second trial was before McDonald C.J., and a jury, when a judgment was entered in favour of the plaintiff on the findings of the jury. Upon appeal to the Supreme Court of Nova Scotia this judgment was affirmed, but a further appeal to the Supreme Court of Canada was allowed, and a new trial ordered (13 Can. S.C.R. 218). The third trial was before Townshend J., and a jury, and a judgment was again given for the plaintiff upon the findings of the jury. This judgment was affirmed by the Supreme Court of Nova Scotia, and on appeal to the Supreme Court of Canada.

Held, Gwynne J. dissenting., that the judgment of the Supreme Court of Nova Scotia should be affirmed and the appeal dismissed with costs.

Held, per Strong J., that nothing but strictly legal evidence having been submitted to the jury, and the whole question being one of fact, the third verdict in favour of the plaintiff should be sustained.

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

Held, per Gwynne J., that evidence by a witness of an admission of a deceased agent of the company that he had received a premium upon the policy in question, when the agent had in his evidence at the first trial denied that he had received the said premium, and the witness at the same trial had not contradicted him, could not be received in evidence as an admission of the defendants, and had no binding effect upon them.

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APPEAL from a judgment of the Supreme Court of Nova Scotia affirming a judgment of the trial judge in favour of the plaintiff.

This was an action brought to recover \$3,000 payable on a policy of life insurance made by the Confederation Life Association, bearing date the 1st day of October, 1872, in favour of William Alphonsus O'Donnell. The policy recited the payment of the premium, \$48.06. On the margin of the policy there was printed the memorandum: "This policy is not valid unless countersigned by agent at . Countersigned this . day of . Agent."

The memorandum was not filled up, and the policy was not countersigned by the agent.

The case was first tried before McDonald C.J., in the month of November, 1879, when he gave judgment against the defendants for \$3,000. The trial judge in his reasons for judgment said:

The evidence shews that the parents of the assured, three days after his death, found the policy in his chest of drawers. It is dated the 1st October, 1872, and the father says that he saw it in the hands of the deceased on the 29th day of November following. He says that at that date he counted the premium money into the hands of his son, who, he says, went to the office of Allison, the agent of the defendant company, and on his return shewed the policy to the witness. After the death of the son the father called upon the agent, who after putting off payment of the claim for several weeks, at last refused to pay at all. The witness says that Allison never told him that the policy was only given to his son to read, which he ought to have told him at once if that were the fact. Allison in his evidence does not contradict this fact, and therefore it may be assumed that the refusal to pay the claim was not then put upon that ground although the plaintiff was not told by Allison

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why the company refused to pay. Allison testifies that he delivered the policy to the deceased that he might read the conditions. He says: "I did not deliver it as a binding contract, and did not on that account countersign it. The policy was in my possession till May, 1873."

The learned trial judge was of the opinion that Allison's memory was at fault, and believed the evidence for the plaintiff and gave judgment in his favour for \$3,000.

On appeal to the Supreme Court of Nova Scotia, the judgment below was affirmed and the rule *nisi* for a new trial discharged with costs.

An appeal was then taken to the Supreme Court of Canada, where it was held, Fournier and Henry, JJ., dissenting, that the evidence established the fact that the policy had not been delivered to the assured as a complete instrument, and the company was not liable, and that the appeal should be allowed and a new trial ordered.

The second trial was before McDonald, J., and a jury. On this occasion evidence was given on behalf of the plaintiff of an entry made by the assured in a cash-book of his father charging himself with the amount of this premium as having been paid by him to Allison on the 29th November, 1872, out of his father's cash. Allison having died in the meantime, his depositions at the former trial were made part of this case. The plaintiff also deposed at this trial that on one occasion he met Allison casually in the street, and that Allison had then said to him that he, the plaintiff, "had a policy now, and the money was paid," by which the plaintiff said that he understood Allison to mean that the premium had been paid.

A judgment entered pursuant to the findings of the jury in favour of the plaintiff was moved against before the Supreme Court of Nova Scotia upon the ground, amongst others, of the inadmissibility as evidence of the entries in the father's cash-book, and of the conversation between Allison and the plaintiff, but after argument, the appeal was dismissed with costs. Upon appeal to the Supreme

Court of Canada, the judgment below was set aside and a new trial ordered (Fournier and Henry JJ., dissenting), Ritchie C.J., and Gwynne J., being of opinion that the policy was only delivered to the agent as an escrow, while Strong J., was of the opinion that the evidence of the entry in the books of the deceased was improperly admitted. Gwynne J., also discredited the evidence of the plaintiff as to the admission by Allison, a fact not alluded to by him on the former trial, when the matter was open to contradiction by Allison, who had since died.

The action was tried the third time before Townshend J., and a jury. In the meantime the plaintiff had died, and his counsel offered in evidence his depositions taken at the former trial, part of which was objected to by counsel for the defendants. All the evidence was admitted except that portion relating to the entries in the books of the deceased's father. The trial judge, in charging the jury, cautioned them against placing too much reliance on the testimony of the deceased's father as to the admission made by Allison of the payment of the premium, as this evidence had not been given until after Allison's death.

Judgment was entered in favour of the plaintiff upon the findings of the jury, and on appeal to the Supreme Court of Nova Scotia, this judgment was affirmed.

S. H. Blake, Q.C., Beatty, Q.C., and Borden, appeared for the appellants.

Weldon, Q.C., and Lyon, appeared for the respondent.

The only reasons for judgment delivered were the following:

STRONG J.—I am of opinion that this appeal must be dismissed with costs. When this cause came before this court on the first appeal I was of opinion that the policy was not void as a deed, by reason of the memorandum endorsed being left in blank, but I considered that the atten-

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tion of the jury ought to have been directed to the circumstances of this incomplete state of the endorsed memorandum, since taken in conjunction with the evidence as to the non-payment of the premium, it had, as a matter of evidence, and purely as a matter of evidence, a strong bearing on the question of the sufficient delivery of the policy, and I therefore considered it proper that the case should be sent back to be re-tried.

On the second appeal the jury having found, as before, in favour of the plaintiff, I should have declined to interfere with the verdict had it not appeared that illegal evidence had been admitted. For this last reason, and for that alone, I held the appellants were entitled to a new trial. As it now appears to me that there can be no question whatever that nothing but strictly legal evidence was submitted to the jury, I am of opinion that the court below were quite right in declining to set aside this, the third, verdict obtained by parties claiming under the policy against this insurance company. The whole question in the view I have always taken is one of fact and ought now to be considered as concluded.

TASCHEREAU J.—This appeal must be dismissed. The jury have found that the premium was paid. They have believed the witnesses who so proved. We could not set aside their verdict, without assuming their functions. This settles the want of countersigning of the policy. The appellants cannot now invoke it. Then, this point has been determined by a majority of this court on a former appeal (a).

I concur in what the judge in equity said in the court below.

GWYNNE J. (dissenting).—I am of opinion that the evidence given by Edmund O'Donnell while he was plaintiff on the record as administrator of Wm. A. O'Donnell, deceased, of an admission alleged to have been made to him by one

(a) 13 Can. S.C.R. 218.

Allison in his lifetime, that he had as agent of the defendants received the premium upon the instrument declared on as a policy effected on his life by Wm. A. O'Donnell, deceased, was inadmissible for the reasons given by me in this case when last before the court, reported in vol. 13 of the Canadian Supreme Court Reports at page 228, namely, that the admission, assuming it to have been made as alleged, formed no part of any transaction which Allison was conducting for or on behalf of the defendants at the time the admission, if made, was made, and that, therefore it could not be received as an admission of the defendants themselves, and it had in fact no binding effect whatever upon the defendants. It is, however, now contended that although it is admitted the evidence could not be given in evidence if Allison were alive, as it formed no part of any *res gesta* which he was conducting for the defendants, that which had no binding effect whatever upon the defendants during the life of Allison, acquires binding effect upon them by his death, upon the principle that, as is contended, the admission is a statement of a deceased witness who, if living, would be a good witness, made against his interest, and as such is admissible; but a little reflection will, I think, shew that this rule of evidence has no application in the circumstances of the present case, and that, indeed, on the contrary, to admit the evidence would be to subvert the rule, and the principal upon which it is founded. The principal upon which such evidence is admissible is that to prevent the ends of justice being defeated by reason of the death of a witness, a statement of the witness made in his lifetime, if such statement be made against his pecuniary interest, and be free from suspicion of collusion, shall be received as secondary evidence of the matter stated in *substitution* for the primary evidence upon the oath of the witness and to *supply the defect* arising from such primary evidence not being forthcoming by reason of the death of the person who could have given it. The statement being against the pecuniary interest of the

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person making it, may be presumed to be what, if alive, he would have given upon oath. In Starkie on Evidence, pp. 64 and 66, statements of this nature are said to be admissible upon the ground that if not admitted all evidence upon the subject might be excluded and that such evidence can never be resorted to until the higher degree of evidence which the declarant might himself have given be shewn to be no longer attainable in consequence of his death. In *Bewley v. Atkinson* (aa) Lord Justice Thesiger says:

The principle upon which statements of a deceased person are admissible in evidence is this, that in the interests of justice where a person who might have proved important material facts in an action is dead, his statements before death relating to that fact are admissible provided there is sufficient guarantee that the statements made by him may be taken to be true. It is obvious therefore that the statement of a deceased person against his interest who, if alive, would have to be called to testify upon his oath as to a fact in question in a cause, can only be received as secondary evidence in substitution for the primary evidence which by reason of the death of such person cannot be obtained, and that such evidence never can be received in contradiction of the primary evidence of the deceased person given in his lifetime upon oath where such evidence is forthcoming, and was given under such circumstances as make it admissible in the action in which the point in question is in dispute.

A brief review of the facts, while establishing the worthlessness of Edmund O'Donnell's evidence as to the statement alleged to have been made to him, and indeed its utter incredibility, will shew that in the present case the alleged admission was not offered in lieu of primary evidence upon oath unattainable by reason of the death of a witness who could have given it; but by way of contradiction of the evidence of the witness given on oath in this very case and for the purpose of insisting that the evidence of the witness so given upon oath is untrue whereas during his lifetime no suggestion of its untruth or that he had ever made the admission now put forward was ever made.

The action was commenced in 1874 by Edmund O'Donnell as administrator of Wm. A. O'Donnell, deceased. In

(aa) 13 Ch. D. 283 at p. 297.

his declaration the plaintiff alleged that on the 1st of October, 1872, the defendants by a certain policy of insurance executed under their seal in consideration of a certain premium paid to them covenanted, in the event of the death of the said William A. O'Donnell, to pay to his executors, administrators or assigns, the sum of \$3,000 subject to certain conditions therein mentioned, and that all conditions had been fulfilled and all things had happened and all times had elapsed necessary to entitle the plaintiff as such administrator to recover from the defendants the said sum of \$3,000. To this declaration the defendants pleaded, among other things:

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1st. That the policy declared on is not their deed.

3rd. That the said policy contained on its face an express condition and declaration that the said policy should not be valid unless countersigned by the agent of the defendants at Halifax, and that the new policy never was countersigned by the agent of the said defendants at Halifax, and that the said policy was therefore never duly executed or of valid effect and force.

4th. That the said alleged policy was never delivered to the said Wm. A. O'Donnell or to any one on his behalf; and

8th. That the premium to be paid by the said Wm. A. O'Donnell before the delivery of the policy, and before, by the terms of the policy, the risk would attach, was never paid.

It will be seen that in the Province of Nova Scotia a practice prevails of pleading specially matters which were open upon the plea of *non est factum*, but this is unimportant upon the merits involved in the case. At the trial Edmund O'Donnell, the then plaintiff, himself called as a witness on his behalf Frederick Allison the defendants' agent at Halifax. The instrument declared upon as the policy of insurance being produced had no attestation clause purporting that it was "signed, sealed and delivered" in the presence of anyone, but in lieu thereof there was printed near the place where such clause is usually

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inserted and opposite the names of the person signing as president and general manager, and on one side also of the seal attached to the instrument the following clause:

This policy is not valid unless countersigned by agent at _____

Countersigned this _____ day of _____ Agent.

By the statute incorporating the defendants, their head office is at Toronto, in the Province of Ontario. Allison having been examined as a witness on behalf of the plaintiff testified upon oath that the deceased, William A. O'Donnell, applied to him at Halifax, where Allison was agent of the defendants, for a policy of insurance upon his life. That he, Allison, received in October, 1872, from the defendants' head office, the instrument produced and that

The premium of the policy was never paid. I did not countersign the policy because the premium was not paid. I delivered the policy to the deceased that he might read the conditions. I did not deliver it as a binding contract and did not on that account countersign it.

And again he said:

The premium was never tendered to me till after the death of the insured by the plaintiff. He said he would pay the premium to get the insurance; he said he did not know whether it had been paid or not. I know as a fact that the policy was not delivered as a contract.

Edmund O'Donnell, the then plaintiff, was called as a witness on his own behalf, but never called in question any of the above matters deposed to by Allison. The learned Chief Justice of Nova Scotia, although he took down the above evidence as given by Allison, was of opinion that such evidence was excluded by sec. 41 of the Evidence Act of Nova Scotia, and so charged the jury who, thereupon, rendered a verdict for the plaintiff for \$3,000. Upon a motion to set aside this verdict the Supreme Court of Nova

Scotia maintained it, being of opinion with the learned Chief Justice that Allison's evidence was excluded by the section of the statute referred to; upon appeal to this Court that judgment was set aside and a new trial ordered upon the ground that Allison's evidence was quite admissible, and should have been submitted to the jury. When tried upon the second occasion the case was tried by a Judge without a jury. The witness Allison had died since the previous trial, and his evidence given at the former trial, as the same had been taken down by the Chief Justice who had tried the case, was, by agreement between the parties, admitted as if proved by the learned Chief Justice himself, who had taken the same down. Upon this occasion the plaintiff, Edmund O'Donnell, tendered himself as a witness on his own behalf and testified to the policy having been found after his son's, William A. O'Donnell, death, in a chest of drawers belonging to him. In order to prove payment of the premium he produced a book kept by his son, the deceased, relating to certain business of himself and his son, containing certain entries therein which he said were in his son's handwriting, including an item of \$48.00 as paid to Allison. He did not, upon this occasion, suggest that Allison had ever made to him any admission that the premium had been paid. The evidence given by Allison on the former trial was also read *verbatim*, as it had been given by him on oath and had been taken down by the Chief Justice who tried the case, and notwithstanding the learned judge who tried the case upon this second occasion rendered a verdict for the plaintiff for \$3,000, which verdict having been sustained by the Supreme Court of Nova Scotia upon a motion to set it aside as against law and evidence and for a new trial, the case again came to this court on appeal when the verdict was set aside and a new trial again ordered. It is important to extract briefly the reasons given by the majority of this court upon that occasion, as those reasons seem to account for the new feature introduced by Edmund O'Donnell, the plaintiff,

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into his evidence upon the new trial taking place, and as in the view which I take, the case is now precisely in the same position as it was when tried before the learned Chief Justice of Nova Scotia originally, and before the learned judge who tried the case upon the second occasion. The Chief Justice of this court says:

I think this instrument was on its face an incomplete instrument for want of the signature of the agent and therefore, though produced by the other side *does not authorize an inference of delivery*. To give any force to the receipt in the policy it must first be established that the policy was duly delivered, for if not duly delivered nothing is established. The policy on its face shews that though signed by the president and manager it was not, and was not intended to be, either a complete or a binding instrument, and the fact is unequivocally made apparent to all parties dealing with agents of the company to whom the policy may be transmitted that the instrument is not to be delivered or received as a valid binding policy unless countersigned by the agent to whom it may have been transmitted to be dealt with, that is to say, to be delivered as a valid binding policy only on payment of the premium and on being countersigned. Until these conditions were complied with there was no contract binding on the company.

Strong J., although of opinion that *primâ facie* the policy was a valid policy, expressed a very strong opinion that the verdict affirming it was contrary to the evidence in thus concurring with the learned Chief Justice. He says:

It was, however, competent for the defendants to shew that the policy had never been delivered, and that it had come into the possession of the assured in such a way that it never was the deed of the defendants, and in fact never was a completed instrument. The question is, do they sufficiently shew this? The evidence relied on to establish the non-delivery is that of the defendants' late agent at Halifax, Mr. Allison. He swears that the premium never was paid. *This, however, is not the vital question*, for although the premium never was paid the defendants might be bound by the policy, and the question of payment or non-payment is only important as bearing on the fact of delivery. But then Mr. Allison adds that for the reason that the premium never was paid he had not countersigned the policy, but had retained it in his hands until the month of May, 1873, when he had handed it to the assured that he might read the contents, and he says "he did not deliver it as a binding contract.

and did not on that account countersign it." Now, this is clear and positive evidence from a party who must have known all the facts, and who is not directly interested, and, moreover, evidence confirmed by the state of the instrument itself which, however technically complete as a deed as I think it was, still appears upon its face never to have received the additional sanction of the countersigning which it is apparent was intended should be given to it and which, the witness tells us, he withheld for the express purpose of not making it a binding instrument, a very natural reason for finding the policy in the state in which it is now produced. In short, the witness swears that the policy never was delivered, because it was never paid for; that it was lent to the assured to read the conditions, and he points to the unsigned memorandum which it was his duty to countersign as proof confirmatory of his testimony. Then I cannot agree with the learned judge below that this explicit statement is to be overthrown because the plaintiff and two witnesses to whom the learned Judge gives credit impeached Mr. Allison's on a collateral point by proving that they saw the policy in the hands of the deceased in the preceding November, 1872, while Mr. Allison says he retained it in his possession until May, 1873. There may be a mistake on one side or the other as to the dates, but assuming that the mistake is Mr. Allison's, this does not shew that he is in error when he says: "The premium on this policy was never paid. I never delivered it to take effect as an executed instrument, and I know that this is so because I did not countersign it as I should have done if I had delivered it as a complete policy." I think the learned judge attributed to the fact that this policy had not been countersigned, not as a matter of law, but as a fact, confirming the testimony of Allison and giving it a great preponderance over that of the plaintiff's witnesses.

I concurred both with the Chief Justice and as to evidence with my brother Strong. I was of opinion that it sufficiently appeared that the instrument was transmitted to Allison by way of an escrow; that is, subject to a condition that it should not be delivered as a binding policy until the premium should be paid and until Allison should in testimony thereof countersign the policy, and as these conditions had not been fulfilled there was no sufficient evidence to hold the defendants bound by the instrument as one completely executed and delivered as their deed. I was of opinion that the exigencies of the defendants' business as a company, whose head office is at Toronto, made it not only reasonable, but necessary that they should protect

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themselves in the manner provided by the printed notice alongside the signatures of the officers of the company, when they send policies to be issued at remote agencies, and that the necessity for pursuing this course and the object of the notice printed alongside the signatures of the officers of the company must be well understood by all persons effecting policies through agents, and that as the application of Wm. A. O'Donnell for the insurance was made to an agent of the company at Halifax, whose business it would be to receive the premium and to whom the instrument was transmitted from the head office of the company at Toronto, he, O'Donnell, could have had no difficulty in understanding that the person to countersign the instrument in order to give it validity was that agent through whom he had applied for the insurance, and referring to the evidence of Allison that the premium never had been paid and that for this reason he had not countersigned the policy, and that he never issued it as a policy binding upon the defendants, but had let the deceased have it to read the conditions, and that as a fact the policy never was delivered to him as a contract. I observed that the only evidence relied upon to defeat this positive evidence is the inference relied upon as proper to be drawn from the fact of O'Donnell having had the policy in his possession in his life time and until his death, and this evidence was, in my opinion, quite insufficient for the purpose. Now, it is obvious that so long as this judgment, which is reported in vol. 10 of the Canadian Supreme Court Reports at page 92, remains unreversed, the plaintiff cannot succeed in this action unless upon evidence good and sufficient in law and of a wholly different character from that commented on in this judgment.

So long as Allison's evidence, as given in this action upon the first trial, remains undisplaced by legal and sufficient evidence, the plaintiff cannot succeed; it was therefore absolutely necessary that in order to succeed he should produce some new legal and sufficient evidence to displace

wholly Allison's evidence. Upon the authority of *Doe v. Wright v. Tatham* (b), that evidence given upon oath by Allison on the first trial is of as high a nature and as direct and immediate evidence, and produceable upon every trial of the issues joined in this action for the same purpose and to the same extent as if the witness himself were alive and sworn and should give the same evidence in the witness box upon every one of such trials. At the next trial, which took place in 1887, Edmund O'Donnell, labouring under the necessity of furnishing some wholly new evidence, again came forward and was sworn on his own behalf, and he again produced the book which he had produced on the former occasion, and as to it he swore that at the time of his son's death, on the 10th July, 1873, at the age of 21 years and six months, he was in business with witness in the grocery business, and that for four years he, the son, had been also doing business for himself in the same business; that he bought and sold for himself in his, witness', store; that witness let him have his store free on condition that he would look after his business also, and that the last entry in the book produced was in the son's handwriting; that entry was, under several others headed "paid," as follows:

"1872. Paid.

"Nov. 29. F. Allison

\$48.06."

This entry was received as evidence of payment of the premium. He also swore that after the death of his son and after finding the policy among his papers in his chest of drawers, he went three times to Allison's office; that the third time he went Allison told him that he thought the money was not paid for the policy; and he now, for the first time, more than ten years after Allison's death, made this further statement: "He afterwards told me on the street that it was all right now for he got the money and gave the policy."

On cross-examination he put it thus:

(b) 1 A. & E. 3.

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The last time I saw him in the office he said he thought it was not paid. I asked him how I could have the policy if it was not paid? He afterwards told me on the street *that I had the policy now, and the money was paid—the premium, as I understood him. I did not call at his office after that. He should have sent me the money.*

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At this trial also the evidence of Allison, as given by him on oath on the first trial, was again received and read. The learned judge who tried the case submitted to the jury among other questions the five following:

1st. Was the premium \$48 paid by the deceased to Allison on the 29th day of November, 1872?

To which the jury answered "Yes, it was."

2. Did Allison then deliver the policy to the assured as a binding contract?

To which the jury answered "Yes."

3. Was Allison instructed not to deliver it until it was countersigned by him?

To which the jury answered "Yes."

4. Was he instructed not to deliver it until the premium was paid?

To which the jury answered "Yes."

5. What amount, if any, is the plaintiff entitled to as damages in the nature of interest for the non-payment of the \$3,000 in the event of judgment being entered for the plaintiff. Give the amount, including the \$3,000?

To which the jury answered..... \$3,000

And 5 per cent. interest for 11 years..... 1,650

\$4,650

The sum of four thousand six hundred and fifty dollars to the plaintiff in full.

Upon these answers the learned judge entered a verdict for the plaintiff for the above amount and upon a motion to set aside that verdict and to enter judgment for the defendants upon several grounds stated, the verdict was sustained and judgment ordered to be entered thereon for the plaintiff, and from that judgment an appeal was again taken to this court, which again sustained the appeal for the reasons appearing in vol. 13 of the Canadian Supreme Court Reports at page 218. The plaintiff, Edmund

O'Donnell, having died since the last trial, and James J. O'Donnell having been appointed administrator *de bonis non* of Wm. A. O'Donnell, it was by an order of the court in which the action is pending, ordered that the proceedings in this action be continued between the said James J. O'Donnell as administrator *de bonis non* of Wm. A. O'Donnell as plaintiff against the defendants, and the case was again brought down to trial. The evidence of Allison, as given by him upon oath on the first trial, was again received and read. Upon the plaintiff proposing to read the evidence of Edmund O'Donnell as given at the last preceding trial from the judge's notes who had tried the case, it was admitted that the evidence was given by him as appearing on the judge's notes, but it was expressly objected, on the part of the defendants, that all relating to the entries in his son's books and to the admission alleged to have been made to Edmund O'Donnell by Allison to the effect that the premium had been paid, and in contradiction of Allison's statement upon oath, was inadmissible and should not be read or submitted to the jury. The learned judge who tried the case, however, while excluding the evidence as to the entries, received the evidence of Edmund O'Donnell as to the admission said to have been made to him by Allison, and submitted it to the jury, accompanying its submission, it is true, with a caution that they should not place *too much* reliance, whatever that may mean, upon this evidence, as the admission was alleged to have been made after Allison's death, and *post litem motam*. The jury, however, found a verdict for the plaintiff, this time for \$3,000 with interest thereon at the rate of four per cent, per annum from the date of the issuing of the writ, by which this action was commenced.

Now, if this evidence is admissible in contradiction of Allison's sworn testimony, upon oath, given in this very case in the presence of the person who never during Allison's lifetime, nor until ten years after his death and after the judgment given by this court as reported in vol. 10

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of the Canadian Supreme Court Reports at page 92, suggested that any such admission had been made, it seems to be quite hopeless for the defendants to expect to obtain justice at the hands of a jury, but that the evidence is not admissible appears to me to be clear for the reasons already given, namely, that it is not offered to supply a defect arising from the fact that the evidence upon oath of the person whose declaration the statement is alleged to be is unattainable by reason of his death, but for the purpose of getting the case to the jury with what is offered as an oral contradiction of the evidence upon oath given in this very action by the alleged declarant in the presence of the person who never during the witness' lifetime suggested that any such statement had been made by him, and who more than ten years after the witness' death for the first time made the assertion when he found, by the judgment, no doubt, of this court in this case as reported in 10 S.C.R. 92, that unless he could in some way displace Allison's sworn testimony he never could succeed in this action. I must say that, in my judgment, it would be a great reproach to the law if the attempt could succeed. The evidence of Allison, as given by him on oath upon the first trial in the presence of Edmund O'Donnell, the then plaintiff, is as much unassailed now by legal evidence as it was then, or as it was when this court gave the judgment which is reported in vol. 10 of the Canadian Supreme Court Reports at page 92, and upon that evidence unassailed, as it has been by any legal, admissible evidence, during all the trials of this action that have taken place, we ought now, in the interest of justice, to allow this appeal and order a rule to be issued in the court below for judgment in favour of the defendants with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Graham, Borden & Parker.*

Solicitors for respondents: *Lyons, Mooney & Lyons.*

*JOHN MOONEY (PLAINTIFF).....APPELLANT;
 AND
 JOHN McINTOSH (DEFENDANT).....RESPONDENT.

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 **Feb. 16.
 **June 20.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trespass—Title to land—Boundaries—Conventional line—Agreement at trial—Pleading.

In an action for damages for trespass by McL. on M.'s land and by closing ancient lights McL. claimed title in himself and pleaded that a conventional line between his lot and that of M. had been agreed to by L., a predecessor in title. On the trial the parties agreed to strike out the pleadings in reference to lights and drains and to try the question of a boundary only. McL. alleged that some fourteen years previous he and L. had agreed upon a conventional boundary line between their properties and that a fence was erected thereon, and that all parties had recognized this as the boundary ever since. The Supreme Court of Nova Scotia held that although the general principle was established that where a lot of land is conveyed describing it as bounded by an adjoining lot, the true dividing line between these lots must be presumed to have been referred to, as the boundary of the land conveyed, this is subject to the qualification that the facts do not indicate a different intention on the part of the grantor (which is a question of fact and not of law) and that in the present case the plaintiff's grantor never intended to grant and to covenant for good title land which he did not himself claim and that M. not being in possession could not recover damages in an action for trespass *quare clausum fregit*.

Held, Sir W. J. Ritchie C.J. and Gwynne J., dissenting, that the judgment of the court below in favour of the defendant should be affirmed and the appeal dismissed with costs.

Held, per Henry J., that M. had failed to establish title to the land in question, and that he took the deed from his grantor with full knowledge of the apparent boundary line as shewn by the fence erected thereon, and must be taken to have purchased on the under-

*XIV. Can. S.C.R. 740.

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

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standing that the fence was the boundary line settled upon and agreed to by those under whom he claimed.

Per Henry J., that the plaintiff could not possibly recover in an action *quare clausum fregit*.

Held, per Gwynne J., that upon the evidence all that was intended by L. was to agree upon a conventional line as the southern boundary of the lane, which at that time and continuously down to the institution of the action had been used by both parties, and which was indispensable to the beneficial enjoyment of the property of M., and the parties did not, in so agreeing intend to affect in any way the title of M. to the land on which the lane was situate. *Grasett v. Carter* (10 Can. S.C.R. 105), discussed.

Held, per Gwynne J.—The Judicature Act, R.S.N.S. (5 ser.) ch. 104, has abolished all forms of action and the technicalities incident thereto, and even if the action was improperly brought in trespass, M. should have been granted the relief to which he was entitled upon the facts proved.

APPEAL from a judgment of the Supreme Court of Nova Scotia (Weatherbe J., dissenting) affirming the judgment of the trial judge in favour of the defendant.

The plaintiff, in his statement of claim, alleged that he was the owner and occupier of the house and lot of land fronting on Main street, in Stellarton in the county of Pictou; that on divers days and times the defendant came with horses and carts and servants and forcibly broke and entered the plaintiff's close and dug up and carted away the plaintiff's land and obstructed and carted away the soil of the roadway which had been used and enjoyed by the plaintiff, and those under whom he claimed, for a period of more than 20 years. The plaintiff also alleged that in the house there were certain ancient lights, and that the defendant was digging the foundation and proceeding to erect a building which would deprive the plaintiff of his land, the use of the roadway and obstruct and diminish his light.

The defendant denied that the plaintiff was in occupation of the lands, but claimed that he was in possession thereof, and also alleged that about fourteen years before Mrs. Lowe, the predecessor in title of the plaintiff, and the

then owner of the close in question, met with the defendant, and they agreed upon and fixed the boundary line between the two lots, and that the land now claimed for by the plaintiff was situate on the defendant's side of the line so fixed and agreed upon, and that ever since such agreement the predecessors in title of the plaintiff had recognized said line as being the true boundary between their property and the property of the defendant.

The plaintiff denied that he or his predecessors in title were aware of the said convention, and the same being unrecorded he claimed the benefit of the Registry Act, as a *bonâ fide* holder for value without notice.

At the trial it was agreed that the question in issue respecting the light should be abandoned, and that the question for trial should be one of boundary only.

The evidence established that Mrs. Lowe at the time she entered into the agreement to establish a conventional boundary line was not, although she afterwards became, the owner in fee simple of the land.

The action was tried before Chief Justice McDonald, without a jury, who gave judgment in favour of the defendant.

Upon appeal to the Supreme Court of Nova Scotia, Mr. Justice Weatherbe, who dissented from the judgment of the majority of the court, held that the plaintiff had clearly established, upon uncontradicted evidence, his legal title to the lands in question, and that the evidence of the establishment of a conventional line fell far short of what was required to defeat the Statute of Frauds, which required every agreement respecting lands to be in writing, and that if the language of the deed clearly and plainly describes the boundary, which can be ascertained on the ground at the time of the convention, the writing required by the statute cannot be dispensed with.

The majority of the court did not commit themselves to an opinion as to whether or not the conventional line was legally established, but based their decision upon the

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ground that the plaintiff had purchased the land with full knowledge of what had been the recognized dividing line between the properties, and knowing that his grantor never intended to grant the lands in question, which were at that time in the adverse possession of the defendant, and further, that an action for damages for trespass would not lie by a plaintiff out of possession against the defendant in possession claiming it as his own and adversely to all others.

Sedgewick, Q.C., for the appellants. Under the agreement made at the trial the question of want of possession of the plaintiff is not open to the respondent. The appellant gave away a part of his case and tied himself down to the one question, and the respondent should be restricted in the same way. This point was not taken at the trial, where the conventional line was relied on, and the defendant has not had the opportunity of adding or substituting parties.

The facts in evidence shew beyond doubt that the appellant's documentary boundary includes the locus, or at least part of the land on which the defendant had commenced excavating. The respondent failed to prove a conventional line as set up in the pleadings and on the trial, and even if he had proved it the appellant is a purchaser for value of the legal title without notice, and would hold as against the respondent, who would only have an equitable right enforceable in equity against the party making the agreement: *Grassett v. Carter*(a); *Turner v. Baker*(b); *Ramsden v. Dryson*(c); *Joseph v. Lyons*(d); *Ross v. Hunter*(e).

Actual possession is not necessary to enable a person with the legal title to maintain trespass. There was an entry here: *Donovan v. Herbert*(f).

(a) 10 Can. S.C.R. 105.

(d) 15 Q.B.D. 280.

(b) 27 Am. Rep. 226; 64 Mo.

(e) 7 Can. S.C.R. 289.

218, and notes on p. 244.

(f) 4 O.R. 635.

(c) L.R. 1 H.L. 129.

Henry, Q.C., for the respondent, cited *Woodbury v. Gates*(*g*); *Davison v. Kinsman*(*h*); *Reid v. Smith*(*i*); *Garhatt v. Gooseley*(*j*); *McLean v. Jacobs*(*k*).

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SIR W. J. RITCHIE C.J., concurred with Gwynne J., and was of opinion that the appeal should be allowed with costs.

STRONG and FOURNIER JJ., were of opinion the appeal should be dismissed with costs.

HENRY J.—The rights of the parties herein are to be decided on the issues joined by them.

The part of the appellant's claim upon the issue raised by which the rights of the parties is to be determined is as follows:

On divers days and times in the months of September and October, 1884, the defendant came with horses and carts and a number of servants and workmen, and forcibly broke and entered the plaintiff's close, and dug up and carted away the plaintiff's land, and obstructed and carted away the soil of the road-way from the street to the rear of the plaintiff's premises which said road-way has been used and enjoyed by the plaintiff and those under whom he claims for a period of more than twenty years.

The respondent pleaded as follows:

1. The defendant denies that he committed the alleged trespasses.
2. The defendant denies that at the time mentioned in the statement of claim herein the plaintiff was in the occupation of the said lands.
3. The defendant says that at the time of the alleged trespass, the said lands were the lands of the defendant who was in possession of the same.
4. The close whereon the trespass is alleged was, in the months of September and October, 1884, the property of the defendant, and

(*g*) 3 N.S. Rep. 255.

(*i*) 7 N.S. Rep. 262.

(*h*) 2 N.S. Rep. 1, 69.

(*j*) 11 N.S. Rep. 235.

(*k*) 1 N.S. Rep. 9.

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not of the plaintiff, and the plaintiff and those under whom he claims have not used or enjoyed said road for a period of more than twenty years.

5. That about fourteen years ago, Sarah Lowe, the then owner of the said close now owned by the plaintiff, met with defendant and the defendant and the said Sarah Lowe agreed upon and fixed the boundary between the lot now owned by the plaintiff and that of the defendant as follows:

Beginning at the north-west corner of the house then called the Blackwood or Railway house and now owned by the plaintiff, and following the line of said house eastwardly along the end of the same to a stake at or near the rear or north-east corner thereof, and thence eastwardly continuing in a direct line in the same course to the rear or north-eastern corner of the plaintiff's lot as then fixed, as will more fully appear by reference to a deed of John Murray and others, to the defendant, dated September 5th, 1868, including in the defendant's side of said line so fixed and agreed upon the close in respect of which the plaintiff alleges said trespasses and the said line was by the said Sarah Lowe while she was owner of said lot, and by Neil Sutherland and James Wentworth subsequent guarantees thereof and up to the year 1882 recognised as the boundary between the lot of the plaintiff and that of the defendant.

The appellant pleaded further as follows:

The plaintiff, in addition to the statement of claim indorsed on his writ, claims:

1st. That he is the owner and occupier of a lot of land and premises situate at Stellarton, and bounded as follows:

Beginning on the east side of the main road leading from Albion Mines up the West Branch of the East River at the north-west corner of a lot now owned by one John Miller, and running thence northerly along the east side of the said road fifty-three feet, or until it comes to the south side line of lands belonging to John McIntosh, thence easterly along said McIntosh's lands sixty feet, thence southerly sixty feet or until it comes to the north-east corner of the said John Miller's lot, thence west along Miller's north side-line sixty feet to the place of beginning, being the same referred to in the indorsement on the plaintiff's writ; from the cellar on the plaintiff's said premises there runs an ancient drain which empties into a drain running through the defendant's lands.

2ndly. That the defendant or persons in his employ, filled up with earth and stopped the flow of said drain and backed the water therein into the plaintiff's cellar.

The respondent joined issue as follows:

1. The defendant says that he did not commit the trespasses alleged in the plaintiff's additional statement of claim herein.

2. The defendant denies that the plaintiff is the owner and occupier of the lands mentioned and described in the said additional statement of claim.

3. The defendant denies that the drain from the plaintiff's cellar mentioned in said additional claim is an ancient drain nor is the drain into which the same empties an ancient drain.

4. The defendant denies that he or persons in his employ stopped or filled up the said drain as alleged.

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I have copied the pleadings as to the merits of the case before us; and it will be seen that the appellant's claim is for damages for acts of trespass alleged to have been committed on his freehold property. His right to recover is founded on that allegation of ownership. It is not in any, the most remote, manner a claim for a disturbance of a right of way. Under the new practice in Nova Scotia, and the rules of pleading the technical distinction between actions is abolished; and the forms formerly necessary to distinguish them no longer exist; but it is nowhere provided that a party can claim for an injury alleged to have been done to him, such as a breach of and entry into and upon his land and doing damage thereon, and recover for the disturbance of a right of way. The question here was raised by both parties to try the right of the appellant to the land upon which the trespasses were alleged to have been committed. The fundamental principle of pleading that parties can recover, and must recover, if at all, according to their allegations and proofs, has not been affected by the changes in the practice referred to. The plaintiff is required, as formerly, to state his claim. By Order 19, sec. 2, p. 849, R.S.N.S. (5 ser.), it is provided that

The plaintiff shall, subject to the provisions of Order 20 and at such time and in such manner as therein prescribed deliver to the defendant a statement of his claim and of the relief or remedy to which he claims to be entitled.

Here, then, the appellant gives a statement of his claim which is, by an action of trespass, *quare clausum fregit*, and

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the respondent having denied the title and possession of the appellant, we have to decide from the evidence whether or not the appellant sustained his claim by sufficient proof. The appellant claims damages for obstructing and carrying away "the soil of the roadway from the street to the rear of the plaintiff's residence." It will be seen, however, by the evidence that it (the roadway) is not claimed as appurtenant to the land claimed by the appellant for the disturbance of which the respondent, independently of his right to the soil, could claim damages. It is not, therefore, a claim separate and distinct from the title to the soil. The appellant claims the soil upon which the roadway was; and damages for injury to the soil.

The deed from John Murray and others to the respondent covers the land under the roadway and makes the appellant's house the southern boundary of the respondent's lot, and he (the respondent) claims by a conventional line, established and agreed upon in 1868, by one Sarah Lowe, and the then owner and occupier of the respondent's lot. She was not then the owner of the lot, but was in the possession of it. She subsequently, in 1870, became the owner by a deed from the administrators of the estate of David Blackwood and signified her satisfaction with the line as previously conventionally established. She conveyed the lot to Neil Sutherland by deed dated 19th August, 1870, and by the description in that deed the southern boundary of the respondent's lot, then lately owned by the heirs of Donald McKenzie, who had previously, in 1868, conveyed to the respondent, was made the northern boundary thereof.

After so ratifying the alleged conventional line by which the north side of the appellant's house was settled upon as the boundary, she gave the deed to Sutherland, and bounded him to the north by the south line of the respondent's lot. Sutherland, to whom she conveyed, was examined as a witness, and his statements, acts and admissions bind the appellant; as it is through title derived from Sutherland that he claims. He said that he was grantee in

the deed from Sarah Lowe and occupied the premises, and that he occupied the same house as the appellant. He said further:

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I understood that the buildings covered the front part of the lot on the front street but not on the rear. The front street runs north and south. I did not understand that I was getting any land except what was covered by the buildings in front—one end of the house bounded on McIntosh's. I understood that I had a right to the lane for a certain length of time, but had no writing for it. I understood that from Mrs. Lowe. I understood the right was to last seven years but I cannot be positive. I put a door in the end of my house leading to the lane. There was a window in front. I don't recollect of a window looking out into the lane. If there was I shut it up and put the door in its place. After the door was put there, there was no window at that end in the lower story while I owned the property. McIntosh and I settled the line in the rear. We sighted from the end of the house—mine—and ran toward the rear. I think we went along the end of the house. The lane would be on McIntosh's side of the line. We extended the line so as to settle the boundary between other lots in the rear. I had previously purchased a piece in the rear from Donald Gray. After we settled the line I got Peter Stewart to put down posts down towards the rear from the house and along the lots I got from Mrs. Lowe and from Gray. I observed that line while I had the lot afterwards.

James Wentworth, who was the grantee of Neil Sutherland, and who conveyed to the appellant, occupied the lot for about eleven years next before his conveyance to the appellant. It was stated by Neil Sutherland that after he and the respondent had extended the line to the rear of the lots and "settled the line" he "got Peter Stewart to put down posts towards the rear from the house" and along the lot he got from Mrs. Lowe and another lot in the rear of it which he got from Gray.

Wentworth was examined as a witness for the appellant and stated that 10 years previous to his examination he built a fence between himself and the respondent. He said:

I saw these posts there I think. I put a board fence there. I sank some posts there. The fence is there yet nailed up close. Those living on the McIntosh lot used the lane with me. Sutherland shewed me the property.

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The respondent was examined and, amongst other things, said:

There is now a fence at the rear on that line. A high board fence 6 or 7 feet high. Posts sunk and boarded up. I cannot say how long it was there but I think it was ten years.

That, no doubt, is the line fence put up by Wentworth utilizing the posts put up by Sutherland. The appellant has shewn no possession north of that fence. He claims, under Mrs. Lowe, Sutherland and Wentworth, who all have held by the line of that fence as the line of the two lots, and the respondent has shewn that his title covers it. The appellant has not, however, shewn any title to the soil where the lane is. He has shewn no survey according to any of the deeds under which he claims, but has depended upon the discovery of some pieces of old logs under ground which might or might not be part of some old building which had stood where the pieces of logs were found, but the evidence in regard to which is so shadowy and contradictory that no value can be properly given to it as evidence of a boundary line. It appears that at the time that old house was built, both lots were owned by the same person and, therefore, the discovery of the remains of an old house would have no value in ascertaining the line.

I have, under the evidence, had no difficulty in concluding that the respondent has the title to the land north of the appellant's house and north of the fence leading from it to the rear, and that the appellant has entirely failed to establish any right to recover in the action *quare clausum fregit* which he has brought.

It is, however, contended for him that even in that case he has a right to claim for the injury to what he claims as his right of way over the respondent's grounds. It seems to me, however, that that claim was abandoned on the trial. The learned judge, who presided, reports:

It was agreed to strike out of the pleadings all references to lights and drain and to try the question of boundary only.

If it was but the question of boundary that was to be tried, then the claim for injury to the right of way was excluded, and it is not here for consideration. That appears to have been so considered in the court below. One of the learned judges so expressed himself, and the others did not deal with it. If it had not been abandoned the learned judges would no doubt have referred to it.

I may, however, say that the appellant has shewn no right or title to the continued right to use the way in question as such. His deed was in 1882, and it contains, as far as can be seen by the abstract in the case, no conveyance of the right of way. So that, although his grantor may have had such right, it was not conveyed to him. He has not, therefore, any such right, either by grant or prescription. Taking the view I do of the evidence, documentary and otherwise, I am of opinion that the appellant, independently of the question of the conventional line agreed to by Mrs. Lowe, has wholly failed to make out a case.

To destroy the possession of the respondent by the fence spoken of under his title it was necessary for the appellant to have shewn where the true line was to be found, that would permit him to affect the twelve years' possession of the respondent as shewn by the acts and admissions of those through whom the appellant claims title. This he could only have done by establishing the starting points referred to in the conveyances and by tracing them round to the place of beginning. Nothing of that kind was done or shewn to have been done, and how is any court to assume that had such been done the result would have shewn a line different from that agreed upon? In this part of the case there was, I think, a fatal failure. The appellant took his deed from Wentworth in 1882 and agreed to be bound by the south side-line of the respondent's lot. On that line there was then a well made board fence, 6 or 7 feet high, and it would require little to justify the conclusion that when he purchased the lot he knew that that fence was the boundary settled upon and agreed to by those under

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whom he should claim. He therefore knew that the respondent's possession was limited only by that fence. It would be monstrous then to sanction a recovery by him in an action, *quare clausum fregit*. The respondent broke no close in possession of the appellant, for he, the respondent, had been in possession of what he claims ten or twelve years, claiming it as his own, and that position admitted by and agreed to by those through whom the appellant derived title.

I am of opinion that the appellant wholly failed to sustain the allegations in his claim, and consequently that the appeal should be dismissed with costs.

GWYNNE J.—The majority of the court below appear to have overlooked the fact that this action is one brought under the Judicature Act, ch. 104, of the 5th series of the Revised Statutes of Nova Scotia, which has abolished all forms of action and the technicalities which had been incidental thereto.

In *Coverdale v. Charlton*(1), which was one of the cases cited in argument, Lord Justice Brett made use of the following language, which has direct application to the present case :

This action is brought under the Judicature Acts, and since the passing of those Acts, forms of action no longer exist. This is not necessarily an action of trespass. It is an action in which the plaintiff states the facts of his case and asks for remedy. The plaintiff has stated facts which he alleges shew that he is entitled to a remedy against the defendant in respect of certain acts of the defendant.

In the present case the plaintiff's action was dismissed because, in the language of one of the learned judges, "the plaintiff had not, in his opinion, sufficient possession to enable him to maintain trespass," and in the language of another learned judge because, as he found the fact to be (although no such point had been raised at the trial and although the parties themselves had at the trial agreed to confine the enquiry to a wholly different point), that by the

(1) 4 Q.B.D. 104.

deed which the plaintiff produced in evidence of his title he took no estate in the particular piece of land upon which the defendant was making the excavation which was complained of, inasmuch as, in the opinion of the learned judge, the defendant, at the time of the execution to the plaintiff of the deed under which he claimed was in actual possession of that piece of land by disseizin of the plaintiff's grantor, and that such disseizin while it gave a cause of action to the plaintiff's grantor, yet that by reason thereof the plaintiff had no cause of action in respect of the matters complained of by him. This reasoning not only ignored the fact that the action is one brought under the Judicature Acts, but, also, set aside as not to be considered the points which the parties had gone to trial upon, and especially the single point upon which the parties had at the trial agreed to rest the case; and, assuming, *first*, the land in question to be within the description of the deed under which the plaintiff claimed, which was one of the points upon which the parties were at issue; it assumes, *next*, to make for the defendant and to decide in his favour a point not raised or suggested by him, and of which there does not appear to have been any evidence, namely, that he had disseized the plaintiff's predecessor in title, and was still in actual possession of the piece of land in question by virtue of such disseizin.

To say that the defendant had been, and was, in such actual possession by disseizin of the piece of land in question, was an exercise of judgment by the learned judge upon a matter of fact as if undisputed, which was not then before the court, and which, to say the least, was open to controversy for the plaintiff's claim was, that unless the piece of land in question was the property of the plaintiff and in his possession it was land of which, as a lane affording access from the street to his dwelling house and messuage where he lived, he and those under whom he claimed title had been in the actual use and enjoyment continuously from day to day, and every day, for more than twenty

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years. So that the point, if it had been made at the trial, could have been readily answered. Of such user there was copious undisputed evidence. There was also evidence that the defendant had in like manner used the lane for access to the rear of his premises, so that the defendant never had such actual exclusive possession of the lane as would constitute disseizin of plaintiff's grantor of that part of the lane which adjoined the plaintiff's dwelling house and which was covered by the description in his title deeds. It is sufficient, however, to say that no such point as that upon which alone the majority of the court below have adjudicated, had ever been suggested or tried, and that the point upon which the parties proceeded to trial and agreed to rest the case has not been adjudicated upon.

The plaintiff in his statement of claim as amended, in short substance, is, that in the month of September, 1884, he was and still is the owner and occupier of a house and lot of land fronting on Main street, at Stellarton, in the county of Pictou, describing it by metes and bounds, and that on divers days in the months of September and October, 1884, the defendant with horses and carts, etc., etc., broke and entered the plaintiff's close, and dug up and carted away his land, and obstructed and carted away the soil of a roadway from the street to the rear of the plaintiff's premises, which said roadway has been used and enjoyed by the plaintiff and those under whom he claims for a period of more than twenty years.

That in the plaintiff's said house are the following ancient lights, viz., a dining room window on the ground floor in the north end, and two windows on the second floor in the north end.

That the defendant is digging a foundation and is about erecting a building which will, if not stopped, deprive the plaintiff, 1st, of his land; 2ndly, of the use of the roadway from the street to the rear of his premises; and 3rdly, will obstruct and diminish the light coming through the said windows, and he claimed damages and an injunction.

The defendant, in short substance, pleaded that the *locus in quo* was his own property, and that the plaintiff and those under whom he claims have not used or enjoyed the said road for a period of more than twenty years—and the plea following:

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That about fourteen years ago Sarah Lowe, then owner of the said close, now owned by the plaintiff, met with defendant and the defendant and the said Sarah Lowe agreed upon and fixed the boundary between the lot now owned by the plaintiff and that of the defendant as follows (setting out a certain line; and proceeds) and said line was by the said Sarah Lowe while she was owner of the said lot and by Neil Sutherland and James Wentworth subsequent grantees thereof and up to the year 1882 recognized as the boundary between the lot of the plaintiff and that of the defendant.

The defendant also pleaded that the plaintiff's lights are not ancient. Besides joining issue on the defendant's plea the plaintiff, to the plea of conventional boundary, replied that neither he nor the said James Wentworth nor Neil Sutherland had any knowledge or notice of the said conventional boundary, and that they were respectively purchasers for value by registered title of the land as described in the plaintiff's statement of claim.

In the notes of trial furnished to us the following entry appears to have been made during the progress of the examination of witnesses for the defence:

It was agreed to strike out of the pleadings all reference to lights and drain and to try the question of boundary only.

The true construction of this would, I think, seem to be that the question to be tried was, what was the true boundary line between the lot of the plaintiff and that of the defendant, according to their title to be collected from the deeds under which they respectively claimed, and not a question whether or not by some agreement between the defendant and the plaintiff's predecessors in title the plaintiff was estopped from insisting upon the true boundary as appearing on his title deeds.

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The learned judge before whom the case was tried without a jury rendered a verdict for the defendant without determining the question of the site of the true boundary line according to the deeds, or the question whether or not the plaintiff was estopped from insisting upon such true boundary by reason of a conventional line having been agreed upon between the defendant and the plaintiff's predecessors in title, as pleaded by the defendant, founding such, his verdict, not upon the issue the parties agreed to rest the case upon, but as appears by his judgment in the Supreme Court of Nova Scotia, upon the point of the alleged disseizin of the plaintiff's grantor by the defendant already above referred to.

Now it cannot, I think, be denied that, as is pointed out by Mr. Justice Weatherbe in his dissentient judgment, the evidence in favour of the true boundary being as contended for by the plaintiff, was very strong, while, as is pointed out also by the same learned judge, the evidence of there having been in substitution therefor such a line agreed upon as would estop the plaintiff from shewing and insisting upon the true boundary line, was of the weakest possible description, if, indeed, it can be said to be of any weight at all for that purpose.

The plea out of which the issue as to the conventional line has arisen is, that fourteen years ago the defendant and Sarah Lowe, then owner of the close now owned by the plaintiff, agreed upon and fixed the boundary between their respective lots on the line as now claimed by the defendant, and that she, while continuing to be the owner of the said close, now owned by the plaintiff, and her grantees up to the year 1882, when the plaintiff purchased the lot, recognized the line so agreed upon as the boundary between the lot of which the plaintiff is now the owner and that of the defendant. No motive or consideration whatever for such line having been agreed upon, if it in truth was, is suggested; nor does the plea allege that the plaintiff since he acquired title ever acquiesced in the line as contended for

by the defendant. The gist of the plea is, that by reason of what is therein alleged to have taken place between the defendant and the plaintiff's predecessors in title, the plaintiff is estopped from shewing that the line, as claimed by the defendant, is not the true boundary line.

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Now, assuming, Sarah Lowe in the plea mentioned to have been the owner in fee of the lot now owned by the plaintiff, when the alleged line, as claimed by the defendant, was agreed upon, it is to be, in the first place, observed that this Sarah Lowe appears to have been quite illiterate: we should therefore require to be well satisfied that she thoroughly understood the purport and effect of the agreement which she is alleged to have verbally entered into.

The plaintiff and defendant both claim under title derived from one Alexander Chisholm. The former through a deed executed by Chisholm to one McBride, in December, 1829, and the latter through a deed executed by Chisholm to one McKenzie, in January, 1833. The plaintiff's title is, therefore, to be governed by the description of the land conveyed by the former of those deeds and not by the latter.

A surveyor, who was appointed by the defendant, in 1868, to ascertain the true boundary of the lot which the defendant now owns, proceeded to determine that boundary by the description in the deed from Chisholm to McKenzie, and he went, as he says, to a point claimed by the heirs of McKenzie to be the southeast corner of the land described in the deed of January, 1833, but that such point was the true southeast corner of the McKenzie lot there is no evidence whatever. According to the evidence, leaving out what is irrelevant and not evidence, this surveyor says that he sighted from that point along the course stated in the deed of January, 1833, to the northwest corner of the Blackwood house (that is, the house which is now the property of the plaintiff). He says that such line, so run by the course stated in the McKenzie deed, would have taken about three feet off the northwest end of the Blackwood house. He thus, as he says, saw a difficulty, and he went

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to see Mrs. Lowe, who lived in the Blackwood house. He told her, as he says, how it was, and she produced the Blackwood deed, that is to say, the deed under which Blackwood claimed, who was then owner in fee of the land now owned by the plaintiff, and with that deed he measured from where she told him, as he says, her corner was, and found that the deed, that is, the Blackwood deed, took him three feet *north* of the northwest corner of the Blackwood house; that is to say, six feet north of the point were running along the course in the McKenzie deed from the point shewn to him as the southeast angle of the McKenzie lot had taken him, and he so told Mrs. Lowe.

Now, having found this difference in the result of the two lines run by him, this intelligent surveyor, acting in the interest of the defendant, admits that he then suggested, to this ignorant woman who had no one to advise her, an arrangement between her and the defendant, and in pursuance of such suggestion he says that they agreed that he, the surveyor, should start from the northwest corner of the Blackwood house and run a line along the north end of the house to the east side of the McKenzie lot near the point from which he first sighted, about five feet south of an ice house, and he drove a stake at that point and made a description for the defendant's deed, and he planted a stake between the stake as planted above and the house. Now, the defendant in his evidence, admits that at the time when this line was run, in 1868, he lived in a house on the McKenzie lot—that there was a lane between his house and the house on the Blackwood lot, now called the Mooney house—that the only entrance into defendant's house, except through a shop in the front of the house, opened upon this lane—that into this lane there was a gate opening from a yard on the Blackwood lot, and a door opening also from the house now called the Mooney house, and that he never interfered with the occupants of that house using the lane. He says also, that at the east end of the lane there was an ice house and barn, which shortly after, as appears in the

defendant's own evidence, was the property of the owner of the Blackwood lot. Now, if Mrs. Lowe, while being owner of the house and lot now claimed by the plaintiff, ever agreed to the boundary line as now claimed by the defendant, is it credible that she could have understood the purport and effect of her agreement to be, as is now claimed by the defendant? Is it credible that she could have understood that she was abandoning all claim forever to the three feet of land north of the house, which the defendant's own surveyor told her that the deed under which she claimed gave her; or that she was consenting to the cutting off of all access between her house and the messuage in the rear and the street in front by the lane in question, the use of which, as such access, appears to have been a daily necessity; or that she was divesting herself of all right and power to maintain the door and windows which were in the north end of the house? Or, is it not much more likely that she understood the agreement to relate only to determining the line upon her property which should be the south limit of the lane, which was situate partly upon her property and partly upon the McKenzie lot, and which the defendant and she were both using daily as the means of access to their respective houses and messuages?

That neither she nor the defendant understood that she was abandoning all claim to the land north of the line run by the defendant's surveyor in 1868, appears, I think, from the defendant's own evidence, when he says that he met her afterwards in the year 1869 or 1870, in the spring of the year, when, as defendant alleges, she said "she was satisfied with the way we had settled the boundary." No explanation is offered of the manner in which this observation, which is relied upon as evidencing acquiescence in and a recognition of the agreement of 1868, came to be made—nor with what conversation it had connection so as to throw light upon the intent of the observation. The occasion of the meeting at which this is alleged to have taken place is thus stated by the defendant:

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I met her afterwards in 1869 or 1870. She was then living in the Blackwood house. She wanted me to buy the barn and the ice-house in the rear for \$40. I told her I would give her \$30. She went into the house saying she'd see Sarah and came back and took the money. She said she was satisfied with the way we had settled the boundary. This was in the spring of the year.

The barn and ice-house here spoken of are the barn and ice-house previously spoken of by the defendant as being at the east end of the lane and north of the line alleged to have been agreed upon in 1868. Now, if by the agreement alleged to have been made at the time of the survey by the defendant's surveyor in 1868, it had been intended and understood that Mrs. Lowe was abandoning all claim to land north of such line (nothing appearing to have been said as to her retaining an interest in the ice-house and barn), it does not clearly appear why, if she had abandoned the land, the defendant should, in the spring of 1869 or 1870, purchase the ice-house and barn from her. What the defendant in his evidence says is, that Mrs. Lowe wanted him to buy the ice-house and barn for \$40 on this occasion, in 1869 or 1870, but when he offered her \$30 she appears to have been unable to consent or to close the bargain without consulting some one else, for the defendant says "she went into the house saying she'd see Sarah and came back and took the money." This evidence conveys, to my mind, that this person called Sarah, whom Mrs. Lowe went into the house to see, for the purpose, as the evidence implies, to convey to her the defendant's offer of \$30, was the person entitled, or who claimed to be entitled, to sell, and who did sell the ice-house and barn to the defendant, Mrs. Lowe acting merely as an intermediate party. At another place the defendant says that Mrs. Lowe got Sarah to write a receipt for the barn and ice-house. The defendant does not produce this receipt; it most probably is dated and would shew when this sale took place and who was the vendor. The evidence, however, very clearly shews that Sarah, whoever she was, and Mrs. Lowe were distinct per-

sons, and from the circumstance of Mrs. Lowe going in to communicate to Sarah the defendant's offer, the latter seems to have been the principal and Mrs. Lowe the agent—and the point seems to be important, for neither in 1868, nor until the 10th May, 1870, was Mrs. Lowe owner of the lot now claimed by the plaintiff, or competent to enter into any agreement about the boundary line between the respective lots in question. As Sarah, whoever she was, would seem to have been the person who sold the barn and ice-house to the defendant, that transaction would seem to have taken place before the 10th May, 1870, when Mrs. Lowe acquired an interest in the house and lot now the property of the plaintiff, and in this view great force is added to the observations of Mr. Justice Weatherbe as to the danger of receiving and attaching any weight to the evidence of defendant when recalled (the reception of which evidence was objected to) for the purpose of saying, after it had appeared in evidence, that Mrs. Lowe had no title until the 10th May, 1870, that since he had given his evidence he had refreshed his memory, not saying how, and that it was between the 1st and 13th June, 1870, that he had the second conversation with Mrs. Lowe, of which he had spoken. But this abrupt and unconnected remark that "she was satisfied with the way we had settled the boundary," assuming it to have been made, and to have been made after she had acquired title in May, 1870, throws no additional light upon what had taken place in 1868; what it was that was there intended is still left in uncertainty. I have already, I think, shewn that the defining the south limit of the lane was more likely to have been the utmost that was intended, than that Mrs. Lowe was surrendering to the defendant, without consideration, a piece of land comprised in the lane, the use of which appears to have been indispensable to the beneficial enjoyment of her property, and which piece of land the defendant's own surveyor had just told her was covered by her deed. Moreover, the conduct of the defendant and of Mrs. Lowe, and those claiming

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under her ever since until the recent act of the defendant, which is the subject of this suit, has been perfectly consistent with the intention of Mrs. Lowe, in 1868 having been limited to defining the south limit of the lane without affecting her title to land on which the lane was situate. That is to say, the plaintiff's predecessors in title ever since the alleged agreement of 1868, including Mrs. Lowe herself, have used the land in the lane, the southern limit of which was then defined, and have retained possession of so much as is covered by the deed from Chisholm of Dec., 1829, under which they derive their title precisely in the same manner as they had done before, namely, as a lane affording access to their dwelling house and messuage in common with the defendant who, in like manner and only in like manner, used the lane as affording access to *his* house and messuage. Mrs. Lowe acquired title by a deed executed on the 10th May, 1870, according to the description contained in the deed of Dec., 1829, from Chisholm to McBride. She conveyed to Sutherland by deed of the 19th Aug., 1870, by the same description as is contained in the deed to herself, and on the 30th June, 1871, Sutherland conveyed to Wentworth by the same description, who in May, 1882, conveyed to the plaintiff by the same description. The boundary line alleged by the defendant to have been agreed upon in 1868 is never referred to. Nor has any difference whatever in the use and possession of the land north of that alleged boundary line ever taken place. Neither Sutherland nor Wentworth ever heard of the alleged agreement of 1868, and they could not ratify or confirm what they had ever heard of and, in point of fact, they never did. Sutherland, it is true, says that he used the line, which was always used as the south limit of the lane, for the purpose of laying out some lots in the rear according to it, but nothing ever took place between the defendant and Sutherland to deprive the latter or any one claiming under him of the right of contesting the defendant's claim to all land north of the line as being his pro-

erty, or of shewing title in themselves to a portion of the land within the limits of the lane, or of shewing where the true boundary between the land to which the defendant has title and that to which the plaintiff has title, is. The evidence wholly fails to establish anything which is sufficient to operate as estopping the plaintiff from shewing where the true boundary between the property to which the defendant has title and that to which the plaintiff has title is, and that a portion of the land comprised within the limits of the lane, and which the defendant claims to be his property, is in fact the property of the plaintiff. There was, in short, no pretence of any difficulty in determining the true boundary line as defined by the terms of the elder deed, nor was there any attempt made to lay down the line by it. The line was not adopted as and for the true line or in consequence of any difficulty in determining the true line. Neither has there been, since the making of the alleged agreement, exclusive possession held by each party of all the land up to the line lying on their side of the alleged conventional line. The plaintiff's predecessor in title, who is alleged to have agreed upon the new line, and her assigns, including the plaintiff, have ever since the agreement had precisely the same possession of all the land covered by the deed under which they claim title lying to the north of the alleged line, as the then owner of the land now claimed by the plaintiff had before the agreement. Assuming Mrs. Lowe to have been in 1868 the owner of the property now claimed by the plaintiff, what the defendant and she were doing by the agreement of 1868, upon defendant's evidence as given in the case, was not the fixing of a boundary line between their respective properties, the site of which was indefinite and uncertain. The utmost that can be said to be established by the evidence, on behalf of the defendant, is that his surveyor having represented to Mrs. Lowe that the line between her property and that of the defendant, if drawn according to the courses in the deed from Chisholm to McKenzie, would run through her house, taking three

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feet off the north end of it, but if drawn according to the courses in the deed under which she claimed title would run three feet *north* of the northwest corner of her house, thereupon the parties mutually agreed to split the difference and to surrender to each other the land which would be on either side of a wholly new line, which, taking the north line of the house, continued to the east end of their lands, they should adopt from the northwest angle of her house as a wholly new line. That was not an agreement fixing a boundary line, the site of which was indefinite and uncertain; it was an agreement for the adoption of a wholly new line which neither party believed, or had any reason to believe, was the true one, as to which there does not appear to have been, in point of fact, any uncertainty or any reason to believe there was any uncertainty. The only question upon which the site of the true boundary depended was which deed, namely, that from Chisholm to McKenzie or that from Chisholm to McBride, was to prevail, which, as we now see, raised a question of law and not of fact, and as to which there could be no doubt unless it might be in the mind of a person as ignorant as Mrs. Lowe appears to have been, if she ever made the agreement which it is alleged, upon the part of the defendant, that upon the suggestion of his surveyor, she did make. The effect, as we now see by the evidence of that surveyor, of her agreement, if it should prevail against her assigns, was to convey to the defendant a piece of land which, as she was informed by the surveyor, was covered by her title deed, and that was an agreement which, as pointed out by Mr. Justice Weatherbe in his judgment, being verbal was void by the Statute of Frauds. Moreover, as the evidence shewed, that at the time of the alleged agreement between the defendant and Mrs. Lowe, in 1868, she had no estate in the land. The defendant's plea as to a conventional line is disproved.

What verbal agreement and what acquiescence therein would be sufficient to create an estoppel upon either party

to shew where the true boundary line between their adjacent properties is, it is not necessary to determine in this case for the reasons already given. The most recent enunciation of the doctrine of estoppel in such cases is that contained in the judgment of this court in *Grassett v. Carter*(*m*).

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The language of the learned judges in that case is not, however, to be read as laying down a rule which is applicable in every case, but must be read, as indeed all judgments should be, in connection with the facts appearing in the particular case in which the judgment is pronounced. The Chief Justice there says that he thinks

it is clear law that where there may be a doubt as to the exact true dividing line of two lots and the parties meet together and there determine and agree on a line as being the dividing line of the lots, and upon the strength of that agreement and determination and finding of a conventional boundary one of the parties builds to that line, the other party is estopped from denying that that is the true dividing line between the two properties.

Strong J., says:

I take the law to be well settled that if adjoining landowners agree to a dividing line between their respective properties and one of them, knowing that the other supposes the line so established to be the true line, stands by and allows him on the faith of such supposition to expend money in building upon the premises according to the line assented to, he is estopped from shewing that he was mistaken and from denying that he is bound by the line which he has thus induced the other party to rely upon.

And, referring to the facts of the case then before the court, he says:

Had there been nothing further done beyond removing the line I do not think there would have been an estoppel or that the respondent could have been, on any acknowledged principle of law, debarred from afterwards shewing either that he was mistaken in supposing that the line of the fence was the proper dividing line between the lots or that the line had been erroneously produced by the surveyor.

And Henry J., says:

(*m*) 10 Can. S.C.R. 105.

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The law applicable to conventional lines I take to be, that if a line is agreed upon and one party acts upon it and erects a house or an expensive fence or holds and improves the land the other party is estopped from saying that the line is not the right one. If, however, nothing is done on the land and there is no change of possession in any way it is, I take it, within the power of one party to prove that a mistake was made in the running of the lines or the adoption of them.

In *Lawrence v. McDowall*(*n*), in the Supreme Court of New Brunswick, the question did not arise, and that case, therefore, is no authority upon the subject. Chipman C.J., delivering the judgment of the court there says (p. 445):

The point whether the defendant was conclusively estopped by his consent to Hathaway's line so that it would not have been open to him, if he could have done so, to shew that there was a mistake or deception in this line and that it was not the true boundary does not appear to have arisen, and as it has not arisen it is not necessary to discuss it.

In *Perry v. Patterson*(*o*) the line agreed upon was ascertained by a surveyor, as the true boundary and the parties agreed to accept it as such, and they put up their fences at the line, and they held *exclusive possession* of the land upon each side, each on his own side up to the line for 14 years. That acquiescence was held to conclude the parties from disputing the line.

In *Davison v. Kinsman*(*p*) the Supreme Court of Nova Scotia held that a conventional line having been verbally agreed upon between owners of adjacent properties as their true division line, and that such line was acquiesced in and exclusive possession held by each party up to the line of all the land on his side for a period of twelve years, the parties were estopped from disputing the line. In *Wide-man v. Bruel*(*q*) the plaintiff brought his action of trespass *quare clausum fregit*, and claimed a line according to a sur-

(*n*) 2 N.B. Rep. 442.

(*p*) 2 N.S. Rep. 1, 69.

(*o*) 15 N.B. Rep. 367.

(*q*) 7 U.C.C.P. 134.

vey made by a surveyor fifty years previously, according to which a fence had been put up for about 40 or 50 rods shortly after the survey, and the residue more than 20 years before action, and it appeared that both parties had always treated the fence as the boundary line between them. The defendant insisted that this was not the true line, and had a verdict, upon a motion to set aside which, a new trial was granted upon payment of costs.

Draper C.J., delivering the judgment of the Court of Common Pleas, at Toronto, says.

The right will be bound in this action, and the plaintiff relies on a conventional line fifty years old clearly adopted in one part and in a possession of at least twenty years of the part where the trespass was committed.

In the American courts there are numerous decisions upon the point. In *Boyd v. Graves*(r) it was held by the Supreme Court of the U.S. that 20 years' acquiescence in, and possession in accordance with boundary line verbally agreed upon, bound the parties to the agreement and those claiming under them. In *Adams v. Rockwell*(s) it was held by the Supreme Court of the State of New York that where both parties derived title from the same source one of the parties was not estopped by an acquiescence of 11 years in a boundary line from shewing the true line, there having been no attempt to ascertain the true boundary by actual survey, according to the description in the older deed. One of the learned judges, on delivering judgment, after reviewing all the cases bearing upon the subject, says:

I have been thus minute in this statement of the cases to ascertain, if possible, a certain definite length of time where possession by express agreement shall be adjudged conclusive, or how long a possession will justify the inference of an agreement so as to conclude the parties, and it seems there is no certain rule on the subject. Five and eight years have been adjudged not conclusive. Sixteen, eighteen and nineteen years have *under particular circumstances* been deemed long enough to justify a court in determining that the possession shall

(r) 4 Wheat. 513.

(s) 16 Wend. 285.

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not be disturbed. The cases of eighteen and nineteen years were cases of possession in pursuance of an express agreement, and of sixteen years continued possession with valuable improvements made on the premises.

In *Davis v. Townsend*(*t*) it was held by the Supreme Court of the State of New York that the ground upon which verbal agreements as to boundary lines rest for their validity is the fact that the true line of separation is not only fairly and truly in dispute, but that it is also to some extent undefined and unknown; and that in such cases a boundary line verbally agreed upon shall control the courses and distances in title deeds when acquiesced in for a length of time sufficient to bar the right of entry.

In *Proprietors of Liverpool Wharf v. Prescott*(*u*) the Supreme Court of the State of Massachusetts held that, if the owners of lots of land are in doubt as to the dividing line between them, and fix the line by an oral agreement, and occupy according to such agreement, no exception lies to an instruction to the jury, that, although the presumption is that such was the true line, yet if it could be shewn not to be so such oral agreement and occupation would not bind the parties nor fix their rights unless the line had been adhered to for the full term of 20 years.

In *Vosburgh v. Teator*(*v*) it was decided by the Court of Appeals of the State of New York that an agreement by parol to establish a new line as the boundary line between adjacent properties where the true boundary was not indefinite or uncertain, would be void by the Statute of Frauds.

In *Reed v. Farr*(*w*) it is said by the Court of Appeals of the State of New York that the rules which makes a conventional boundary line acquiesced in for a length of time binding, has been adopted as a rule of repose, and that it rests upon the same principle as does the Statute of Limitations, and that, in all cases in which practical locations

(*t*) 10 Barb. 333.

(*v*) 32 N.Y. 561.

(*u*) 7 Allen (Mass.) 494.

(*w*) 35 N.Y. 113, at p. 117.

have been confirmed upon evidence of this kind, the acquiescence has continued for a long period rarely less than 20 years.

It is obvious that the decision in none of the above cases warrants a judgment in favour of the defendant upon the facts as they appear in the present case.

For the several reasons above given, and because the great weight of the evidence establishes, I think, beyond doubt, that the excavation which is complained of is, to some extent at least, made upon land of which the plaintiff is seized in fee. I am of opinion that this appeal should be allowed with costs, and that judgment should be entered for the plaintiff in the court below for \$10 damages and costs of suit, and that an injunction should be ordered to issue from the court below restraining the defendant, etc., etc., etc., from continuing to excavate the soil of, or erecting any building upon, any part of the land comprised within the description in the deed from Chisholm to McBride, under which the plaintiff claims, and from suffering any part of such soil which has been already excavated by the defendant, etc., etc., from remaining and continuing to be excavated and removed from the land of the plaintiff as determined by the description in the said deed from Chisholm to McBride.

Appeal dismissed with costs.

Solicitor for appellant: *John McGillivray.*

Solicitor for respondent: *J. H. Sinclair.*

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ISAIAH DANKS (PLAINTIFF).....APPELLANT;
 AND
 W. W. PARK (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Partnership—Same firm name in different cities—Partners different
 —Liability of firm—Individual member making note in firm name.*

Action on a promissory note for \$1,260.40. The defendant, J. E. Dunham, carried on business in the city of Montreal as a dealer and importer in dye stuffs and chemicals under the name of J. E. Dunham & Co. In this company the defendant Park had no interest, and was in no way connected with it. While carrying on this business at Montreal the defendant Dunham entered into partnership with Park, on the 1st of May, 1886, for the purpose of carrying on the same business at Toronto under the name of J. E. Dunham & Co. On the 12th of August, while both these firms were thus carrying on business separately at Montreal and Toronto respectively, Dunham made the promissory note sued on. This was afterwards endorsed over to one Gardner, and by Gardner to the plaintiff. Upon the evidence it was held by Rose, J., before whom the action was tried, that the note was given by Dunham with reference to the business carried on at Montreal, and came within the principle of *Standard Bank v. Dunham* (14 O. R. 67), which was an action brought on another note, given under the same circumstances and at the same time as the one sued on in the present case. On appeal to the Court of Appeal for Ontario this judgment was affirmed, and on further appeal to the Supreme Court of Canada:—

Held, that the appeal shall be dismissed with costs.

Held, per Gwynne J., that a person who was a member of two partnership firms having the same partnership name, but not composed of all the same members, giving a note in the partnership name which reaches a *bonâ fide* holder for value, it is a question of fact to be determined on the evidence what firm he intended to sign for, and the members of such firm only are liable on the note.

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

APPEAL from a judgment of the Court of Appeal for Ontario affirming the judgment at the trial of Rose, J.

The facts of the case are set out in the following judgment of Rose J., at the trial (unreported).

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ROSE J.—The facts of this case, I think, are comparatively simple. I shall find as a fact that at the time of the making of this note there was a carrying on of business by Dunham in Montreal under the name of J. E. Dunham & Co. Although the certificate of registration, or the certificate which was registered, shews that the firm name as written in the certificate was J. E. Dunham & Company, as a matter of fact we find that the abbreviated form was used in the signature of the firm name. There is no evidence to displace the statement of fact by Dunham that at the time he signed these notes he signed not for the firm of Dunham & Company, of which Park was or had been a member, but that he signed in respect to the business carried on by him in Montreal. The presumption should be in favour of that proceeding, because first, he had no authority to sign the name of J. E. Dunham & Company to any such paper with reference to the business carried on by him and Park, and secondly, it would have been a fraud upon Park to have made any such paper under the circumstances detailed here in evidence. Where, therefore, the transaction can be referred to a state of facts consistent with honesty of purpose, although there may be folly in the carrying out of the design, the man having lost his reason possibly by the use of intoxicating liquors, and where there is another state of facts which is inconsistent with honesty, and the man's oath is given in accordance with the state of facts which is inconsistent with honesty, I think I should not find against his direct statement that he made this paper intending to bind the firm of which Park was not a member. I think, as a matter of fact, as between the partners it had been determined, upon the receipt of that notice, that the firm or partnership between them should end, and there is nothing beyond a few small purchases, if purchases they are, since the first of September, that would militate against that view. A partnership although dissolved as between the partners, and which determines their relations between each other as principal and agent, and the authority which one has to bind the other in any direct contract, will continue to exist for the purpose of liquidation, and realizing the assets in which they are jointly associated, they still continuing liable for the prior liabilities of the firm, but that possibly may not be so material because it only determines the question of agency and the express authority of the agent to bind his principal. If they had continued the business in such a way as to lead any stranger to deal with them as if they had continued partners for the purpose of carrying on that business they might be stopped from denying it, and, by the doctrine of implied agency, Mr. Park

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might have been liable. This is not a transaction with the firm, not a dealing with the firm or a purchase from them; it is the making of a note by Dunham, if made with reference to this firm, in fraud of the firm, and in fraud of his partner, and it was a handing of that note to a man who was cognizant of the whole of that transaction and who was not an innocent holder for value. Therefore a contract which is endeavoured to be passed over by the mercantile law through commercial paper to the first holder is a contract which, if it was intended to bind Park, had its inception in fraud. It may be that the first holder was a holder for value without notice. I am not on this evidence prepared to find the contrary. If the case is further reviewed, that matter will be open for further discussion upon the evidence which will be perhaps more carefully analyzed, especially the evidence taken on commission which I, perhaps, have not apprehended as clearly as if orally given. I should rather doubt the position claimed for the bank of being holders for value without some notice, without notice that ought to put them upon enquiry, and I am inclined to think they did take this paper for what it was worth without much regard to the financial strength of the parties who made it or assumed to make it. It is difficult, in face of the letter which has been referred to, coming from headquarters, to conclude there was not some discussion in the town where these transactions took place which would have found its way to the headquarters of the bank in that town. However that may be, I do not rest the case or my decision upon that ground. I think there was no express authority enabling Dunham to bind Park by giving any such paper, that there was no implied authority given, or any dealing with the firm by either of the holders of this paper in such a way that they were misled by the carrying on of the business in Toronto under the name of Dunham & Co. I find as a fact that the paper was given with reference to the Montreal business, that therefore the plaintiff has failed to shew that the paper which he has taken was given either with the authorization of the firm or in respect to their business or by the continuation of the business by the partnership in any way misleading the parties into dealing with the firm so as to bind them by estoppel if that be the proper word to use in that connection. I think the case is brought within the principle of *Standard Bank v. Dunham*, (14 O.R. 67.) and I will give judgment for the defendant. If the case is to be further reviewed, opportunity may be had for further consideration of the authorities, but until that case is further reviewed I think the judgment must be in accordance with these findings. It is only for the defendant Park judgment is given.

Upon appeal to the Court of Appeal for Ontario, this judgment was affirmed, the following reasons being given: (unreported).

Burton J.A.:—I scarcely think the *Yorkshire Banking Co. v. Beatson* (a) is authority for holding that the plaintiff, if a holder for value in this case, is not entitled to recover against the defendant Park, upon the note sued on.

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That case merely decides, as I understand it, that where a partnership is carried on in the individual name of one of the partners, and a bill or note has been accepted or given in that name, a person who has become a holder for value and without notice of whom the firm consists has not the option to sue either the individual or the firm at his election.

It was held in that particular case that as the individual who signed the acceptance carried on no business separate from the business of the firm of which he was a member, the presumption was that it was given for the firm and binding upon it, but that the presumption might be rebutted by proof that the bill was signed, not in the name of the partnership, but of the individual for his private purposes, and that a dormant partner would not, therefore, be liable upon such a bill.

Generally in such a case the burden of proof is upon the holder of the bill to shew that the paper was given in the business and for the use of the firm, for it will be intended *prima facie* to have been given by him individually, and lead to credit being given to him individually, and would be binding upon him alone. There being no uncertainty on the face of the paper, but the uncertainty being created by extrinsic circumstances, it is obviously necessary for the plaintiff to establish that it is a contract of the firm and ought to bind them.

I see no difficulty in such a case in evidence being receivable to shew that the note never was the note of the firm, but was given for the individual and private purposes of the person who signs it, and I see no hardship in holding that a person taking a bill so signed assumes the risk of its being one given for partnership purposes, but the case is very different where paper is signed in a partnership name, which is not that of the individual member; in such a case all the partners, whether named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached.

It is unnecessary to consider whether the case of *Fleming v. McNair* (aa), a decision in the House of Lords, referred to without approval by Lord Eldon, also in the House of Lords in *Davison v. Robertson* (b), is still to be considered as good law; it is sufficient for the purpose of this case to say that here is paper *prima facie* binding upon the Toronto firm, taken, as I assume, for the purpose of this branch of the case by a *bonâ fide* holder for value without notice that there was any other firm carrying on business in another

(a) 5 C.P.D. 109.

(aa) Dom. Proc. 16 July, 1812.

(b) 3 Dow 218, at p. 220.

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country under the same name, and that being so I think it would be contrary to the first principles of commercial law to admit evidence to shew that the maker of the paper had a secret intention not to bind the Toronto firm but one in Montreal.

In considering this point it can make no difference that by the terms of the articles of co-partnership he was prohibited from granting negotiable paper, it is one of the incidents of a partnership that each partner can put such paper in circulation, and it would tend to destroy all confidence, if, when paper is signed in a partnership name which has been assumed (other than the individual name of one partner) evidence could be receivable to shew that although these persons are all members of a firm carrying on business, say in Toronto, another business under the same style or firm, in which only one of the partners is interested, was being conducted in New York or Montreal, and that the party signing had it in contemplation to bind that firm only, I am of opinion, therefore, that the evidence on this point was improperly received, and that the plaintiff should recover unless his title is displaced on some of the other grounds that were urged.

It is said in the first place that the firm was dissolved by the notice given in pursuance of the articles of co-partnership on the 1st August, and although no notice of that dissolution was published until the 21st, still the agency of Dunham ceased with the dissolution, and it cannot therefore be enforced against Park.

The plaintiffs, on the contrary, contend that in the absence of notice they, as holders for value, are entitled to succeed, and that would undoubtedly have been so if any evidence had been given to shew that either Gardner or the plaintiff had any knowledge of Park being a member of the firm during its existence, all the information they got was at the time they acquired the note; they were then told that Park was a member, which was untrue.

As to persons who had had actual dealings with the firm previously to the dissolution, or persons who had actual knowledge of the existence of the partnership whilst it existed, I cannot define the law more clearly than in the language of Lord Selbourne in *Scarf v. Jardine* (c).

After referring to a passage in Lindley that where an ostensible partner retires, or where a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred, he proceeds: "And the principle on which they are entitled to assume it, is that of the estoppel of a person, who has accredited another as his known agent, from denying that agency, at a subsequent time, as against the person to whom he has accredited him, by reason of any secret revocation. Of course, in partnership, there is agency—one partner is agent for another,

and in the case of those who, under the direction of the partner for the time being, carry on the business according to the ordinary course, where a man has established such an agency and has held it but to others, they have a right to assume that it continues until they have notice to the contrary."

I quote also Lord Blackburn's remarks in the same case:—"But then I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the grounds as has been very well put and explained in *Freeman v. Cooke*, that there is a duty upon the person who has given that authority, if he revoke it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued, and the failure to give that notice precludes him from denying that he gave authority against those who acted upon the faith that that authority continued."

But how can that apply to a case like the present, for all that appears, neither Gardner nor the plaintiff had ever heard of the firm until the note was offered to them.

The short judgment of Mr. Justice Littledale, in *Carter v. Whally* (d), seems to apply precisely to it:—"It was incumbent." He says, "on the plaintiff in this action to prove a contract between the parties whom he named as acceptors and himself as indorsee. If they were all partners when the acceptance was given by Veysey that contract is established. But it appears that they had ceased to be so, Saunders having withdrawn. Then it is said that the defendant ought to have proved some notice received by the plaintiff of this separation, and it is true that if the plaintiff at any previous time knew Saunders to be one of the partners such notice ought to have been shewn. Now, where all the names in a firm appear it may be presumed that every one knows who the partners are, but where there is only a nominal firm, as in the present case, the fact of such knowledge must be ascertained by express proof."

In other words, the partner cannot be made liable to a creditor who did not know him to be a member, while he was such in fact, and therefore cannot be supposed to have dealt with the firm on the faith of having his credit to look to, and in this respect the case does not differ from that of a dormant partner, who may always retire from the firm without giving notice to the world.

It was further urged that notwithstanding the notice of dissolution, the partnership was not actually dissolved until the 20th of August. That position is not tenable, the partnership was, by reason of the notice, terminated and dissolved, beyond doubt, on the 1st of August. The fact that Park remained about the premises superintending the business and doing things from which persons might infer that he was a partner after that time would no doubt be perti-

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nent evidence to fix him with liability to persons who had made sales to the firm believing from his conduct that he was still a member of it, but nothing of the kind is pretended here, all that Gardner or the plaintiff had information of was gleaned from the report of a mercantile agency.

I do not think it necessary, under these circumstances, to deal with the other questions argued as to the plaintiff being a holder for value, although the case of *Misa v. Currie* (e) would seem fully to support the plaintiff's contention.

For the reasons stated I think we ought to dismiss the appeal.

HAGARTY C.J.A., and PATTERSON J. A., delivered no written judgments, but concurred.

Osler J.A.:—I think the appeal should be dismissed and the judgment below affirmed—on the ground that the note in question, which was fraudulently obtained from Dunham by Isaacs, was made after the partnership between Dunham and the defendant Park had been dissolved, and therefore at a time when Dunham had no authority to make it. The plaintiff had never dealt with the firm of J. E. Dunham & Co., they had no knowledge of the firm or of Park being a member of it, and their title to the note must depend upon Dunham's authority to bind Park by what he did. He had none, and therefore their claim fails.

It seems unnecessary to determine the other objection to their title, viz.: That the evidence shews that the real makers of the note were the Montreal firm of J. E. Dunham & Co. I need only say that I have formed no opinion adverse to the view of the court below, and of Wilson, C.J., in *Standard Bank v. Dunham* (f), on that point.

George C. Gibbons and *David Mills* appeared for the appellants.

J. K. Kerr and *Patterson* appeared for the respondent.

The only reasons for judgment in the Supreme Court of Canada were those of

GWYNNE J.—The only question before us in this case is as to the liability of the defendant Park. The question is simply one of fact, and I entirely concur in the conclusion which the learned judge, who tried the case, arrived at upon the facts.

(e) 1 App. Cas. 554.

(f) 14 O.R. 67.

The defendant J. E. Dunham carried on business in the city of Montreal as a dealer and importer in dye stuffs and chemicals under the name of J. E. Dunham & Co. In this company the defendant had no interest whatever, nor was he in any way connected with it. While carrying on this business at Montreal the defendant Dunham entered into partnership with Park for the purpose of carrying on the same business at Toronto under the name of J. E. Dunham & Co. While both of these firms were carrying on business separately and distinctly at Montreal and Toronto respectively, one Isaacs, by means of most unquestionable fraud practised upon the defendant Dunham, procured him to make the promissory note sued upon in the present action, together with several others payable to Isaacs under the name and style of L. Isaacs & Co. The transaction in respect of which these notes were made, was wholly with Dunham as representing the Montreal firm, the Toronto firm, in which alone the defendant Park was concerned, had no interest in the transaction; it was not a dealing in a matter of the business of the Toronto firm at all. The whole transaction was a fraud, but it was one between Isaacs and the defendant Dunham, as representing the Montreal firm. Isaacs may be presumed to have intended to have affected Park by the fraud he was practising, but it was with Dunham as representing the Montreal, and not the Toronto, firm that he was dealing, and it was as representing the Montreal and not the Toronto firm that the defendant Dunham signed the notes in the name of J. E. Dunham & Co. Isaacs passed off the note sued upon to one Guerin under such circumstances that, if it was necessary to decide the point, I should have no difficulty in holding that Guerin had notice that the note was obtained by Isaacs by fraud. Isaacs then absconded and Guerin passed over the note to the plaintiff under somewhat equivocal circumstances also, but whether under circumstances which would make the plaintiff a holder for value, it is also unnecessary to decide, for the fact upon which the case turns, as found

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by the learned judge who tried the case, in whose finding as I have said, I entirely concur, is that the note was made by the Montreal, and not the Toronto, firm, and, therefore, the defendant Park can be no more affected by it than if he was sued upon a note made by another person of his own christian and surname. The plaintiff, therefore, whether he acquired the note for value given to Guerin or not cannot recover upon it against the defendant Park, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Gibbons, Macnab & Mulkern.*
Solicitors for respondent: *Kerr, Macdonald, Davidson
& Patterson.*

ALEXANDER FORSYTH ET AL..... APPELLANTS;

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AND

**May 6.

THE BANK OF NOVA SCOTIA..... RESPONDENTS.

*IN RE BANK OF LIVERPOOL.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Winding-up Act—Appointment of liquidators—Right to appoint another bank—Discretion of Judge.

The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators, and the judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank.

Held, affirming the judgment of the court below, that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the judge in exercising his judgment as to the appointment, such discretion was wisely exercised in this case.

APPEAL from a decision of the Supreme Court of Nova Scotia (a) affirming the judgment of Townshend J., appointing liquidators of the insolvent Bank of Liverpool.

The Bank of Liverpool had been placed in insolvency under the provisions of the Insolvent Act of 1875, and amending Acts, and the Bank of Nova Scotia was the assignee. In 1884 the Bank of Nova Scotia filed a petition, praying that the said Bank of Liverpool be wound-up.

*XVIII, Can. S.C.R. 707.

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

(a) 22 N.S. Rep. 97.

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—

After hearing arguments for and against the petition the Chief Justice of Nova Scotia granted a winding-up order.

This order was set aside on appeal to the Supreme Court of Canada (*Mott v. Bank of Nova Scotia, re Bank of Liverpool*) (b) upon the ground that secs. 99-103 of 45 Vict. ch. 23, as amended by 47 Vict. ch. 39, which require that a meeting of shareholders should be called, had not been complied with. Section 99 provides as follows:

In the case of a bank the application for a winding-up order must be made by a creditor for the sum of not less than \$1,000, and the court must, before making the order, direct a meeting of the shareholders of the bank, and a meeting of the creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

After the judgment of the Supreme Court of Canada, Townshend J., called a meeting of the creditors and shareholders when the creditors recommended as liquidators the Bank of Nova Scotia, John M. Smith and George Thomson, the last two having no interest in the insolvent bank, but the Bank of Nova Scotia was the principal creditor. The shareholders recommended H. F. Worrell, Alexander Forsyth and J. Newton Freeman, all three being shareholders or contributories of the insolvent bank. The creditors objected to the three persons nominated by the shareholders on the ground that they were contributories and had an interest directly opposed to the purpose of the liquidation proceedings, and further alleged that some of the parties nominated by the shareholders had been actively carrying on litigation to prevent the affairs of the bank being settled. The contributories strenuously opposed the appointment of the Bank of Nova Scotia, their opposition being chiefly based on what they claimed had been the past illegal, oppressive and hostile conduct of the Bank of Nova Scotia and its officers in all the proceedings which had taken place in regard to the insolvent bank. The contributaries further alleged that

(b) 14 Can. S.C.R. 650.

the Bank of Nova Scotia, when assignee under the Insolvent Act, had made eleven calls for double liability at once, and commenced forty suits in respect to the same in which the courts so far had decided adversely to its proceedings.

Townshend J., was not satisfied that the conduct of the bank was of an oppressive character, but was of the opinion that at the most there was error of judgment in their conduct of the proceedings, and that the bank was not responsible for the delay. He was also of the opinion that the persons recommended by the shareholders having interests which were inconsistent with those of the creditors the very mischief might follow by the appointment of one of them which it was the object of the court to prevent, namely, a divided and hostile board, unable to work in harmony, and for this reason appointed the liquidators selected by the creditors.

The Supreme Court of Nova Scotia affirmed the order of Townshend, J., and thereupon an appeal was taken to the Supreme Court of Canada.

Weldon, Q.C., appeared for the appellants.

Mr. Borden, appeared for the respondents.

At the close of the argument judgment was pronounced dismissing the appeal, and subsequently the following reasons were handed down:

SIR W. J. RITCHIE C.J.—We think that this appeal should be dismissed. I cannot think that the learned judge erred in any matter of law or fact. If the legislature had intended, as the learned counsel contends, that both creditors and shareholders should be represented on the board of liquidators I think it would have been so expressed, in plain unequivocal language as to which there could have been no doubt, but that has not been done and I can see great reason why the matter should be left entirely to the discretion of a judge.

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Suppose the creditors were very numerous and the assets of very doubtful amount to meet them and there was no double liability; as I understand the contention, the shareholders, even in that case, should be represented. Why should they? Who but the creditors could have any interest in such a case?

But when it was a matter between the creditors and shareholders and the learned judge selected, as one of the liquidators, a bank who, as the statute provides, should act through one of its officials who must be regarded as eminently qualified to deal with the assets of an insolvent bank and who is made an officer of the court for the purposes of liquidation, and for the other liquidators selected two disinterested parties, for there is no imputation that these gentlemen are not entirely impartial and well qualified to represent every interest involved in the liquidation, I think he exercised not only the discretion which the law allows but a very wise and proper discretion in the matter; and as he has not erred in matter of law, that I can discover, nor in any matter of fact, I think we cannot set aside his appointment; we must be satisfied that the discretion was wrongfully exercised before we can interfere with it.

I find in the factum of the appellants no objection whatever taken to the legality of the appointment, but they rest their case entirely on the manner in which the discretion was exercised. Under these circumstances I do not think we are called upon to interfere; if we were I could not say that the appointment was not a proper one as the gentlemen appointed will be desirous of winding-up the affairs of the bank as speedily as possible, while it might be to the interest of the shareholders to delay it. I think the appeal should be dismissed.

STRONG J.—This appeal must be dismissed. One objection which has been urged is that when a bank is in liquidation another bank cannot be appointed liquidator. I think that under the statute an incorporated company

may be appointed liquidator of an insolvent company and that this would include a bank. Therefore there can be no legal objection to the Bank of Nova Scotia as liquidator in the present case.

As to the other matters in discussion, I think no appeal is admissible, but if these are appealable questions, and if we are to be called upon to review the discretion exercised by the learned judge, I should unhesitatingly come to the conclusion that his decision was perfectly right. I think he made an excellent selection of liquidators. He appointed the Bank of Nova Scotia, who, by the Act, had authority to delegate its powers to one of its officers, and the officer chosen was one against whom no objection has been made. It appears to me there could be no better liquidator in such a case than the officer of a bank who is familiar with the business of banking, and whose experience would enable him to conduct the business of realizing the assets to the best advantage of all parties.

Under these circumstances I think, a very wise discretion was exercised by the learned judge in the appointment of the liquidators, and that there is no foundation for this appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Henry, Ritchie & Henry.*

Solicitors for respondents: *Borden, Ritchie & Parker.*

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*Oct. 28. JOHN FRASER (DEFENDANT).....APPELLANT;
AND
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*Feb. 25. WILLIAM STEPHENSON (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.

Evidence—Improper admission of—Uncorroborated testimony of plaintiff—Contradictory evidence—Verdict against weight of evidence.

The plaintiff claimed to recover from the defendant the price of certain goods delivered to the defendant's brother, alleging that defendant verbally agreed that notes at three months should be given in payment of the goods by the brother, and when they matured the defendant would give his own promissory notes at four months. The defendant denied that he ever made any such agreement, and said that any notes given by him were to help his brother in his business and were not made payable to the defendant. The trial judge admitted evidence of the plaintiff of a statement alleged to have been made to him by the defendant's brother when bringing a note made by the defendant in favour of his brother to take up the latter's note. The jury gave a verdict for the plaintiff, and a new trial was refused by the court below.

Held, the Chief Justice and Taschereau, J., dissenting, that the plaintiff's dealings with the defendant's brother were inconsistent with the plaintiff's statement of the transaction, and that there should be a new trial.

Held, per Fournier, Henry and Gwynne JJ., that the plaintiff was not entitled to give in evidence a statement made by the defendant's brother as to what the defendant had instructed him to say to the plaintiff when substituting the defendant's note for his own.

APPEAL from a decision of the Supreme Court of New Brunswick discharging a rule *nisi* for a new trial obtained by the appellant.

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

The respondent was a merchant doing business at the North Market Wharf in the city of St. John, and the appellant was a ship builder carrying on business at a ship yard in the same city. David Fraser, a brother of the appellant, carried on at the same time a general grocery business in a store near the appellant's ship yard. The respondent alleged that the appellant came to him and told him that he was going to start his brother in business, and thought of running a store in connection with his ship yard, and asked respondent to supply the store with such goods as would be required in the ship yard and take his brother's paper at three months, and he, the appellant, would retire it with his own paper in four months, making a seven months' credit, but that the goods should be charged to the brother, as the appellant wished to keep a check on him. The appellant denied the agreement *in toto*, and alleged that the respondent had come to his office in his ship yard and told him that his brother had been buying goods from him, the respondent, and asked the appellant to become security for him, which he refused to do, but that he told the respondent that he had made arrangements with his men to take one-half their pay in orders on his brother David's store, and that he would turn over as many of his timber accounts to his brother as he could, and that for the goods so received from his brother by these different people, the appellant would give his brother notes from time to time payable in three or four months.

The respondent supplied the defendant's brother with the goods for a number of years to the amount of about \$20,000. The goods were charged by the respondent in his day book to David Fraser, but the account in the ledger was headed "David Fraser, *per* John Fraser." The appellant purchased goods and supplies for his ship yard from his brother David, and gave his men working in the yard orders on David for one-half their wages, and turned in what timber accounts he could, and from time to time gave David notes for these amounts at four months.

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The respondent from time to time rendered David Fraser bills in his own name for the goods purchased, and David gave his notes for them at three months, which notes he usually retired himself at maturity. On some occasions David gave respondent the appellant's notes, made by appellant in David's favour, but the appellant never personally, at any time, gave the respondent a note, nor did the respondent ever ask him for a note. The appellant claimed that any notes given by him to David were not given to retire any of David's notes in favour of the respondent.

The following question was asked the respondent by his counsel, and, although objected to, was admitted by the court:

"When David Fraser brought a piece of paper on his first note coming due, what did he say as to it?" and one of the grounds of the appeal was that this question was an improper one.

The jury brought in a verdict, which was not unanimous, in favour of the plaintiff for \$5,448.35.

A motion for a new trial was refused by the Supreme Court, Palmer, J., dissenting. Thereupon an appeal was taken to the Supreme Court of Canada.

McLeod, Q.C., appeared for the appellant.

Rand appeared for the respondent.

GWYNNE J.—The documentary evidence and the evidence of the plaintiff's dealings with David Fraser, with whom the plaintiff says he had no contract whatever, and to whom he was giving no credit, are so apparently inconsistent with the plaintiff's statement of the transaction, out of which this action arises, and are so consistent with David and John Fraser's statements of that transaction, that as the verdict is large and the consequence may be very serious, I think the case should be submitted to another jury, and that, therefore, the appeal should be allowed and the rule *nisi* for a new trial be ordered to be made absolute in the

court below, to enable another jury, upon their attention being specially drawn to the plaintiff's dealings with David and to the documentary evidence, to express their opinion upon the effect these matters may have upon the question in issue; and I come the more readily to this conclusion, finding the verdict to be the verdict of a majority only. I am also of opinion that what the plaintiff said that David Fraser told him, that the defendant had told him to say to the plaintiff, should not have been received in evidence. The question was as follows:

When he (David) brought a piece of paper on his first note coming due, what did he say?

Now, it is to be observed here that no evidence had been given that the defendant had sent to the plaintiff or that David had brought to the plaintiff any piece of paper from the defendant, and if he had it was most important that its contents should be known. The question was allowed, and the plaintiff's answer was that

David said his brother sent him to shew how he was protecting his notes with John's four months' notes.

This statement so made by the plaintiff was plainly intended to have, and very probably had a great effect upon the minds of the majority of the jury, who, if they believed that the defendant had directed David to say, what the plaintiff alleged that David said the defendant had told him to say, they would naturally come to the conclusion that this was an admission by the defendant that he had made the agreement with the plaintiff which the latter swore to, but which the defendant wholly denied, and which was the only matter in issue in the cause. Now the admissibility of this evidence has been rested upon the ground that, as was contended, David Fraser was the defendant's agent in the *res gesta*, and as such that his statements of what the defendant had said was binding upon the defendant. But that David was the defendant's agent was a pure assumption; there was no evidence whatever that he was. In the court above, upon the motion for a new trial for the improper

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reception of this evidence, its admissibility is put upon the ground that

The defendant having made the note, entrusted or gave it to David for some purpose, and that it is but reasonable to suppose that he told him what that purpose was, and that David had to do with the note what he (the defendant) told him to do with it, and that he (David) was substantially the agent of the defendant to do with it what the defendant directed.

This reasoning with great deference seems to me to assume the fact of agency for the purpose of proving it to exist, but in truth what the piece of paper was had not appeared when the evidence was received, and the subsequent evidence shews it to have been a note made by the defendant in favour of David, in respect of dealings between themselves, and that it was as it is imputed to be, David's own property, to deal with as he pleased, as he in fact did, the plaintiff never having had it in his possession or any property in it. It is altogether an assumption that the defendant ever sent it to the plaintiff, or that he knew or supposed that the plaintiff would ever see it. That the plaintiff never did see it, so as to know what it was, appears from his own subsequent evidence where, he says, that he never had it in his hand or read it. In short it was a note which, like many others which David produced, was given by the defendant in David's favour and discounted by the latter without any intervention of the plaintiff, and which, if it had been produced would apparently have supported the statement of the defendant and of David rather than that of the plaintiff as to the latter's dealing with the note. Again, it is assumed that David had to do with the note whatever the defendant told him to do with it, and that, therefore, David was substantially the defendant's agent. In this there seems to be involved a double assumption, firstly, that the defendant gave to David any directions how to deal with a note which imported to be and, so far as appeared, was David's own property to deal with as he pleased; and, secondly, that, if he had given any such direc-

tions, the giving them would make the owner of the note the maker's agent so as to bind the latter by any statement the payee might make with reference to the note. The reception of the evidence was well calculated to prejudice in advance the jury against the defendant's sworn testimony that he never made any such agreement with the plaintiff as that declared upon, and if the plaintiff intended to rely upon the fact of the defendant having given directions to David to tell the plaintiff what the latter says that David told him, David himself should have been called as the only person competent to establish the fact. I am of opinion also that the question which was put to the plaintiff following the last and his answer thereto were equally inadmissible; the question was: "Bearing in mind the agreement with John Fraser in 1879, how long did John Fraser continue to carry out his part of the arrangement?" The matter in issue was whether any such agreement as that referred to in the question had ever been made by the defendant with the plaintiff. The plaintiff alone swore that there had been. The defendant denied it upon the record, and subsequently to the reception of the plaintiff's answer to the above question, upon his oath; this question, like the former one, was plainly put with the intention of having, and very probably had, the effect of prejudicing the minds of the jury in advance against the testimony of the defendant when he should come forward to give his evidence, for if the agreement sworn to by the plaintiff had been carried out by the defendant for any length of time, he must have made the agreement which he denied upon the record; and whether or not it ever had been carried out was a matter which the court and jury had to determine, upon facts proved before them, and not upon an opinion formed by the plaintiff upon facts not disclosed to the jury, and upon the sufficiency or insufficiency of which to justify the opinion formed by the plaintiff the jury had no means of judging. The question having been allowed the plaintiff answered: "For six months from November, 1879." Now

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 ———

this answer so admitted by the court was well calculated to prejudice the jury in advance against what the defendant might say when giving his evidence. I am clearly of opinion that it was not admissible and should not have been received; the answer involved merely an opinion of the plaintiff and disclosed no fact from which the jury, whose opinion in the matter was alone material, could arrive at a just conclusion upon the point in issue. In the court above, upon the motion for a new trial, the admissibility and proper reception of this evidence was rested and sustained upon the ground that the form in which the question was put was equivalent to asking the plaintiff "How long did John continue to retire David's three months' paper with his own four months' notes?" If this be the proper understanding of the question it is plain that the plaintiff could not have so understood it, for if he had he must have answered "never," instead of the answer which he did give, as by his own subsequent evidence it appears that he never had a single note of the defendant's made in conformity with the terms of the agreement as stated by the plaintiff: that is a note of the defendant in favour of the plaintiff at four months, as David's three months' paper became due, which was the form the defendant's notes must have assumed to have been in conformity with the agreement as stated by the plaintiff; the defendant, and not David, having been the person to whom alone, as the plaintiff says, he gave credit. The attention of the jury has not, I think, been drawn to the effect the conduct of the plaintiff throughout in his dealings with David, and the documentary evidence might have upon their minds in determining the issue joined between the parties.

The appeal should be allowed, and rule made absolute for a new trial, with costs.

RITCHIE C.J. (dissenting.)—This case was left to the jury on the credit they would give to the parties; in other words, as the learned judge put it, whose evidence they

would believe. The question simply appears to have been to whom the credit was given, whether to John or David Fraser. The learned judge at the trial, ruled that if the credit was given to David, then, however much the plaintiff may have fancied or believed that John was liable to pay, by reason of any conversation he may have had with him, or any verbal understanding, plaintiff had made out no case, the law requiring such an undertaking to pay to be in writing. This covers the main claim. The learned judge then directed the jury that, if the arrangement the plaintiff speaks of be correct, the credit would be given to John, and he would be personally liable for the whole amount; if, on the other hand, the statement of the plaintiff is not correct and that on the part of the defence is believed, the plaintiff is not entitled to recover on his general charge, and he proceeds:

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I speak of the general charge as there are different surroundings in connection with the other articles.

If John, on his own account, or any person authorized by him, purchased goods from Stephenson he would be liable to pay for them.

Then as to these goods there are two questions. Did John get the goods from the defendant and on his own credit? There is evidence both ways.

If the jury arrive at the conclusion that John did not get the goods from the plaintiff, on his own credit, but they were got from David or on David's credit, then he would not be liable unless Stephenson's account of the arrangement be established.

But if he did get the goods on his own account and by a subsequent arrangement it was agreed between plaintiff, David and John that the goods should be charged by plaintiff to David and by David to John, the result would be that John would be released from his liability to plaintiff and become indebted to David, and David would become liable to the plaintiff, and, if in pursuance of this arrangement, John paid David, the plaintiff cannot recover for these goods against John.

The plaintiff bringing the action must make out his case and, if he fails to make it out to the satisfaction of the jury, the defendant will be entitled to recover.

As to the notes of John it is contended on one hand they were given to take up David's notes in pursuance of the agreement.

On the other hand that the notes were given from time to time to pay David for goods got from David by John.

The judge asked the council if they wished any particular view

1886 presented to the jury or any particular direction given at the close
 of his charge.
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 ular view presented or any particular direction given.
 Ritchie C.J. The evidence was read to the jury.
 The foregoing is a copy of the evidence on the trial of the
 above mentioned cause, and a memorandum of my charge to the
 jury and of the finding of the jury.

A. R. WETMORE J.
 11th April, 1885.

Mr. Justice Fraser, on delivering judgment on the motion for a new trial, thus speaks as to the ground taken for a new trial namely, that the verdict was against the weight of evidence:—

At the argument on the motion for a new trial, the ground taken that the verdict was against the weight of evidence seemed almost sufficiently answered by the great length of time the learned counsel for the defendant took in pointing out to the court the various particulars in which the statements of the plaintiff and his witnesses were contradicted by the evidence of the defendant and his witnesses; all of which contradictions were presented to the jury in the address to them by the counsel on both sides, and were fairly matter for their consideration; and, as the learned judge who tried the cause directed the attention of the jury to these various contradictions, I think this finding in this particular, whether I would have arrived at the same result or not, ought not to be disturbed, and I cannot see that there is such a preponderance of evidence in favour of the contention of the defendant as would justify the court in saying that the verdict was against the weight of evidence.

Judge Wetmore, who tried the case, thus speaks on this point:

I agree with my brother that the verdict in this cause should not be disturbed. Objection was made on the argument that the defendant could not avail himself of the ground that the verdict was against "the weight of evidence" upon the notice of motion in which the ground is stated "verdict against evidence." I am not free from doubt on this point, but, inasmuch as the case was submitted to the jury upon the credit they would give to the several witnesses after a very full and complete investigation, and they having found in favour of the plaintiff, I think this finding should not be set aside.

Judge Palmer says :

This was an action for goods sold and delivered by the plaintiff to the defendant, tried before Mr. Justice Wetmore at the last St. John circuit. The goods were delivered to one David Fraser the brother of the defendant, during several years, and were charged to David in the plaintiff's books. This, according to the evidence of the plaintiff, was done under an agreement with the defendant that they were to be so delivered, and David was to give his note for them at three months, which was to be taken up by the defendant giving his note at four months; the defendant denied this agreement, and David stated that he got the goods on his own credit and paid for them by his own note. There was a great deal of evidence on both sides, some supporting one view, and some the other; the learned judge left to the jury whether the agreement, as sworn to by the plaintiff, was made or not, and they found that it was, so this was the real question to be decided.

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Under these circumstances, I do not think we should disturb this verdict, the jury being the legitimate tribunal to determine on the credit due to the witnesses, and more particularly as the judge who tried the cause saw and heard the witnesses on a very full and complete investigation, I think the finding of the jury should not be set aside.

It may possibly be that if this case was before us in the first instance, after seeing and hearing the witnesses, we, individually might take a different view of the credit due to the witnesses; on the other hand, the contrary might have been the case; we might agree with the jury, or some of us might think one way and some the other. But however this may be, how can I say that this jury and these judges were so manifestly and clearly wrong, that there has been a miscarriage? I cannot say that this jury did not fairly discharge the duty which, as a jury, they had to discharge upon conflicting and doubtful evidence, after having had the case most carefully presented to them by the presiding judge; unless I can, what right have I to interfere with the conclusion at which they arrived?

As to the questions which it is said were improperly allowed to be put to the plaintiff, viz. : First,

When David Fraser brought the piece of paper, on his first note coming due, what did he say?

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For the reasons given by Mr. Justice Fraser, if the jury believed plaintiff's account of the transaction, which they must do to find for the plaintiff, when David handed the plaintiff defendant's four months' note, he was the defendant's agent to state what the note was given for, and without such statement the mere handing of the note to the plaintiff would be unintelligible. Consequently, the question was, in my opinion, quite admissible.

As to the other question,

Bearing in mind the agreement you made with the defendant in 1879, how long did he continue to carry out his part of the arrangement?

The issue in controversy, and the only issue raised, was as to the existence of such an agreement as plaintiff relied on, defendant denying it *in toto*. The agreement as stated by the plaintiff was that David should give his note at three months, to be retired by John's (the defendant's) at four months. I agree with Fraser and Wetmore, JJ., that this question simply amounted to this: "How long did defendant continue to give plaintiff four months' notes?" I do not appreciate the force of Mr. Justice Palmer's objection. He says the witness, when he gave the answer, may have believed things done a performance, when, if the facts themselves were proved, the court would see that there had been no performance. But what was there to prevent the opposite party, on cross-examination, besting this by simply asking how the agreement was carried out? I think no sufficient ground has been shewn for disturbing this verdict, and therefore the appeal, in my opinion, should be dismissed.

FOURNIER J., concurred with Gwynne J.

HENRY J.—I am of opinion that under existing rules in regard to the power of juries to settle disputed points raised by the evidence in trials before them we should decide that this case ought to go to a new trial.

This is an action brought by the plaintiff to recover a pretty large sum of money and it is sustained almost, if not wholly, by his own testimony. Until a few years ago no action could have been sustained upon such testimony, but by comparatively recent legislation in some of the provinces, parties to suits became entitled to give evidence in their own behalf and are liable to be called upon by their opponents. I think, if I know anything about the policy of the administration of justice, that it was never intended by the passage of that Act to give a plaintiff a judgment on his own evidence which was flatly contradicted by the evidence of the defendant, unless indeed there was a great disparity in the standing and respectability of the parties or unless the plaintiff's evidence is sustained by other testimony.

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That this case has evidence to sustain that of the plaintiff I fail to see. If we look at his statements which shew the mode in which he dealt with David Fraser, the brother of the defendant to whom the defendant says the credit was given, and not to him, it is apparent that it was the regular course of dealing between creditor and debtor. The transactions between them were complete without making John Fraser, the defendant, a party to them in any respect. We find that the agreement stated in the testimony given by the plaintiff was never carried out by any of the parties, in the mode in which such agreement was entered into.

The credit as it appears to me was given to David Fraser, and the plaintiff says that the agreement was that David's notes at three months were to be renewed by John's notes at four months. If it was intended that the credit was to be given to the defendant why should David's notes have been taken in the first place? It was a novel and singular mode of dealing, and no reason is given for adopting it. The assertion of the plaintiff is therefore suspicious, at least.

It is in evidence that David carried on an independent business, and he furnished supplies for his brother's shipyard, and obtained from the latter, at different times, in

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payment notes which he indorsed to the plaintiff to retire his own notes given to the latter in the course of such business. It is also in evidence that regular accounts were kept between John and David from time to time, and, at the end of certain periods, John gave notes to David for amounts supplied by him. These are facts which negative the statements of the plaintiff that the notes were to be given by John under the agreement as stated by him.

Matters went on in this way until David became largely behind hand with the plaintiff, and then, for the first time, the plaintiff applied to John and asked him to interfere in the matter, but he refused to do so.

The plaintiff says, it is true that all the accounts were kept with David, but still the credit I have given hitherto was not to David, but to John. If David was the mere agent of John, why should he be called upon to give notes at all? There is an incongruity in the mode of the transaction which appears to me to be strong evidence against the plaintiff's contention. The action is not sought to be sustained against John as the guarantor of David, and it is shewn that all the accounts of the plaintiff were kept with David who, under the evidence, was the primary debtor.

We are told also that there was no improper reception of evidence at the trial. As to that I may say that I agree with my brother Gwynne, whose prepared judgment I have seen, and for the reasons he gives, that it is our duty to grant a new trial in this case. We have every reason to conclude that the jury as instructed took a wrong view of the weight and import of the evidence, and that the evidence was not sufficiently laid before them to enable them to come to a proper conclusion. And not only that but that the evidence in regard to what passed between the plaintiff and David was improperly received and was highly calculated to influence the jury. The plaintiff had nothing to do with notes given by John to David for supplies furnished by the latter and, because those notes were given and John was not answerable for David's statements to the plaintiff.

It was but hearsay evidence, in the absence of proof of any authority, from John to make them. It is not shewn that David had any authority to make any such statements, and if they were not withdrawn from the jury the verdict should be set aside on the ground also of improper reception of evidence.

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I think for the reasons given the appeal should be allowed and the case submitted to another jury.

TASCHEREAU J., concurred with the Chief Justice.

Appeal allowed with costs.

Solicitors for appellant: *E. & R. McLeod.*

Solicitors for respondent: *Harrison & Rand.*

1886 *GRAND TRUNK RAILWAY COM-
 **Nov. 15. PANY OF CANADA (DEFENDANTS).. APPELLANTS;

1887
 **June 20. ESTHER BECKETT (PLAINTIFF).....RESPONDENT.

AND

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Railway company — Negligence — Contributory negligence — Crossing
 — Accident — Life policy — Deduction from damages — Practice —
 Court equally divided — No costs.*

Plaintiff's husband was driving in his waggon along the highway in the town of Strathroy where it crossed the defendants' line of railway. There was evidence to shew that the view of an approaching train was obstructed by the station house, buildings and cars, until a person approaching on the highway had reached within a short distance of the main line. The evidence was contradictory as to the ringing of a bell or the sounding of a whistle, but the jury found that the engineer had failed to do either in approaching the crossing in question. The plaintiff's evidence shewed that the deceased, in approaching the crossing, was driving with his head down, apparently oblivious of his surroundings. For the defence it was deposed to, that the deceased was driving slowly in approaching the main track with his head down, but when some distance off he perceived the train and struck his horses with a whip, but was hit before he was able to cross the line. The jury found the defendants guilty of negligence and negatived any contributory negligence on the part of the deceased. The deceased had effected a policy of insurance on his life, and, at the trial, the jury were directed to deduct the amount of the policy from the verdict. The Divisional Court, Wilson, C.J. dissenting, held that the case was one for the jury; that the findings in plaintiff's favour should not be disturbed, and that the policy of insurance had been improperly directed by the learned judge at the trial to be deducted from the damages. In the Court of Appeal it was held that it could not be said that the verdict of the jury was against the weight of evidence,

*XVI. Can. S.C.R. 713.

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

applying the principles laid down in *Metropolitan Ry. Co. v. Wright* (11 App. Cas. 152). Hagarty C.J., and Osler J., were of opinion that the policy of insurance should be deducted from the damages, while Burton and Patterson JJ., were of the contrary opinion.

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Held, per Sir W. J. Ritchie C.J., Fournier and Henry JJ., that the appeal should be dismissed with costs.

Held, per Strong, Taschereau and Gwynne JJ., dissenting, that the deceased was guilty of contributory negligence.

Held, per Sir W. J. Ritchie C.J., and Strong, Fournier and Henry JJ., that the policy of insurance should not be deducted from the damages.*

Held, per Taschereau J., that it was the duty of the deceased before attempting to cross the track to look and see whether a train was approaching, and that his failure to do so was the cause of the accident.

Held, the court being equally divided, that the appeal should be dismissed without costs.

APPEAL from a judgment of the Court of Appeal for Ontario (a) affirming the judgment of the Divisional Court (b) discharging with costs an order *nisi* obtained by the defendants to set aside the findings and verdict of the jury and the judgment thereon in an action for damages for death resulting from the negligence of the defendants, and making absolute an order *nisi* obtained by the plaintiff to increase the verdict by the amount of a life policy deducted by the jury in assessing the damages.

The facts of the case are sufficiently set out in the head note.

Osler, Q.C., appeared for the appellants.

S. H. Blake, Q.C., and Folinsbee, appeared for the respondent.

SIR W. J. RITCHIE C.J., was of the opinion the appeal should be dismissed with costs.

(a) 13 Ont. App. R. 174

(b) 8 O.R. 601.

*Cf. *Grand Trunk Railway Co. v. Jennings*, (13 App. Cas. 800)

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STRONG, J., was of a different opinion as to contributory negligence. As to the point respecting the insurance, he agreed with the Chief Justice.

FOURNIER and HENRY JJ., concurred with the Chief Justice.

TASCHEREAU J.—I am of opinion to allow this appeal, upon the ground that Michael Beckett, the deceased, was guilty of contributory negligence. It was his duty to look to see whether a train was approaching, as he attempted to cross the track. The evidence shews that had he looked he would have avoided the accident. His conduct, on this occasion, his posture, his deep inattention and total disregard of his surroundings are to me utterly unexplainable. I would say with the Chief Justice of Ontario:

If parties so acting can recover it must be solely on the ground that the defendants are a railway company; and to hold them entitled to damages notwithstanding this total disregard of their own safety is to encourage carelessness and endanger human life.

Nicholls v. Great Western Railway Co.(c). The following authorities fully sustain the appellant's contentions on this point.

Baron Pollock in *Stubley v. The London and N. W. Railway Co.(d)*:

A railway is in itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming.

And Channel B., in the same case, says:

But passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended.

In *Cotton v. Wood(e)*, which was an action by plaintiff, who was run over by an omnibus, it appears that the driver

(c) 27 U.C.Q.B. 382.

(d) L.R. 1 Ex. 13.

(e) 8 C.B.N.S. 568.

saw the plaintiff, but at the same time looked back to speak to the conductor, and the plaintiff was run over and injured. It was held that the defendants were not liable.

Erle C.J., says:

It is as much the duty of foot passengers attempting to cross a street or road to look out for the passing vehicles as it is the duty of drivers to see that they do not run over passengers.

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In *Skelton v. London & N.W. Ry. Co. (f)*, Bovill C.J., in answer to the argument that the gate being open the deceased had a right to assume that the line was clear, says:

The deceased could not have supposed that the position of the ring shewed that the line was clear, because the coal train was standing before the gate; and if the crossing was rendered dangerous by obstructions to the view, it only made it more incumbent upon him to take due care. There is no evidence, however, that the deceased took any care or caution whatever. When he reached the first line of rails he could have seen 300 yards, but it appears from the evidence that he did not look either to the right or left, but walked heedlessly on, and it was owing to this want of caution on his part that the accident occurred.

In *Cliff v. The Midland Railway Co. (g)*, Lush J., says:

I think that where the Legislature authorizes a railway to cross a way public or private, upon a level, and does not require from the company any precaution to avoid danger, the Legislature intends that the persons who have to cross that line should take the risk incident to that state of things.

In *Ellis v. The Great Western Ry. Co. (h)* the plaintiff, while crossing on a public footway in the evening, was knocked down and injured by defendants on the crossing. He stated that he did not see the train until it was close upon him, that he saw no light and heard no whistling. He stated also that he heard no caution or warning given to him by a servant of the company. A porter, however, swore that he called to him not to cross. The driver and fireman of the engine both swore that the lamps on the train were

(f) L.R. 2 C.P. 631.

(g) L.R. 5 Q.B. 258.

(h) L.R. 9 C.P. 551.

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lighted. It appears that no signals were given. The jury found for the plaintiff. Held, on a bill of exceptions, that there was no evidence of negligence to go to the jury.

Mellor J., at p. 556, says:

It is not enough to make out a case to go to the jury that the party injured did not see a light or hear a whistle. He must give evidence which ought to satisfy a jury that there was something negligent or unusual in the conduct of business on that night, . . . and I think that the true inference from the evidence on the part of the plaintiff was that the accident was due entirely to his own want of ordinary care.

And Bramwell B., says:

The sight and sound of the approaching train were warning enough. If not, I cannot see why it should not be held that when a carriage on a common road crosses a footpath the driver is bound to blow a horn, or stop, or have somebody at the crossing to warn the foot passengers.

The Lord Chancellor in *The Dublin, Wicklow and Wexford Ry. Co. v. Slattery(i)*, says:

My Lords, I should by no means wish to say that a case in which such a course should be taken might not arise, and indeed had the facts in the present case been only slightly different from what they are, I should have been disposed to accede to the appellants' argument. 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 daylight, 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 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. This would be an example of what was spoken of in this House in the case of *The Metropolitan Ry. Co. v. Jackson(j)*, an *incuria* but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushes with his eyes open, on his own destruction.

This expression of the Lord Chancellor is cited with concurrence by Lord Justice Baggallay, in his dissenting

(i) 3 App. Cas. 1155.

(j) 3 App. Cas. 193.

judgment in the case of *Davey v. The London & S. W. Ry. Co. (k)*.

Now, with the Ontario cases: In *Nichols v. The Great Western Ry. Co. (l)*, it is said:

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There is a duty incumbent on all persons driving or walking on a road crossed by a railway, and it is dictated by common sense and prudence that on approaching a railway crossing they should do so with care and caution both with a view to their own safety as well as the safety of the passengers travelling by the rail. Taschereau J.

The present Chief Justice of the Queen's Bench Division in *Winckler v. The Great Western Railway Co. (m)*, at p. 264, says:

Then as to the necessity of the driver maintaining a lookout, it is quite manifest that this was his duty; he cannot go on at all hazards because the other party is in fault. If this were so, it would have been right of the plaintiff to have killed the donkey in *Davies v. Mann (n)*.

And at p. 269 Wilson J., says:

The defendants have a right to run their trains, and they can neither go to the right nor left, nor can they stop them at once. Knowing all this the Legislature gave the defendants the right to run their trains, and I think cast the duty upon those who cross their track not to rush in the way of their trains, when in motion, which they cannot control.

The case of *Johnston v. The Northern Railroad Company (o)* is much similar in its facts to the case before this court. The plaintiff having approached and attempted to cross the track at a trot and without looking out, though he could have seen along the line in either direction for some distance, it was held that he could not recover for an injury sustained by a collision with the defendants' train and a non-suit was ordered.

The court, at p. 439, say:

(k) 12 Q.B.D. 70.

(m) 18 U.C.C.P. 250.

(l) 27 U.C.Q.B. 382.

(n) 10 M. & W. 546.

(o) 34 U.C.Q.B. 432.

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It is the duty of a traveller approaching a railway crossing to look along the line of railway track and see if any train is coming, and if he fails to take such precaution and an accident happens, it is more than evidence of negligence in the traveller, it is negligence itself; it is little short of recklessness for anyone to drive on to the track of a railroad without first looking and listening to ascertain whether a moving locomotive is near. . . . In general terms a neglect of duty on the part of a railway company will not excuse a person approaching a crossing from using the senses of sight and hearing, where those senses may be available; and when the use of either of these faculties would give sufficient warning to enable the party to avoid the danger contributory negligence is shewn.

Boggs v. The Great Western Railway Company(p) is also a case which in its facts very much resembles the present case. It appears that neither the plaintiff, his son nor the man that was with him were looking out for or thinking of the train; and it was not until they were on a side track or switch, within 15 yards of the main track, that the man on looking around saw the train, when he sharply told the son to put on the whip; but he said the son appeared confused, and did nothing; he then attempted to get the whip and whip the horses across the track, but it was too late.

The court held that there was such contributory negligence on the driver's part as prevented the plaintiff from recovering.

At p. 578 it is said:

It appears also that even at the moment when Crocker saw the train there was still time either to draw up the horses or even to have crossed the track in safety had either of the men been paying the slightest attention; for as it was the horses crossed and it was only the rear part of the waggon that was struck.

The American authorities are also in the same sense.

The Supreme Court of the United States in *Chicago, Rock Island and Pac. Railroad Co. v. Houston*(q), say (p. 701):

If the positions most advantageous to the plaintiffs be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to

(p) 23 U.C.C.P. 573.

(q) 95 U.S.R. 697.

see on what ground the accident can be attributed solely to the "negligence, unskilfulness, or criminal intent" of the defendants' engineer. * * * She (the deceased) was bound to listen and to look before attempting to cross the railroad track in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If using them she saw the train coming, and yet undertook to cross the track instead of waiting for the train to pass and was injured, the consequences of her mistake and temerity cannot be cast on the defendant.

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The case of *Gorton v. Erie Railway Co.*(r) is, in its main features, somewhat like this case. There were two parallel tracks of a road running east and west. The highway approached the road at an acute angle. There was the usual dispute as to whether or not signals were given by the train, and as to whether there was anything to obstruct the view of the train. The court, at p. 664, says:

But these obstacles, if they existed and hid from view the railroad and approaching trains to the extent claimed, did not relieve plaintiff from the duty of looking for an east bound train at the first opportunity, but rather rendered a cautious approach to the crossing the more necessary. Upon the undisputed evidence that if the plaintiff had looked to the west as he approached and reached the north track of the road, he could have seen the train, and that he did not look. He should have been non-suited.

In *McGrath v. New York Central & H.R. Rd. Co.*(s) the defendants had been accustomed to keep a flagman at the crossing in the city of Albany, where plaintiff was injured, but at the time of the accident the flagman had been withdrawn. It was held that this does not excuse a traveller from the charge of negligence in omitting the use of his senses, and the plaintiff was held not entitled to recover. At page 471 the Court of Appeals says:

In respect of a person travelling in a highway, which is crossed by a railway, it has been settled by a series of adjudications in this

(r) 45 N.Y. 660.

(s) 59 N.Y. 468.

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state, that he is bound on approaching the crossing to look and listen, if by so doing he can discover the proximity of a moving train, and that the omission to do so is an omission of ordinary care which will prevent his recovering for an injury which might have been avoided if he had used his faculties of sight and hearing.

Salter v. Utica & B. R. R. Co. (t). Deceased had been hauling logs in the vicinity of the crossing for some weeks. There were buildings obstructing the view of the track from the highway in places. He drove upon the crossing and was run over. The Court of Appeals, at p. 281, says:

The principle which requires that a man shall use his ears and eyes in crossing a railroad track, so far as he has opportunity to do so, equally demands that he shall employ his faculties in managing his team, and thus keep out of danger, and the fact that the view was obstructed for a certain distance, imposed the greater obligation of holding his team in check.

Pennsylvania R.R. Co. v. Beale(u) is a case which has been frequently recognized in our courts. At pages 509-510 the Supreme Court says:

There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se* and a question for the court. Collisions of this character have often resulted in the loss of hundreds of valuable lives of passengers on trains, and they will do so again if travellers crossing railroads are not taught their simple duty, not to themselves only but to others.

Butterfield v. Western Rd. Corp.(v). The plaintiff was struck while crossing the railroad on a highway. The night was dark and stormy and he did not look, although he listened for a train, relying upon a signal to apprise him of his approach. The Supreme Court held, assuming that the duty of sounding the bell or whistle was violated, and that the plaintiff had a right to expect those signals to be given, that this did not relieve him from the use of both eyes and

(t) 75 N.Y. 273.

(u) 73 Pa. St. 504.

(v) 10 Allen (Mass.) 532.

ears, as he approached the crossing, and that a failure to do so was negligence, and the plaintiff could not recover.

In the case of *The Central Railroad Co. of N.J. v. Fel-ler (w)* the facts were these: A watch house stood near the track and obscured the view. Deceased was familiar with the crossing (and so was Beckett in the case before this court), but he did not stop to look until he came in front of the building, although there was considerable space before reaching it where the train could have been seen. The court held that a verdict should have been directed for the defendant, notwithstanding the negligence of the defendant.

The same jurisprudence prevails in the Province of Quebec. See *Tousignant v. Boisvert (x)*; *Moffette v. Grand Trunk Ry. Co. (y)*.

GWYNNE J.—The question in actions of this nature is not merely whether the defendants have been guilty of negligence. That is the first question to be determined, for if they were not guilty of any negligence they cannot be made liable at all, but they may have been guilty of very great negligence and yet not be liable; but, secondly, the death must be traced to the defendants negligence as the *causa causans mortem*, for if the act of collision which caused the death could have been avoided but for some negligence of the deceased himself, then the deceased was guilty of what is called contributory negligence, and in such case the defendants are exempted from liability, however great may have been the negligence attributable to them; so that in effect the negligence of the defendants, which renders them liable in an action of this nature, must be the sole cause of the death, without any negligence on the part of the deceased, which can be said to have contributed to the fatal result.

Now, in the present case, I concur with those of my learned brothers, who think that the deceased was guilty of contributory negligence, and I can only attribute the

(w) 84 Pa. St. 226.

(x) 1 Rev. de Lég. (1820) 503.

(y) 16 L.C.R. 231.

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finding of the jury to the contrary, to the well known and natural sympathy which, in the minds of jurors, exists for the family of a person killed by a railway company, and the absence of all sympathy for the companies, which combined causes have the effect too often of shutting our eyes to evidence unfavourable to the plaintiff, and of closing the doors of justice against the companies. I am of opinion that the appeal should be allowed with costs.

As to the insurance money, I am of opinion that the jury should have been told that they should take into consideration the benefit accruing to the plaintiffs from the insurance in order to determine the amount of damage accruing from the death, but I cannot see my way to allow the deduction in the present case as matter of absolute right.

Appeal dismissed with costs.

Solicitor for appellants: *John Bell.*

Solicitors for respondent: *Folinsbee & Going.*

*ALEXANDER GRANT AND CATHER-
 INE McDONALD, ADMINISTRATOR
 AND ADMINISTRATRIX OF ALEX-
 ANDER McDONALD, DECEASED,
 (DEFENDANTS) } APPELLANTS;

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 **May 6.

AND

ALEXANDER D. CAMERON (PLAIN-
 TIFF) } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Chose in action—Sufficiency of assignment—Statute of Limitations
 —Acknowledgment of debt—Interest.*

Action brought by the plaintiff as assignee of one T. against the defendants, alleging indebtedness of the defendants' testator to T. on the common counts and alleging an assignment of the indebtedness from T. to the plaintiff and notice thereof to the defendants. The defendants denied the claim and alleged, first, that no sufficient notice under the statute was ever given of the assignment from T. to the plaintiff, and that the action was barred by the Statute of Limitations.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the notice of the assignment given was a sufficient compliance with the statute (R.S.N.S., (4 ser.), ch. 94, sec. 357), and that the letters written by the defendants' testator to the assignor of the plaintiff were a clear acknowledgment of the debt and sufficient to take it out of the provisions of the Statute of Limitations.

APPEAL from a judgment of the Supreme Court of Nova Scotia (Graham J., dissenting), affirming the judgment at the trial in favour of the plaintiff.

This action was brought by the plaintiff as assignee of

*XVIII. Can. S.C.R. 716.

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

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one Finlay Thompson against the defendants as administrator and administratrix of Alexander McDonald, deceased. The evidence shewed that the deceased, Alexander McDonald, had received monies from Finlay Thompson, and that no part of the debt had ever been paid to Thompson or his assignee. The defence attacked the sufficiency of the notice of assignment required to be given under sec. 357, of ch. 94 (4 ser.) R.S.N.S., which, along with a preceding section, reads as follows:

355. Any assignee, by writing signed by the assignor of the entire interest in any chose in action founded on any contract for payment of money only or in any judgment, decree or order for payment of money only, and who would have been entitled to maintain a suit in equity as such assignee to enforce such contract or the payment of such money, and the executor or administrator of such assignee shall be entitled in his own name, to maintain such personal action in the Supreme Court and have such final judgment and execution in as full a manner as the person originally entitled to such chose in action, judgment, decree or order, and whose interest has been assigned, might have had or done. . . .

357. No action shall be brought upon any such assignment by such assignee, unless a notice in writing signed by him, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall have been served on the party to be sued, or left at his last place of abode at least fourteen days before the commencement of such action.

The notice of assignment given read as follows:

Alexander Grant, Esq.,

Administrator Estate of Alexander McDonald, deceased.

Dear Sir,—You are hereby notified in accordance with chapter 94 of the Revised Statutes, sec. 357, that the debt due by the said estate to Finlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of \$1,200, the amount of the said debt so assigned to him.

S. H. HOLMES,
Attorney of A. D. Cameron.

The following letters were put in to establish an acknowledgment by the defendants' testator of the indebtedness:

HOPEWELL, August 9th, 1876.

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Dear Uncle Finlay,—I received a letter from you some time ago about your money. I delayed writing because I did not know what to write. I did not know but something would turn up that would enable me to pay you. I have a good deal of property—too much for these hard times—and I want to sell some of it but cannot in the meantime as times are that bad that people do not want to buy anything only what they cannot do without. But this state of matters will not continue long, and when the times get better I will make some arrangement to pay you your money. Be not afraid of it, as I have but a small family and no boys, I will have plenty to pay my debts. I did get somewhat behind hand by railway affairs, but have recovered, and I am now in possession of a good deal of property and in a fair way of doing well whenever the times get better. I regret very much keeping it from you so long; however, I hope the time will soon come when I will be able to pay you.

Yours very truly,

ALEX. McDONALD.

HOPEWELL, June 19th, 1875.

Dear Uncle,—I am in receipt of yours of the 31st of May about your money, and must say I am not astonished at you for wanting it. You ought to have had it long ago and you would have had it, only I was unfortunate in a railway contract I took, on the railroad between Truro and Pictou, in which I lost considerable money, and got largely in debt besides. After giving up the work I hired with the Government to carry on part of the work. At this time James and I commenced to build a cloth factory on a small scale, in order to have some permanent work. I borrowed most of what I put in. The man who had your money on mortgage, after having it two years, left. I had to sell the property, which I took from him by deed, for one thousand dollars (\$1,000) losing by this likewise. I then got an offer from the Government to go to the Red River and North-West Territories to explore there for two years among the Indians, and got back last winter. I have now my debt nearly paid and the amount of your claim secure in property, viz., land property, so that you will be as sure of your money in a short time as if you had it. Do not think, Finlay, that I intend to do you, or any other body, out of one shilling. So rest assured that I have your money secured in a manner that you will get it, although I cannot send it now. You had good patience, so I hope you will have a little more, and I will put you all right.

I believe I worked as hard and travelled far more than you did, and have been much more unfortunate than you were since you left; but since two years I have done well, and hope soon to do well by

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you. Now, Finlay, rest assured that I have your money secured so that you will get it, whatever becomes of me.

Yours very truly,

ALEX. McDONALD,

Mr. F. Thompson,
Port Ludlow, British Columbia."

The defendants contended, amongst other things, that these letters were only promises on condition that the writer, Alexander McDonald, should realize on the securities he refers to, or should be able to pay, and did not take the case out of the Statute of Limitations, and in the Supreme Court of Canada relied upon the following cases cited in the dissenting judgment of Mr. Justice Graham in the court below, namely, *Skeet v. Lindsay* (a); *Chasmore v. Turner* (b); *Fearn v. Lewis* (c); *Hart v. Prendergast* (d); *Philips v. Philips* (e); *Murdoch v. Pitts* (f). The defendants also contended that the notice of assignment did not comply with the statute by "stating the right of the assignee and specifying his demand thereunder."

Borden, Q.C., appeared for the appellants.

Ross, Q.C., appeared for the respondent.

The only reasons for judgment delivered were the following:

SIR W. J. RITCHIE C.J.—I think this appeal should be dismissed. As I have before remarked on the argument, it is quite clear that the cause of action was taken out of the Statute of Limitations by the letter of the 19th of June, 1875. I do not think, if the man had been living he would have ventured to come into court and contended that he had not made a promise to pay the money he had collected and to pay it shortly. Four years having elapsed before an

(a) 2 Ex. D. 314.

(b) L.R. 10 Q.B. 500, at p. 516.

(c) 6 Bing. 349.

(d) 14 M. & W. 741.

(e) 3 Hare 281 at p. 300.

(f) 2 N.S. Rep. 25s.

action was taken, he ought to be very grateful for the great forbearance of his creditor in this case. In the face of the debtor's letters it was very ungrateful to set up as a defence the Statute of Limitations.

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Ritchie C.J.

Then, as regards the notice of assignment I do not think the plaintiff could have said much more than he did. The notice explicitly says:

That the debt due by the estate of Alex. McDonald to Finlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of \$1,200 the amount of the said debt so assigned by him.

That shews and specifies what debt was due and they would know what they owed. As regards the question of interest, I am of opinion, like my brother Strong, that if the judgment on this point should be complained of, it ought to be by the respondent instead of the appellant. There was ample ground for allowing interest.

The appeal must be dismissed with costs.

STRONG J.—I quite agree with what has just been said by the learned Chief Justice, especially as regards the effect of the letter, which contains a clear acknowledgment of a debt and a promise to pay it within a short time.

The notice of the assignment is also quite sufficient, as regards interest. I find at page 4 of the case that express notice of a demand for interest was made by the following words:

Plaintiff hereby demands the payment of the sum of \$2,558.20 and gives the defendants notice that if the amount be not paid forthwith, interest will be claimed thereon from date of this writ.

This was in October, 1880. No doubt the solicitor who framed the notice had the statute before him.

As regards this question of interest I think the appeal should have been from the other side.

PATTERSON J.—I concur also. I have no doubt the proper reading of the letter of the 19th June, 1875, takes

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—

the case out of the Statute of Limitations. There is no conditional promise in the letter in the sense in which it has been treated in the cases referred to by the dissenting Judge, and the counsel for the appellant. Its affect is "I have the means and I will soon pay you."

As to the notice of the assignment—it is clearly a sufficient compliance with the statute. The statute requires that the notice shall specify the demand under the assignment because the assignment might only be of a portion of the debt or only entitle the assignee to demand a part of it. But I take it that this notice does specify the demand. It gives notice that the debt assigned is a debt of \$1,200, and that the assignee claims the whole of the \$1,200. In my opinion it is a literal compliance with the statute.

As regards interest, as merely six years' interest upon \$1,000 is allowed, there can be no objection. There was no demand for interest prior to the issue of the writ, but the judgment only gives six years' interest, while more than six years elapsed after action and before judgment.

I think the judgment is right.

Appeal dismissed with costs.

Solicitor for appellants: *H. M. Henry.*

Solicitor for respondent: *R. L. Borden.*

*JOHN W. GRIFFITHS AND ARTHUR
 LOUIS BELYEA (ASSIGNEE FOR THE
 BENEFIT OF CREDITORS OF JAMES DOUGLAS
 WARREN); VANVOLKENBURGH
 BROS. AND HENRY SAUNDERS, WHO
 SUE AS SUCH ON BEHALF OF THEMSELVES
 AND ALL OTHER CREDITORS OF JAMES
 DOUGLAS WARREN (PLAINTIFFS BY ORIGINAL ACTION) } APPELLANTS;

1891
 **June 16.
 —

AND

JOSEPH BOSCOWITZ (DEFENDANT BY ORIGINAL ACTION) } RESPONDENT.

AND BETWEEN

THE SAID JOHN W. GRIFFITHS,
 ARTHUR LOUIS BELYEA, VAN
 VOLKENBURGH BROS. AND HENRY
 SAUNDERS (DEFENDANTS BY COUNTER-CLAIM) } APPELLANTS;

AND

THE SAID JOSEPH BOSCOWITZ (PLAINTIFF BY COUNTER-CLAIM) } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

New trial—Misdirection, or improper non-direction.

W., a trader, while in financial difficulties, transferred his property to B., one of his creditors, and subsequently made an assignment of his property in trust for the benefit of all his creditors.

*XVIII, Can. S.C.R. 718.

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

1891
 GRIFFITHS
 v.
 BOSCOWITZ.

The trustee for the creditors brought an action to have the conveyances set aside. On the trial, after the evidence on both sides was concluded, plaintiff's counsel asked the judge to instruct the jury as to what, on the evidence of this case, might constitute fraud under the Statute of Elizabeth, and he also asked that an account should be taken of the dealings between W. and B. The judge refused. The jury stated that they were unable to deal with the accounts but found that there was no fraud in the transaction between W. and B.

Held, that the refusal of the judge to charge the jury as requested, amounted to a misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts, and that it could be more properly dealt with as an equity case.

Quare, per Patterson, J.—Whether an assignee for the benefit of creditors was entitled to maintain the action if there was no provision in the statute relating to assignments for the benefit of creditors, entitling him so to do.

APPEAL from a decision of the Supreme Court of British Columbia discharging an order *nisi* obtained by the plaintiff to set aside the judgment in favour of the defendant.

The facts of this case were as follows:—One, James D. Warren, being indebted to the respondent Boscowitz in a large sum of money, from time to time gave mortgages to the latter as security for his indebtedness. The property so mortgaged was sold by Boscowitz and the proceeds applied upon his claim. Other property of the debtor was also conveyed to Boscowitz on account of the indebtedness. Subsequently to these transactions the debtor made an assignment for the benefit of his creditors to the appellants, and an action was instituted by them against Boscowitz, alleging that no consideration passed from Boscowitz to Warren for the mortgages and conveyances made to him, but the object of the transactions was to husband the property of the debtor for the debtor's benefit and to defeat, delay and defraud his creditors in the recovery of their just claims.

In their declaration, the appellants claimed an account of the dealings between Warren and Boscowitz; payment to the plaintiffs of the amount found due by Boscowitz to

Warren, and to set aside the conveyance and transfers; or in the alternative, to have Boseowitz declared trustee of the property for the benefit of the creditors of Warren.

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GRIFFITHS
v.
BOSCOWITZ.

Prior to the trial an order was obtained for the taking of the accounts, but before this was completed the action came on for trial before the Chief Justice, Sir Matthew Begbie, and a jury.

On the trial, after the evidence on both sides was concluded, counsel for the plaintiff asked the judge to direct the jury with respect to what would constitute fraud under the Statute of Elizabeth, but the request was refused. It was upon this refusal that the complaint of misdirection or improper non-direction was mainly based.

The conversation between counsel and the trial judge is set out with particularity in the judgment of Patterson, J.

S. H. Blake, Q.C., appeared for the appellants.

Davie, Q.C., appeared for the respondents.

SIR W. J. RITCHIE C.J.—I think this case was not properly left to the jury, and that there has been a mistrial. The law as to the Statute of Elizabeth was not properly explained to the jury, nor their attention called to the several facts brought out in evidence which should have been left to them as matters for their consideration to enable them to determine whether or not there had been an indebtedness, and whether or not the mortgages were given honestly and *bonâ fide*. I think the attention of the jury should have been called to the facts which Mr. Taylor indicated that he wished the judge to submit to them, though I do not think it was necessary for the counsel to do that, but the judge should have made up his mind as to the main facts which the jury should take into their consideration. Under the circumstances there must be a new trial.

As to taking the accounts I think that is a matter for the court below. I do not wish to dictate to the court as to whether it should treat the case as an equity or a jury

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 GRIFFITHS
 v.
 BOSCOWITZ.
 Ritchie C.J.

case, though I think the ends of justice would be better served by treating it as an equity case.

I think the verdict should be set aside and the case go down for a new trial, so that the jury may decide on the law and facts proper to be submitted to them.

STRONG J., concurred in the reasons for judgment of the Chief Justice.

FOURNIER J., concurred.

GWYNNE J., was of opinion that the verdict should be set aside and the case dealt with as an equity case.

PATTERSON J.—I agree with, or rather I do not dissent from, the conclusion that the case should be sent back, but I must state, with respect to some of the grounds taken, that my views are not, perhaps, so decided as those of my brother judges. I suppose that the taking of the accounts referred was in order to ascertain whether or not there was a balance due to Boscowitz at the time these mortgages were given, but I am not satisfied that that was the purpose or the object for which the question was discussed at the trial. When the counsel tendered the copy of an order postponing the trial, the Chief Justice asked:—

What is your object in putting it in? I don't see the object of it.

Mr. Taylor.—Simply this, my lord. It will shew that when Mr. Boscowitz found that the accounts were being taken and shewed a balance the wrong way he wanted this trial pushed before we had the accounts finished. There was an order postponing this trial, and when he found the balance was on the wrong side he forced on the trial. I wanted the accounts taken before this action was tried so that we would have the accounts settled by the referee and I tender that order for the purpose of shewing that the accounts were tendered.

I think the matter there discussed was with reference to the ultimate balance and not the accounts due in 1884,

and so the taking of these accounts should not, I think, affect our decision as to a new trial.

But when we look at the issue which attacks the transaction as being against the Statute of Elizabeth, I think the objection was properly taken by Mr. Taylor, though I am not sure that he is not to blame for not taking it more expressly. The Chief Justice says:

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 v.
 BOSCOWITZ.
 Patterson J

You want me to define fraud?

Mr. Taylor.—No; I want you to put this proposition: That, under the Statute of Elizabeth, there are two requisites; there must be good consideration, and there must be *bona fides*. Not as to the question of consideration, of which apparently there was enough, but as to the question whether this could be held to be *bona fide*. If Mr. Boscowitz took this property to cover it and keep off the balance of Warren's creditors, so that he and Warren should pay them when they got ready, that would be a sufficient benefit to Boscowitz to do away with the *bona fides* under that statute.

Chief Justice.—I shall decline to do anything of the sort; the law always refuses to define fraud, and very properly. As soon as I define fraud, some man hears my definition, does something, and when brought here says, "I have not committed fraud; I have your definition."

He is not asked to put the question of consideration to the jury. It seems to me that the counsel must then have had in his mind the proposition of Giffard L.J., in *Alton v. Harrison*(a). The question intended to be put seems to have been whether the property was not conveyed so as to keep off Warren's creditors and so be an advantage to Warren. It would have been more satisfactory if counsel had asked the judge more specifically to leave to the jury the question "Was it done to hinder, defeat or delay creditors?" Perhaps it comes to the same thing, but the judge does not seem so to have apprehended it or left it to the jury. He speaks as if it was fraud generally that was spoken of, not fraud with reference to the statute. In that view I think the verdict should be set aside and the case sent back and, as the Chief Justice has said, left to the

(a) 4 Ch. App. 622.

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BOSCOWITZ.
Patterson J.

court to deal with as regards the form of action, as it shall think proper.

With regard to parties I am not prepared to say that these parties are entitled to maintain the action. The Ontario cases have not decided that an assignee for the benefit of creditors has a right to attack a deed of this kind except under statute. If there is a statute in British Columbia authorizing it the assignee can act. Then the question whether the plaintiffs are creditors or not is attacked by the pleadings. I suppose both these questions are still open to the defendants and can be raised on another trial.

The appeal is allowed with costs, verdict and judgment of the court below set aside and a new trial ordered.

Appeal allowed with costs.

Solicitors for appellants: *Eberts & Taylor.*

Solicitors for respondent: *Davie & Bodwell.*

<p>*THE HALIFAX BANKING COMPANY (COMPLAINANTS)</p>	}	APPELLANTS;	<p>1888 **Nov. 10.</p>
AND			
<p>URIAH MATTHEW, JOHN McLEAN AND BENJAMIN HERTZ, WHO SURVIVE THEIR CO-DEFENDANT CHARLES J. HA- LEY (DEFENDANTS)</p>	}	RESPONDENTS.	<p>1889 **April 30.</p>

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF
PRINCE EDWARD ISLAND.

Chattel mortgage—13 Eliz. ch. 5—Pleading—Approbating and reprobating transaction—Right to redeem—Oral evidence to vary deed—Sheriff's sale—Equity of redemption—Not salable under fl. fa.

The appellants were judgment creditors of one H. and the respondents grantees under a chattel mortgage made by H. The appellants levied on and sold part of the goods described in the mortgage and became purchasers from the sheriff. Respondents claimed goods under the mortgage. The appellants then filed a bill, alleging that the mortgage was made in fraud of creditors and was also paid off, and asked for a decree that it be set aside or declared satisfied.

Held, that the plaintiff had not made out a case of fraud and the judgment below should be affirmed; that the plaintiff was not entitled to approbate and reprobate the same transaction and that a bill so framed was demurrable; that a bill to set aside a mortgage as fraudulent under 13 Eliz. and asking for an account should be coupled with an offer to redeem; that oral evidence to shew a different consideration from that expressed in the deed was admissible.

APPEAL from a decision of the Court of Appeal in equity of Prince Edward Island, affirming the judgment of the Vice-Chancellor.

*XVI. Can. S.C.R. 721.

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

1888
HALIFAX
BANKING Co.
v.
MATTHEW.

The Halifax Banking Company, on the 14th July, 1883, recovered judgment against one Charles J. Haley upon a promissory note dated 28th December, 1882, made by him for the sum of \$1,514.50 and costs, and placed a writ of *fiery facias* in the hands of the sheriff for the purpose of realizing said judgment out of the goods and chattels of the judgment debtor. At the time of the making of the note and of the issue of the execution, Haley was in apparent possession of certain goods and chattels, and these were seized by the sheriff and sold to the Halifax Banking Co. for \$250.

On the 3rd January, 1883, Haley gave a chattel mortgage to the respondents, which recited that the mortgagor was indebted to the mortgagees in \$2,000 for goods sold and delivered, and for money due and to become due upon promissory notes made by the mortgagor in favour of the mortgagees. The respondents claimed that they were entitled to hold the said goods and chattels under and by virtue of their chattel mortgage. The appellants filed a bill in the Court of Chancery of Prince Edward Island, alleging that the mortgage had been given for the purpose of delaying and defeating the creditors of Haley. The bill further alleged that, although the chattel mortgage was expressed to have been given for goods sold and delivered by the mortgagees to the mortgagor, and for money due and to become due upon promissory notes held by the mortgagees, that no such indebtedness to that amount existed. The bill also alleged that the defendants had refused to render an account to the plaintiffs of their dealings with Haley. The bill concluded by a prayer that the defendants might render an account of their dealings with Haley up to the date of the making of the bill of sale, and that the payments made by Haley to the defendants should be appropriated in taking the accounts towards payment of any sum due to the defendants at the time of the making of the chattel mortgage, and that the chattel mortgage might be decreed to be satisfied, and for an injunction.

The Vice-Chancellor, whose judgment was subsequently affirmed by the Court of Appeal in Equity, held that there was nothing fraudulent in the circumstances connected with the execution of the chattel mortgage, and that it was obtained *bonâ fide* for the purpose of securing the mortgages for the indebtedness of Haley to them, and that there being no bankrupt or insolvent laws in the Province of Prince Edward Island, there was nothing to prevent the debtor legally assigning his property to one creditor preferentially, provided the debt was just and the assignment absolute.

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—
HALIFAX
BANKING CO.
v.
MATTHEW.
—

The defendants' answer admitted that there were two items, amounting to about \$273, in their account against the plaintiff, forming part of the \$2,000 mentioned in the consideration for the chattel mortgage, which did not comply strictly with the recital in the chattel mortgage that the indebtedness was for goods sold and delivered and for moneys due on promissory notes, but was money paid by the mortgagees to third parties, at the request of the mortgagor.

Counsel for the appellants contended that parol evidence was not admissible to shew that the chattel mortgage was given for any other consideration than that shewn on its face, but the Vice-Chancellor held that the evidence was admissible, and properly received. The Vice-Chancellor further held that the sheriff, under his *fi. fa.*, could not sell the equitable interest of the respondents, and that although the appellants had the right as execution creditors to file a bill in chancery, asking to redeem the said mortgage, they had not done so, but had rested their claim for redress wholly upon the right to have the chattel mortgage set aside on the ground of fraud, and as to this had failed. Nevertheless he made a decree that if the appellants offered to redeem, he would make an order for the taking of the accounts, but only as of the date of the filing of the bill, and not of the appellants' judgment.

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v.
MATTHEW.

Ross, Q.C., for the appellants contended that the whole transaction was a cloak on the part of the mortgagees to protect the mortgagor, and that the mortgage should be set aside as a fraud upon the creditors, and that if they failed in that regard, the appellants were entitled to a decree ordering the accounts of Haley with the respondents to be taken as of July 14th, 1873, the date of their judgment, and that although ordinarily a creditor in the position of the appellants could only claim redemption as of the date of the filing of his bill, the appellants were entitled to have the accounts taken at the earlier date, because of the erroneous and fraudulent accounts given to the appellants by the respondents.

Peters, Q.C., for the respondents, relied upon the reasons given by the Vice-Chancellor in his judgment.

SIR W. J. RITCHIE Chief Justice.—I am of opinion that the appeal should be dismissed with costs.

STRONG, J.—I am of opinion that the judgment of the court below was right and ought to be affirmed.

The bill was filed for the purpose of having the chattel mortgage set aside as being fraudulent against creditors within the Statute, 13 Elizabeth. In a suit so framed according to a well known rule of pleading which forbids that a party shall so frame his suit as to present cases approbating and reprobating the same transaction, a plaintiff failing in establishing the fraud he alleges cannot have relief by way of redemption, on the assumption that the impeached mortgage was a valid security. If the bill should be so framed with a double aspect, seeking alternative relief, it would be demurrable. The court might, of course, in its discretion, permit an amendment by which a bill, such as the present, is converted into one for redemption, and might, upon such terms and conditions as it might think the present, is converted into one for redemption, and

indulgent offer made by the Vice-Chancellor in the present case was refused by the plaintiff. The only question, therefore, really before us is one of evidence, viz., is the fact of fraud made out? For the reasons given fully in the judgment of my brother Patterson, it clearly is not, and the judgment appealed from is, in this respect, entirely right.

1889
 HALIFAX
 BANKING Co.
 v.
 MATTHEW.
 Strong J.

Although the sheriff's sale, which appears to have been of the equity of redemption only, does not appear to have been according to the Statute of P.E.I., which contemplates a sale of the whole property in the chattels, legal as well as equitable, leaving the mortgagor and execution creditor to be paid in order of their priorities out of the proceeds in the sheriff's hands, still the execution itself constituted such a potential lien or charge as entitled the plaintiff to maintain a bill to redeem.

I think, therefore, the judgment should be varied by providing that the dismissal of the bill should be without prejudice to a suit to redeem, and that subject to such variation this appeal should be dismissed with costs.

FOURNIER and GWYNNE JJ., were to dismiss the appeal with costs.

PATTERSON J.—The plaintiffs recovered judgment against one Haley on the 14th of July, 1883, and on the same day issued a *fi. fa.*, upon which the sheriff sold or professed to sell to the plaintiffs certain chattel property.

The sheriff's deed to the plaintiffs bears date the 15th of October, 1883. It recites the *fi. fa.* and then proceeds thus:

And whereas I, the said Michael McCormack, Sheriff, as aforesaid, having under and by virtue of the said writ of *fi. facias* entered upon and taken possession of all the share and interest of the said Charles J. Haley in and to all the goods set out in the schedule hereto annexed, marked "A" and all the share and interest of the said Charles J. Haley of, in and to all the book debts, materials, tools, implements, goods, chattels, and effects, and stock in

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 HALIFAX
 BANKING Co.
 v.
 MATTHEW.
 PATTERSON J.

trade, used in or belonging to the lobster factories fishing and meat canning business carried on by the said Charles J. Haley, at Souris, Red Point and Bay Fortune, whether the same be carried on solely by the said Charles J. Haley, or jointly with the firm of Matthew, McLean and Company, and in and belonging to such meat canning business carried on at Souris, Red Point and Bay Fortune, by the said Matthew, McLean and Company in or to which the said Charles J. Haley was entitled to any share or interest; and the same having been set up for sale at public auction were knocked down to the said The Halifax Banking Company, they being the highest bidders therefor, at the price or sum of two hundred and fifty dollars. Now, know all men by these presents, that I, the said Michael McCormack, Sheriff as aforesaid, for and in consideration of the said sum of two hundred and fifty dollars (the receipt whereof is hereby acknowledged) and under and by virtue of the said writ of *fi. facias* and pursuant to his authority in me vested as such sheriff, and under and by virtue of and pursuant to all other powers and authorities in that behalf thereunto me enabling, have bargained, sold and assigned, and by these presents do bargain, sell and assign unto the said Halifax Banking Company, all the estate, right title, interest and claim of him the said Charles J. Haley of, in and to all the goods and chattels mentioned in the said schedule hereunto annexed marked "A," and all the share and interest of the said Charles J. Haley, of, in and to all the book debts, materials, tools, implements, goods, chattels and effects and stock in trade used in or belonging to the lobster factories, fishing and meat canning business worked and carried on by the said Charles J. Haley at Souris, Red Point and Bay Fortune, whether the same be carried on solely by the said Charles J. Haley, or jointly with the firm of Matthew, McLean and Company and in and belonging to such lobster factories, fishing and meat canning business worked and carried on at Souris, Red Point and Bay Fortune by Matthew, McLean and Company, in or to which the said Charles J. Haley is entitled to any share or interest, and all the estate, right, title, claim, share and interest of him the said Charles J. Haley, of, in to or out of all the said factories, fishing and meat canning business, to have, hold, receive and take the same and every part thereof unto and for the sole use of the said The Halifax Banking Company.

The defendants held a mortgage made by Haley to them on the 3rd of January, 1883, more than six months before the recovery of judgment by the plaintiffs, which mortgage covered all the goods which the sheriff professed to sell under the plaintiffs' *fi. fa.*

The plaintiffs filed their bill in the Court of Chancery of Prince Edward Island on the 4th of February, 1884,

attacking the mortgage as bad under 13 Eliz. ch. 5, and as fraudulent in fact, one of their allegations being that while the mortgage purported to be given in consideration of \$2,000 due from Haley to the defendants for goods sold and delivered, and for money due and to become due on promissory notes, Haley did not, in fact, owe the defendants anything.

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 HALIFAX
 BANKING Co.
 v.
 MATTHEW.
 PATTERSON J.

Haley had carried on the business mentioned in the sheriff's deed. The goods conveyed by the mortgage were chiefly the plant and materials used in that business, and the defendants had employed Haley in carrying on the business, leaving him to a great extent, if not altogether, to conduct it, though they had an agent, Mr. White, also engaged in it, and with an understanding with Haley that the profits should go in payment or reduction of his debt to them.

The prayer of the plaintiffs' bill somewhat abbreviated is, that the mortgage may be set aside; that the defendants may give an account of their transactions with Haley up to the date of the mortgage; that they may exhibit a detailed account of the goods covered by the mortgage, and may account for them and be charged with the use and profit of them; that they may account for any other securities which they may hold from Haley; and may also account for their dealings and transactions with Haley after the making of the mortgage; and may deliver up the property to the plaintiffs.

There is no offer to redeem the defendants.

The action was heard before Mr. Justice Hensley, who was clearly of opinion, founded on views which he set out in an able review of the case, that the mortgage was not fraudulent in fact or fraudulent and void under the Statute of Elizabeth. He thought, however, that if the plaintiffs desired and offered to redeem they should be allowed to do so. And he drew up an order to be made in case they acceded to his proposition. They did not accede, and he dismissed the bill.

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 HALIFAX
 BANKING CO.
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—
 MATTHEW.
 —
 Patterson J.

That judgment was affirmed by the court *in banco*.
 I see no sufficient reason for interfering with the judgment.

The questions of fraud and of the intent necessary to bring the mortgage within the mischief of the Statute of Elizabeth are questions of fact. It would require a tolerably clear demonstration of the alleged error in the finding of the courts of Prince Edward Island to induce this court to disturb that finding. Far from establishing any such error, I do not think anything urged before us creates a reasonable doubt on the subject.

That there was a debt actually due by Haley to the defendants is quite clear. I think it is also manifest that the debt fully equalled the consideration money of two thousand dollars expressed in the deed. A point was made on the circumstance, asserted on the part of the plaintiffs, and which may be taken as truly asserted so far as it affects the argument, that to make up the \$2,000, two items had to be computed which were not either goods sold and delivered or money due on promissory notes. The point made was that oral evidence could not be given of any consideration not expressed on the face of the deed. Mr. Justice Hensley acted on perfectly sound principles in rejecting that contention. It rested on a rule which did not apply under the circumstances, but which is a strict and somewhat technical rule; while a little strictness in the reading of the deed deprives the point of any significance which it might at first sight seem to have. The deed is a good conveyance of the property, for good consideration, and for securing, as it is expressed "the payment of the sum of \$2,000 and interest as *hereinafter* mentioned." The after mention is in the defeasance proviso and the covenant to pay, when the sum is simply \$2,000, without any statement of how it is composed. To make anything of the asserted *falsa demonstratio* in the earlier recital the plaintiffs would require to establish that \$2,000 was not properly demandable. It would not be enough to prove that the debt

that came strictly within the description in the recital was under \$2,000.

It is scarcely worth while to discuss this point, because it does not affect the question of the *bona fides* of the deed to any appreciable extent.

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 HALIFAX
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 v.
 MATTHEW.
 Patterson J.

It is more than doubtful whether the plaintiffs took anything by the sheriff's sale. Haley had only an equity of redemption in the goods and that is not saleable under a *fi. fa.* from a common law court.

The sale may have been intended as a sale under the provincial statute, 41 Vict. ch. 7, sec. 3, which reads thus:

Sheriffs and sheriff's bailiffs, constables and all persons authorized to levy under any execution issued from any court in this province, may levy upon and sell any chattels mentioned, described in, or conveyed by a chattel mortgage: Provided that the amount secured by all chattel mortgages duly registered prior to the levy together with interest as expressed in such mortgages up to the day of payment, be duly paid, and shall hold the surplus toward satisfaction of the levy.

That enactment, however, obviously requires a sale of the goods themselves and not of the equity of redemption only, and it applies, as it would seem, only when the goods can be sold for more than the mortgage money and interest.

If the plaintiffs intended, in selling and buying the goods, to treat the defendants' mortgage as void, the sale ought, of course, to have been of the goods and not of the equity only.

The sheriff's deed, which purports to convey merely the interest of Haley in the goods, and which, in that respect, correctly represents the sale actually made, as proved by the evidence of the sheriff, would, if operative at all, pass only the equity.

I do not see how the plaintiffs can be held to have taken anything under the deed.

Still they would be entitled, on the principle of *Reese River Silver Mining Co. v. Atwell*(a), to file their bill for

(a) L.R. 7 Eq. 347.

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 HALIFAX
 BANKING Co
 v.
 MATTHEW.
 Patterson J. answered by the findings in the courts below.

What, then, is the position?

The plaintiffs being judgment creditors of Haley, and being unable to make their debt under the *fi. fa.*, have a right to the aid of the Court of Equity. The statute referred to provides for selling the goods under the *fi. fa.*, but only, as I understand it, if they bring more than is due on the mortgage. If they are not sufficient to satisfy the mortgage, it would be against principle, and the statute does not assume to disturb the mortgagee in the possession of them.

The creditor has a right to know how the mortgage debt stands, and if not satisfied with the accounts furnished by the mortgagees, may properly resort to the court for assistance.

In this case I entirely agree with the opinion expressed in the courts below, that the accounts shewing the profits, if any, to be credited to Haley on the mortgage debt must be taken up to the latest moment. There is no date at which the plaintiffs can be held entitled to say that the business ought to have stopped, or ought to stop, unless the date at which they offer to redeem the defendants, which has not yet been done.

What would be the result of a taking of the accounts, whether it would shew the debt to be paid, or to be reduced to a sum which would be realized by a sale under the statute with a margin left to apply on the execution, we, of course, cannot say. The creditor would have to take the risk of the result of the action and accounting, including, of course, the risk of costs.

I do not know that either of the parties would desire to turn this action into one for the purpose just mentioned, but I do not think it would be proper to do so, even if one

party, without the concurrence of the other, should so desire.

The action has been prosecuted *diverso intuitu*, and a suit for an account with a view to a sale under the statute, or with a view to equitable execution in any form, would probably involve considerations concerning the use of the plant, etc., which has perished in the using, and other complications which would be better dealt with in a separate action.

The action, as instituted, and as so far prosecuted, fails, and we should simply dismiss the appeal with costs.

The plaintiffs will, of course, be at liberty notwithstanding this judgment to proceed to redeem if so advised.

The appeal is dismissed with costs, but the plaintiffs to be at liberty to file a bill for redemption if so advised.

Appeal dismissed with costs.

Solicitors for appellants: *Malcolm & McLeod.*

Solicitor for respondent: *Frederick Peters.*

1889
 HALIFAX
 BANKING Co.
 v.
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1889
 **Mar. 30.
 **June 14.

*HESTOR JONES, EXECUTRIX OF THE }
 LAST WILL AND TESTAMENT OF THOMAS } APPELLANT;
 J. JONES, DECEASED (PLAINTIFF) }

AND

THE GRAND TRUNK RAILWAY COM- }
 PANY OF CANADA (DEFENDANTS) . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Railways—Station buildings—Dangerous way—Invitation or licence
 —Breach of duty—Negligence—Questions for jury.*

The approach to a station of the Grand Trunk Railway from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass around the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go around the rear when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company:

Held, affirming the judgment of the Court of Appeal (16 Ont. App. R. 37), Fournier and Gwynne JJ., dissenting, that the company had neglected no duty which it owed to the deceased as one of the public.

Held, per Strong and Patterson JJ., that while the public were invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass around a train in motion.

*XVIII, Can. S.C.R. 696.

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

Held, per Taschereau J., that the death of the deceased was caused by his own negligence.

Held, per Patterson J.—In an issue of negligence, the jury should be asked, "What was the duty which you find to have been neglected?"

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APPEAL from a decision of the Court of Appeal for Ontario(a) allowing an appeal from the judgment of the Chancery Division of the High Court of Justice for Ontario, which affirmed the judgment in favour of the plaintiff entered at trial on the findings of the jury, and dismissing the action with costs.

The accident out of which the action arose occurred at a station of the respondents at Point Edward, opposite Fort Gratiot, on the St. Clair River, and immediately at the outlet of Lake Huron. At this point there is a steamboat ferry carrying railway trains across the river. The respondent's station is built on the north side of nearly all the tracks. The way for horses, carriages and foot passengers to the station was by a planked walk about 12 feet wide, commencing south of the tracks at the terminus of the street railway, and extending across the tracks to the platform of the station. On the morning in question the plaintiff's husband, who resided at Fort Gratiot, but who had been visiting his sister at Point Edward, left his sister's house shortly after six o'clock, intending to return home by the early train from the East, due at 6.15 a.m., but which did not arrive on that morning until 6.30 a.m.

As he approached the station this train was just coming in and drawing up on the first track, which was that nearest to the platform, and it was then passing over the plank walk, obstructing, for the time, further passage to the platform.

Jones, who was then on the plank walk, spoke to McMillan, a car repairer in the company's service, who was standing there just at the rail of the second track, and asked where the morning train was from. He was told it was from Toronto. McMillan says he then turned away,

(a) 16 Ont. App. R. 37.

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and that when he next noticed him, which must have been but a moment or two later, he saw that he was going in an easterly direction, walking between track No. 1 and track No. 2, for the purpose, as he supposed, of going round the rear of the train to the platform. He had hardly gone 20 feet from the east side of the walk when he was overtaken and knocked down by the projecting buffer beam of a shunting engine, which came up behind him on track No. 2. He was walking close to the end of the ties of this track, probably for the purpose of keeping as far away as possible from the moving train on his other side.

The shunting engine in question was standing, when Jones came up to McMillan, some distance, perhaps 150 feet, as one witness says, west of the plank walk, on track No. 2 (in the evidence as reported there is some confusion occasioned by the way the witnesses speak of this, but it was west), and it started to go up that track to the east for the purpose of switching on to track No. 1, some 400 feet beyond the plank walk, and then backing up behind the incoming train to assist in the work of trans-shipping it to the ferry boat. It was stationed at the point it started from for the sake of convenience in giving orders to the engineer, and was being moved and managed, so far as time, place and purpose were concerned, in the usual and ordinary course of the defendants' business. It was going at the rate of two or three miles an hour, and, if stationed 150 feet distant from the crossing, must have started before Jones left it, as the accident happened at a spot distant therefrom hardly more than (if so much as) the length of the engine. When McMillan saw Jones walking between the tracks he shouted to the men on the engine, which had then passed the crossing, and his call being apparently unheard, he shouted again. Another man T. Martin, also in defendants' service, who was seven or eight feet from Jones in the same direction, but facing the engine, also called out and ran towards him. As he did so the unfortunate man turned his head, and was knocked down by the

buffer of the engine as already described. The morning was dark, but the engine had the usual head-light in front and also a light in the rear. The bell was ringing from the time it started until it passed McMillan on the crossing, and there was no evidence that it had ceased ringing up to the moment of the accident. The incoming train had not then stopped, and the bell of its engine was also ringing.

R. M. Meredith, for the plaintiff. There was an invitation or permission by the company to the deceased and others to leave the plank walk and seek other means of access over their grounds, to the platform because passenger trains frequently drew up across the walk, and necessarily did so (as the train in question finally did) when made up, as it was, of more than five cars. The rear car in this instance overlapped the walk by about 30 feet. There being this invitation or permission of the company to deviate from the provided and usual way, there was negligence (1) on the part of the men in charge of the engine in not keeping a proper look out; (2) in using an engine with a buffer projecting so much over the space between the tracks; (3) in stationing the engine west instead of east of the crossing, thereby making it necessary to traverse the crossing in going to switch on to track No. 1; and (4) to summarize generally all other objections, that there was negligence in not using more than ordinary care and caution to prevent accidents at a place which was certainly dangerous.

D'Alton McCarthy, Q.C., for the respondents, contended that there was no negligence in the manner of moving the shunting engine that killed the deceased, but that the latter was guilty of negligence in stepping off the plank walk and proceeding between the tracks without looking behind to see if there was any engine moving on the second track.

STRONG J.—I am of opinion that this appeal should be dismissed with costs for reasons in the judgment pronounced by Mr. Justice Patterson.

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FOURNIER J.—L'Appelante poursuit en dommages la compagnie intimée pour avoir par négligence causé la mort de son mari allant prendre les chars à la station de "Point Edward."

C'était à l'appelante à faire preuve des faits que l'accident avait été causé par la négligence de l'intimée, et que son mari n'y avait pas contribué par sa propre négligence, ou que l'intimée en usant des précautions ordinaires aurait pu éviter l'accident. Lorsque le défunt se rendit à la station, il faisait encore nuit, à six heures du matin, en hiver; pour arriver à l'embarcadere il fallait passer par un endroit couvert de 13 à 14 différentes voies de chemins de fer. Le train était en retard de vingt minutes. Pour atteindre plus tôt la station le défunt essaya de passer par derrière le dernier char du train qui venait d'arriver à la station et dont la longueur dépassait la plateforme qui sert d'embarcadere. Ne pouvant y arriver directement en conséquence de cette obstruction, il laissa le trottoir qu'il avait suivi jusqu'alors et s'en éloigna de quinze à vingt pieds pour passer en arrière du train. Il se trouvait dans l'espace entre deux voies lorsque le *shunting engine* employé par la compagnie pour l'embarquement du train sur les pontons qui doivent le traverser de l'autre côté de la rivière, reçut le signal de partir. Ce signal fut même donné pendant que le train était encore en mouvement. C'est par cet engin venant dans la direction de la station que la défunt fut frappé.

Un témoin voyant le danger auquel il était exposé essaya de faire arrêter l'engin en criant à l'ingénieur, mais celui-ci n'arrêta son engin que lorsque l'infortuné était dans les roues.

Le principal moyen de défense de l'intimée est que le défunt a été lui même la cause de l'accident. La preuve établit que l'endroit où l'accident a eu lieu est très dangereux. Il faut pour arriver au quai d'embarquement traverser 13 à 14 voies ferrées. Il est vrai que la compagnie a fait construire un trottoir pour conduire à la station à travers ce dédale les voyageurs qui veulent prendre ses

trains. Par ce fait même n'invite-elle pas le public à passer par cet endroit, en le mettant sous l'impression que les précautions nécessaires ont été prises pour pourvoir à sa sûreté. C'est le seul moyen d'accès à la station. Puisque l'endroit est si dangereux, il est entièrement du devoir de la compagnie de voir à ce que le trottoir et l'accès à la station soient au moins libres de toute obstruction de tous genres à ce qu'il soit fait bonne garde pour la protection des voyageurs. Mais au contraire, il est en preuve qu'il y a souvent des trains qui interceptent cet accès, et qu'en conséquent, beaucoup de gens font ce que Jones a voulu faire, passent en arrière du dernier char, sans que la compagnie ou ses serveurs y objectent, afin d'arriver à la station. La compagnie ne maintient aucun gardien à ce dangereux endroit. Ignorant le temps que l'obstruction devait durer, et le train étant en retard, il n'est pas surprenant que dans la crainte de perdre son passage, Jones ait essayé de prendre le même chemin que les autres voyageurs, ayant lieu de croire qu'il n'y serait exposé à aucun danger puisque la compagnie l'empêchait d'arriver à la plateforme par le trottoir. L'accident est arrivé non par le faute du défunt mais bien plutôt par celle de la compagnie qui d'après la preuve a été coupable de négligence.

1. En obstruisant la trottoir conduisant à la station par le train qui en intredisait l'accès et forçait Jones à passer en arrière du dernier char, pour arriver à la plateforme.

2. En faisant partir le *shunting engine* pour traverser ce trottoir pendant que le train qui arrivait était encore en mouvement, et l'accès à la station obstrui par le train arrivant.

3. Parceque le conducteur du *shunting engine* n'a pas exercé une surveillance suffisante pour s'assurer s'il n'y avait pas quelqu'un en avant de son engin pendant qu'il approchait et traversait le trottoir.

4. Parceque la construction de l'engin en question dont le reservoir à l'arbre est d'une hauteur qui empêche

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l'ingénieur d'apercevoir aucune objet devant lui, à moins d'arrêter à une distance de 50 à 60 pieds, est defectueuse.

D'après toutes les circonstances de cette cause, je crois avec l'honorable juge en chef de la cour d'appel, que l'honorable juge Galt qui présidait au procès, a sagement fait de soumettre la cause aux jurés. Il se trouve certainement une preuve suffisante pour justifier leur verdict. Je suis d'avis que l'appel doit être alloué avec dépens.

TASCHEREAU J.—I concur with my brother Patterson that this appeal should be dismissed. It appears clearly that the accident was attributable to the deceased's own want of care, and not to any negligence on the part of the railway. As to the law applicable to the case, in view of the verdict of the jury, I cannot undertake to add anything to what has been said in the Court of Appeal by Burton, Osler and Maclellan JJ.

GWYNNE J.—I am of opinion the appeal should be allowed with costs.

PATTERSON J.—The argument of this appeal, particularly that on the part of the appellant, which was urged by Mr. Meredith with much zeal and earnestness as well as with force and ability, took a wider range than the position of the case strictly warranted.

It is, therefore, important to ascertain as precisely as we can what is really the matter for our consideration.

The questions left to the jury were only two, apart from the question of damages:

1. Were the defendants guilty of negligence in the manner which the shunting engine was moved?
2. Was the deceased guilty of contributory negligence in leaving the plank road and walking between the rails in order to get around the end of the cars?

To the first question the jury answered—*Yes*, and to the second—*No*.

The non-suit was ordered by the court below on the ground that there was not evidence to justify the answer to the first question.

Counsel for the plaintiff objected at the trial to the learned Chief Justice, confining the inquiry as to negligence to the manner of moving the shunting engine, and urged a variety of other topics touching the train, the roadway, the lighting of the station yard, the pattern of the shunting engine, etc., which he submitted should have formed subjects of inquiry. These topics have been expanded and elaborated, with skill and fertility of illustration in the appellant's factum, and again in the argument addressed to this court, as grounds in addition to the manner of moving the shunting engine, on which negligence might be imputed to the defendants. They do not properly come up for consideration until it is decided that the finding of negligence in the manner of moving the shunting engine, which is the only fact found by the jury on the charge of negligence, is not supported by proper evidence. If that should be so decided, it will still be a question whether the non-suit was proper or whether the alternative motion for a new trial ought not to have been granted in order to enable a jury to pronounce upon the other matters.

It will aid the explanation of my view of the question of negligence to recapitulate the leading facts as I understand them to appear from the evidence. They are few and are not in dispute.

The railway station at Point Edward has to be reached from the town by crossing a number of tracks. These tracks are all on the railway property, and so is the station building. The company has constructed a planked causeway across the tracks leading from the highway to the station building.

Passenger trains coming to the station necessarily cross the planked way. Stopping where they are accustomed to stop for the convenient use of the station, in order, as it is said, to have the baggage car at the place where baggage

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is handled, a train coming from the East will, if it is a short train, be clear of the planked way, but if not a short train one car or more will usually be on and east of it.

Trains coming from the East are propelled on to the ferry boat by a shunting engine, which stands at the west of the planked way when waiting the arrival of a train, and passes, when the train comes, eastward along the second track, crossing the planked way, to reach the rear of the train which it is to propel.

On the 29th of January, 1887, the deceased, intending to take a train that arrived from the East about six in the morning, which was before daylight, walked down the planked way, and when he got near the station found the train, which was just arriving, moving across the planked way. He did not wait for the train to stop, but left the planked way with the intention of passing round the rear of the train to the station platform.

The train was on the track next the platform. The shunting engine, which was stationed on the next track and about one hundred and fifty feet west of the planked way, moved easterly as the train was drawing up, for the purpose of taking its place at the rear of the train, and overtook the deceased, unperceived by him, about twenty feet from the planked way. The deceased was between the first track and the second. His attention was apparently fixed upon the train, which was still in motion, and from which he was seemingly keeping back, when he was struck by the buffer beam of the shunting engine, which projected over the track, and was thrown under the wheels.

The shunting engine is said to have been moving at the rate of two or three miles an hour. Its headlight was burning brightly and its bell was kept ringing from the time it started.

From the fact that the deceased was only eight or ten paces from the planked way when he was struck it may be that the engine, which had been one hundred and fifty feet to the west, had begun to move before he left the

planks, but that inference (if the matter were of much importance) might perhaps be unsafe, because there is evidence that before the deceased was struck he was standing still, apparently watching the train and waiting until it should have passed him.

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The first question is whether as a result of the facts which I have thus briefly stated or as a conclusion of law it can be said that the company neglected any duty towards the public, and towards the deceased as one of the public.

That question can, in my opinion, only be properly answered in the negative.

It is said that the public are invited to cross the railway tracks, and that, therefore, some precautions, which were absent in this case, ought to have been taken. The precautions, as we must bear in mind on this branch of the case, being against danger from the shunting engine.

What the jury intended by "the manner of moving" the engine, which is the rather vague specification of the negligence which they attribute to the company, may not be quite clear, but we may take it to include the moving of it at the time when the passenger train was coming in, and the omission to keep a lookout for people who might get in its way.

The fundamental proposition is that the deceased was invited by the company to use the way across the tracks, but that proposition requires to be qualified. The public are, it is true, invited to use that way, but only as a way across the tracks of a railway in active operation. There is no representation or guaranty, either express or implied, that the traffic of the railway shall not proceed in its ordinary course. The great fallacy, as it appears to me, of the argument based on the implied invitation to cross the tracks, is in overlooking this qualification which is *ex necessitate rei*. Caution must, of course, be exercised in conducting the traffic in view of the fact that the tracks cross what is, in a limited sense, a public way; but it cannot be reasonably contended that the implied invitation to

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use the way, which may not be confined to the planked causeway, but may, in case that approach happens to be obstructed, extend to a necessary deviation *extra viam*, covers the exploit of making a detour among the tracks in order to get round a moving train, and imposes on the company a duty to provide special safeguards for those who attempt it.

It is more reasonable to regard the moving of a train across the causeway as a suspension for the moment of the right of way. If, when the train stops, it still obstructs the causeway the station may have to be reached by passing over the platform of a car, or by going round the end of the train, but this would be under different conditions from the case of a train in motion, as there would be no apprehension of danger from the train itself like that which unfortunately caused the deceased to stand a little too near the second track.

It has been suggested, but whether it was or was not so considered by the jury the form of the finding does not enable us to say, that the shunting might and, therefore, ought, to have been kept east of the crossing, so as not to have to pass it when a train was coming in.

The suggestion seems to me entirely speculative.

A reason connected with the working of the road is given for adopting the usual standing place, viz., the facility for receiving orders. The engine must necessarily cross the causeway every time it returns from the ferry, and there is no such indication of greater danger in crossing when a train comes in instead of at some other time, as to found a duty not to cross at that time. On the contrary, if my understanding of the so-called invitation is correct it may well be argued to be the safest time. Taking the present case as an illustration, the engine had passed the causeway before the train came to a stop and while the plaintiff ought to have been standing still on the planks. When a train is actually moving across the causeway may not unreasonably be regarded as the time when people are not

expected to be forcing their way to or from the station, and, as I have said, the invitation to cross the tracks is not an invitation to cross at that time.

On these general grounds, which were, I think, more fully expounded in the court below, particularly in the judgments of Burton and Osler JJ., I think there was no evidence on which the company could properly be charged with negligence in the manner of moving the shunting engine.

I am of the same opinion with regard to those other matters on which the jury have not pronounced, but which if there was evidence of them, would afford ground for a new trial only.

I think, therefore, that the non-suit was properly ordered.

It may not be out of place to add here a remark which I have frequently had occasion to make and also to act upon. An issue of negligence will usually be more intelligently and more satisfactorily disposed of by asking the jury what was the duty which they find to have been neglected? What was done or omitted which, under the circumstance, ought not to have been done or ought not to have been omitted? By thus calling the attention of the jury to the real point for decision the tendency to haphazard verdicts may be lessened.

The question of contributory negligence cannot arise until there is evidence, not only of negligence on the part of the defendants, but that there was negligence which caused the accident.

The conduct of the deceased in this case is of consequence rather as explaining how the accident was brought about than as proving or disproving a formal issue of contributory negligence. If contributory negligence were in question more directly, and not merely as part of the evidence bearing on the issue which the plaintiff has to maintain, viz., that the accident was caused by the negligence of the defendants, the burden of proving it would be on the

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defendants, and it would not be a subject for discussion on a motion for non-suit.

I do not attempt to analyze the evidence to any greater extent. It has been discussed in all its aspects at the bar, and seems, to my mind, to demonstrate that the mischief was entirely caused by the deceased taking the unfortunate course of attempting to cross or get round the moving train. Every argument for the plaintiff is answered by that circumstance, *e.g.*, when it is urged that the ringing of the bell of the shunting engine was insufficient warning of its approach because the bell of the engine that drew the train was ringing at the same time, the obvious answer is that the latter bell rang only when the train was in motion; when, it is said, that the space between the tracks was too narrow for a man to be safe in passing between two trains, the observation if true at all, is only true when two moving trains are understood, and so on.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Meredith & Meredith.*

Solicitor for respondent: *John Bell.*

<p>*THE MERCHANTS BANK OF CAN- ADA (PLAINTIFFS).....</p>	}	APPELLANTS;	<p style="text-align: center;">1889</p> <p>**Dec. 4, 5, 6</p> <hr style="width: 50%; margin: 0 auto;"/> <p style="text-align: center;">1890</p> <p>**Mar. 10.</p> <hr style="width: 50%; margin: 0 auto;"/>
AND			
<p>RICHARD ALAN LUCAS AND JAMES M. YOUNG (DEFENDANTS).....</p>	}	RESPONDENTS.	

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Bill of Exchange—Forgery—Ratification—Estoppel.

Y., who had been in partnership with the defendants, trading under the name of the H. C. Co., but had retired from the firm and become the general manager for the defendants, but with no power to sign drafts, drew a bill of exchange for his own private purposes in the name of the defendants on a firm in Montreal, which was discounted by the plaintiff bank. Before the bill matured, Y. wrote to defendants informing them of having used their name, but that they would not have to pay the draft. The bill purported to be endorsed by the company, *per* J. M. Y. (one of the defendants) and the other defendant having seen it in the bank examined it carefully and remarked that "J. M. Y.'s signature was not usually so shaky." J. M. Y. afterwards called at the bank and examined the bill very carefully, and in answer to a request from the manager for a cheque he said that it was too late that day but he would send a cheque the day following. No cheque was sent, and a few days before the bill matured the manager and solicitor of the bank called to see J. M. Y., and asked why he had not sent the cheque. He admitted that he had promised to do so and at the time he thought he would. Y. afterwards left the country, and in an action against the defendants on the bill they pleaded that the signature of J. M. Y. was forged, and on the trial the jury found that it was forged, and judgment was given for the defendants. The defences set up were ratification and estoppel. The Court of Appeal held there could be ratification of a forgery, and that the plaintiffs had failed to shew any injury by reason of the alleged representations, which was an essential element in a claim of estoppel by representation.

*XVIII. Can. S.C.R. 704.

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

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Held, that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed with costs.

Held, per Sir W. J. Ritchie C.J., that though fraud and breach of trust can be ratified, forgery cannot and that the bank could not recover against the defendants on the forged bill. *La Banque Jacques Cartier v. La Banque d'Epargne* (13 App. Cas. 111) and *Barton v. London and North Western Ry. Co.* (62 L.T. 164), followed.

APPEAL from a judgment of the Court of Appeal for Ontario(c), Hagarty C.J.O., dissenting, allowing an appeal of the defendants from the judgment of the Divisional Court(d), Rose J., dissenting, which reversed the decision of Galt J., at the trial in favour of the defendants.

Hamilton Young had been for a short time a partner with the defendants, Lucas and Young, carrying on business under the name of the Hamilton Cotton Company. The partnership lasted for only a short time, when he withdrew, leaving a very considerable sum of money in their hands, and he assumed a position of general manager, but had no authority to sign drafts. In addition to conducting the affairs of the company, he embarked in speculations of his own in reference to purchases of cotton in connection with which he drew several bills of exchange, in the name of The Hamilton Cotton Company. Among others, he on the 25th June, 1883, drew the bill of exchange now in question on a firm of McElderry, Montreal. This was discounted by the plaintiffs and sent to Montreal, where it was duly accepted. While the bill was current Hamilton Young, about the 25th August, called at the office of the plaintiffs and requested them to recall the bill and said: "We are settling up with McElderry." The bill was returned and received by the bank on the 27th August.

From the evidence it appeared that on the 25th August, Hamilton Young wrote the following letter to the defendants:

(c) 15 Ont. App. R. 573.

(d) 13 O.R. 520.

Dear Sirs,—I hereby request and authorize you to retire and charge to my account with your company a note made by you, indorsed M. Wright, discounted in the Ontario Bank, and due on or about the 7th September, for \$5,718.60; also a note made by you indorsed by said Wright, discounted in said bank and due on or about the 7th October next, for \$5,312.18; also a draft made in your name of F. McElderry, of Montreal, discounted in the Merchants Bank here, and due on 28th September next. The said notes and drafts were discounted for my accommodation, and the proceeds applied to my own use, and your company should pay no portion thereof.

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The last mentioned draft was the one in question in this action.

Mr. Bellhouse, who was acting manager of the plaintiffs, in his evidence in answer to the question: "Who next called in to see you about the bill?" stated, Mr. Lucas came in on the 27th, the day the bill got back. He asked to see this bill. He said, "You hold a bill on McElderry for \$2,760," and asked to see it. Mr. Lucas examined the bill very critically, both back and front. Seeing him examine it so carefully I asked him:—Is there anything scaly (or words to that effect) in the bill that you are examining so carefully? He did not reply directly, but he looked at it again and ran his thumb along the signature and said, "Ben is not usually so shaky." (Mr. James W. Young, the defendant, was usually called Ben). "I told him the bill was recalled at the request of Hamilton Young, and I think as he went out of the office he said he would call in a day or two to see if the bill was taken up. I do not recollect his saying anything else."

The trial judge was of the opinion that the defendant Lucas, when he "critically examined" the bill, knew that Hamilton had signed the name of J. M. Young without authority, and that it was a forgery, and that it was a mere pretence when he said, "Ben is not usually so shaky." At the time when he said that he would call in a day or two to see if the bill was taken up, there was a very considerable sum of money standing to the credit of Hamilton

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Young in the books of the company, and as he was specially authorized by the letter of the 25th August to apply a portion of it in retiring this draft, it rested with himself and James M. Young whether the bill was taken up. Mr. Bellhouse, the manager, when examined with respect to his interviews with James M. Young, in answer to the question, "Whom next did you see on the subject of the bill?" said:

Mr. James M. Young. He came in a few days afterwards, two or three days after, I should judge. He asked to know the amount of Mr. McElderry's bill. He was standing in the manager's office. I was present. He looked closely at the bill, and examined it very carefully, and I said to him, "Will you send me up a cheque for that?" and he looked at his watch and said it was rather late to-day to get up a cheque in time, but he would send me one up on the following day. I said that would do.—Q. Did the cheque come?
 A. It did not.

The Divisional Court held that the defendants had by their conduct precluded the plaintiffs from proceeding criminally against Hamilton Young at a time when they had monies of his in their hands which he had authorized them to apply for the purpose of taking up the bill in question, and that the defendants were estopped as respects the plaintiffs from denying their liability.

In the Court of Appeal it was held that the plaintiffs had neither pleaded nor proved that they had suffered any injury by reason of the conduct and language of the defendants, and were, therefore, not in a position to claim against the defendants estoppel by representation. The Court of Appeal also held, following *Brooke v. Hook(e)*, and *Banque Jacques Cartier v. Banque d'Epargne(f)*, that an act which can be ratified must be one pretended to have been done for or under the authority of the party to be charged and that a forger does not pretend or act for another, but personates the man whose signature he forges, or pretends that the signature is his signature, and that the act of the forger not being an act professing to have been

(e) L.R. 6 Ex. 89.

(f) 13 App. Cas. 111.

done for or under the authority of the person sought to be charged, is incapable of ratification.

Christopher Robinson, Q.C., and E. Martin, Q.C., for appellants. A forged note is capable of ratification so as to make a person civilly responsible. We refer to *McKenzie v. British Linen Co. (g)*; Daniel on Negotiable Instruments (2 ed.), secs. 1351, 2, 3; *Greenfield Bank v. Craft (i)*; *Bartlett v. Tucker (j)*; *Casco Bank v. Keene (k)*; *Union Bank v. Middlebrook (l)*; *Howard v. Duncan (m)*; *Pratt v. Drake (n)*; *Brooke v. Hook (o)*; *Ashpitel v. Bryan (p)*; *Wilkinson v. Stoney (q)*.

They also contended that the defendants by their conduct were estopped from disputing their liability on the bill and cited *Westloh v. Brown (r)*; *McKenzie v. British Linen Co. (g)*; *Hevey's Case (t)*; *Levinson v. Young (u)*; *Wellington v. Jackson (v)*; *Lindus v. Bradwell (w)*.

D'Alton McCarthy, Q.C., and Bruce, Q.C., for the respondents, cited Banque Jacques Cartier v. Banque d'Epargne (x); *Carr v. London & N. W. Ry. Co. (y)*; *Simm v. Anglo-American Telegraph Co. (z)*; *Walker v. Hyman (a)*.

SIR W. J. RITCHIE C.J.—This was an action brought by the indorsers of a bill of exchange for \$2,760 alleged to have been drawn by the defendants trading under the name of The Hamilton Cotton Co., *per J. M. Young*, on F. Mc-

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| (g) 6 App. Cas. 82. | (r) 43 U.C.Q.B. 402. |
| (i) 4 Allen 447. | (t) 1 Leach C.C. 232. |
| (j) 104 Mass. 336. | (u) 1 Times L.R. 571. |
| (k) 53 Maine 103. | (v) 121 Mass. 157. |
| (l) 33 Conn. 95. | (w) 5 C.B. 583. |
| (m) 3 Lansing, N.Y. 174. | (x) 13 App. Cas. 111. |
| (n) 17 U.C.Q.B. 27. | (y) L.R. 10 C.P. 307. |
| (o) L.R. 6 Ex. 89, at p. 92. | (z) 5 Q.B.D. 188. |
| (p) 3 B. & S. 474, at p. 492. | (a) 1 Ont. App. R. 345. |
| (q) 1 Jebb & S. (Ir.) 509. | |

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Elderry & Co., dated June 25th, 1883, payable three months after date to the order of the drawers. The defences pleaded were that the bill of exchange was forged, or that it was discounted in fraud of the defendants. The cause was tried without a jury and resulted in establishing the defence of forgery pleaded by defendants, and the action was dismissed. The Court of Appeal affirmed the finding as to the forgery.

It was claimed by the plaintiffs that the bill though forged had been ratified by the defendants and they were estopped from relying on the defence of forgery. We cannot give effect to that contention unless we are prepared to reverse the principle established by the Privy Council in the case of *La Banque Jacques Cartier v. La Banque d'Epargne* (x), where it is said

that acquiescence and ratification must be founded on a full knowledge of the facts and in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given, as against the party, by his acquiescence in, and adoption of the transaction.

The Court of Appeal has since decided, in the case of *Barton v. London & North Western Ry Co.* (y), that fraud or breach of trust can be ratified, but forgery cannot, and if so it is clear that this appeal must be dismissed. Even if I thought differently I could not reverse the decision of the Privy Council and that of the Court of Appeal. I can see a very good reason why parties should not be allowed to ratify a forgery.

I see no reason for disturbing the judgment of the Court of Appeal and think the appeal should be dismissed.

STRONG J., was to dismiss the appeal with costs.

(x) 13 App. Cas. 111, at p. 118.

(y) 62 L.T. 164.

FOURNIER, GWYNNE and PATERSON JJ., concurred.

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Appeal dismissed with costs.

Solicitors for the appellants: *Martin, Kittson & Martin.*

Solicitors for the respondent: *Bruce, Burton & Bruce.*

1889 *Oct. 23, 24, <hr/> 1890 *Mar. 10. <hr/>	PATRICK O'BRIEN, JEREMIAH O'BRIEN AND THOMAS O'BRIEN (PLAINTIFFS).....	}	APPELLANTS;
	AND		
	JOHN O'BRIEN (DEFENDANT).....		RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.

*Sale of goods—Set-off—Debtor and creditor—Partnership—Evidence
—Creditor's books of account—Admissibility—Practice—New trial
—Reducing verdict in lieu of new trial.*

The plaintiffs were partners engaged in getting out timber for the defendant during three years ending 1882, and on the transaction were entitled to be paid by the defendant \$3,427.05, and brought their action to recover the same. During 1883 and 1884 goods were sold and delivered by the defendant to the plaintiff P. O'B. to an amount exceeding the plaintiffs' claim against him. The defendant filed a set-off claiming that the goods sold to P. O'B. after 1882 were sold for and on behalf of the partnership. The plaintiffs claimed that the goods were sold to P. O'B. personally. At the trial defendant's books were placed in his hands by his counsel to refresh his memory as to the set-off. Plaintiffs' counsel cross-examined him on the books of account for the purpose of shewing that the entries during 1883 and 1884 were charged to the plaintiff P. O'B. personally, and defendant's counsel in reply examined the defendant on the books to shew that some partnership entries prior to 1882 similarly appeared charged to the plaintiff P. O'B. The trial judge, in charging the jury, directed them to inspect the books for the purpose of testing the defendant's account of the transaction. The jury found for the defendant. Plaintiffs moved for a new trial on the ground that the trial judge had allowed the defendant's books to go in evidence to support his claim that the plaintiffs were partners. The full court ordered that there should be a new trial if the defendant refused to reduce his verdict on the set-off by \$1,200. On appeal by the plaintiffs to the Supreme Court of Canada:—

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

Held, Strong and Gwynne JJ., dissenting, that the appeal should be dismissed with costs.

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Held, per Patterson J., that the books having been put in evidence by the plaintiffs to shew the change in the defendant's mode of dealing with them, after 1882, which indicated a recognition by the defendant of the partnership having ceased, it was proper for the defendant, for the purpose of rebutting this inference, to exhibit the earlier accounts to support his assertion that the same mode of bookkeeping had prevailed through all the years, and although there were some expressions of the trial judge which were susceptible of the construction that the jury were at liberty to inspect the books for the purpose of determining whether or not there was a partnership, after 1882, yet the jury was probably not misled thereby.

Held, per Patterson, J., that upon a motion for a new trial in an action for goods sold and delivered it is open to the court to refuse a new trial, although satisfied that the findings of the jury as to some of the items of the account are not supported by the evidence, if the successful party consents to have the verdict reduced to the proper amount.

Held, per Gwynne J., dissenting, that the practice of refusing to grant a new trial upon condition of the party in whose favour the verdict has been rendered by a jury agreeing to accept a reduced amount named by the court has always been confined to cases of excessive damages only.

APPEAL from a judgment of the Supreme Court of New Brunswick (*a*), Wetmore J., dissenting, which ordered a new trial unless defendant consented to a reduction of verdict on the set-off.

This action was brought to recover the amount of three accounts, stated as follows: October 19th, 1880, \$710.53; October 3rd, 1881, \$422.56; and September 28th, 1882, \$2,293.96. The defendant pleaded never indebted and a set-off. On the trial, which took place before Tuck J., at the Northumberland Circuit in September, 1885, it appeared that the plaintiffs, Patrick, Jeremiah and Thomas O'Brien, had worked together as partners, getting out lumber for the defendant, John O'Brien, and purchasing their supplies from him, during the three lumbering seasons

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ending in September, 1882. At the close of each year's operations, after the lumber was all got to market in the fall they settled accounts with the defendant, which were the three accounts stated for the recovery of which this action was brought. The accounts stated were not disputed by the defendant, but he alleged that after the last settlement the plaintiffs, as co-partners, continued to deal with him, and incurred the debt claimed in the set-off. The plaintiffs, in rebuttal, gave evidence that they dissolved their connection with each other, immediately upon the settling of the last account stated, in September, 1882; that the defendant knew it; and that the set-off claimed against them was for supplies afterwards furnished to Patrick O'Brien alone, and chiefly in an entirely new business of shop-keeping, with which the other plaintiffs, Jeremiah and Thomas O'Brien, had nothing whatever to do; that the plaintiff, Patrick O'Brien, worked in the woods for the defendant, the year following the dissolution of the partnership between the plaintiffs and that Jeremiah and Thomas O'Brien were in no way concerned with the operation for which the supplies claimed in the set-off were advanced, and that Patrick O'Brien alone was liable to the defendant for them.

During the trial the defendant's books were used in the examination of the defendant, being in his hands to refresh his recollection, and, in course of the examination, counsel for plaintiff drew attention to the fact that in the books the goods were charged against Patrick O'Brien alone. To explain this, defendant pointed out that charges were similarly made against Patrick O'Brien alone in the period from 1879 to 1882, when the plaintiffs were admittedly in partnership.

In his charge to the jury, the trial judge, amongst others, made the following observations:

“The learned counsel for the plaintiffs makes some strong observations as to the way these accounts were kept over this period of years, and that is entirely a matter for

your consideration. You will have the accounts, and I suppose they will not object to the books, or the portions of them shewn in court, to shew how these accounts were kept. You will see how these accounts were kept. You will see how they were kept from 1879 to 1882, and 1882 to 1884. Is John O'Brien dealing differently with these parties from 1882 to 1884 than what he did from 1879 to 1882? And does he thereby shew that he meant to keep a different account from 1882 to 1884 than what he kept from 1879 to 1882? It is for you to inspect the day-book, and see how the account is headed in the different periods. See if you find from 1879 to 1882, Patrick O'Brien & Bros. at any time in the day-book, or P. O'Brien from 1882 to 1884, or is it all P. O'Brien? These are matters entirely for your consideration in determining whether these parties were in partnership during these latter years or not. At all events, it seems mostly in the ledger between 1879 and 1882, P. O'Brien & Bros., and yet I think it is somewhere P. O'Brien. There is this point revealed at this trial, that as far as this business is concerned, John O'Brien deals with Patrick, and not with Jeremiah and Thomas, and one can very readily see why that would be, even in the manner they give their testimony. The want of intelligence on the part of his brothers would shew why his dealings would be with Patrick. All the agreements would be made with Patrick; all arrangements with reference to lumber would be made with Patrick; and you can readily understand that he would consider Patrick as the main man. Patrick would speak of it as his transaction. But then you have, on the other hand, the accounts under which the plaintiffs claim in this action, those three settled accounts, but are there made out 'P. O'Brien and Bro. to John O'Brien,' but the accounts for 1882-1883 and 1883-1884 are made out 'P. O'Brien to John O'Brien.' Take all these things into your consideration and determine what bearing, if any, they have upon the case. In enabling you to arrive at a conclusion in regard to this partnership, you ought to give this last point its fair and proper weight."

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This portion of the charge was objected to on the ground that the jury were not entitled to consider the way in which the books were kept as bearing upon the question of partnership, but the majority of the court below held that "what the learned judge said to the jury as to the heading of the accounts in the different periods from 1879 to 1884, in the defendant's books, and as to the entries being sometimes 'P. O'Brien & Bros.' and sometimes 'P. O'Brien,' being matters for their consideration in determining whether a partnership existed or not from 1882 to 1884, was said, not with a view of telling the jury that thereby a partnership might be established, but rather that it was one of the circumstances that might be considered by them in determining whether the parties were or were not in partnership from 1882 to 1884; that so far as the account rendered 'Patrick O'Brien to John O'Brien' was concerned, that that was some evidence that no partnership existed, but that no inference should necessarily be drawn against the defendant of there not being a partnership by reason of his having made some entries between 1882 and 1884 charging P. O'Brien alone, because he had between 1879 and 1882, when there was an admitted partnership, kept his books in the same way and make like entries."

The trial judge in his judgment in the full court stated that, after having examined the stenographer's report of the trial and his own notes, he thought the evidence as to the sale and delivery of items amounting to \$1,209.50 was insufficient and that there should be a new trial unless the defendant consented to a reduction of his balance by that amount on or before the first day of the Easter Term then next.

From this judgment the plaintiffs appealed to the Supreme Court of Canada.

Gregory, Q.C., appeared for the appellants.

Gilbert, Q.C., appeared for the respondent.

SIR W. J. RITCHIE C.J., and TASCHEREAU and PATTERSON JJ., were of opinion that the appeal should be dismissed with costs, whilst STRONG and GWYNNE JJ. considered that it should be allowed and a new trial granted.

The only reasons handed down were those of Gwynne and Patterson JJ.

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GWYNNE J.—This appeal must, in my opinion, be allowed and a new trial be ordered to take place between the parties.

The action is brought by Patrick, Jeremiah and Thomas O'Brien, plaintiffs, against John O'Brien, upon three several accounts stated between the parties in the years 1880-1 and 2 respectively.

The plaintiffs' brother Michael, who can read and write and keep accounts, was called by them to prove the accounts stated. By his evidence it appeared that the three plaintiffs were engaged in working together in the woods getting out lumber for the defendant in the winters of 1879 and 1880, of 1880 and 1881, and of 1881 and 1882. In the month of October, 1880, an account was produced by the defendant purporting to shew a synopsis from his books of a debit and credit account of the operations of the then past year, which account was headed "Messrs P. O'Brien & Bros. To John O'Brien, Dr.," and purported to shew a balance "due P. O'Brien and Bros. of \$543.21." This account the witness proved to be in the handwriting of the defendant. Patrick O'Brien could sign his name, but neither of the other plaintiffs could read or write, and Michael, therefore, acted for them at the stating of the account. In the account rendered he discovered two errors, of \$7.32 and \$160 respectively, against the plaintiffs, which sums being added to the \$543.21 made the balance then due to the plaintiffs by the defendant to be \$710.53. In October, 1881, a like account was rendered by the defendant to the plaintiffs, also headed "Messrs. Patrick O'Brien & Bros. to John O'Brien, Dr." containing a short debit and

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credit account for the year and shewing on the 3rd October, 1881, upon the operations of that year a balance "due P. O'Brien & Bros." of \$422.53.

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So in like manner an account was produced by the defendant in the month of October, 1882, containing a like debit and credit statement of the operations of the year then closed headed "Patrick O'Brien & Bros. to John O'Brien, Dr.," and shewing upon the operations of that year a balance "due P. O'Brien & Bros." of \$2,293.96.

These three items, amounting together to \$3,327.05, constituted the plaintiff's claim, and upon proving the above accounts stated their case closed. For the defence the defendant gave evidence on his own behalf and upon his examination in chief he stated that he had been dealing with the three brothers, the plaintiffs, since 1878-9 in lumbering operations, that they went on dealing together for the three years mentioned in the evidence given on behalf of the plaintiffs, that after the last balance was struck in 1882 they lumbered the following year, and that they commenced right away to get supplies from him again, that he supplied them throughout the winter; that in 1884 they did not lumber; that they were then getting bark and sleepers to market; that during the time they were lumbering and working on bark they went on getting supplies from him; and that from the time of the settlement in 1882 until the end of the year 1883 he got no intimation from any of the plaintiffs that they were not in partnership; that in fact the first intimation he had that they were not, was given to him by their attorney in the action, Mr. Tweedie, in the fall of 1884; that in the spring of 1883 they opened a store at Rogersville for which the defendant supplied goods, the price of which constituted a large part of his set-off. Upon his cross-examination an account was put into his hand which he admitted to be in his handwriting and which he stated to have been an account rendered by him in 1883 for the operations of that year. This account was headed "Mr. Patrick O'Brien to John O'Brien, Dr.," and com-

mencing in October, 1882, and ending the 12th December, 1883, claimed a sum of \$16,021.02 as the gross amount due to the defendant. The items of this account are the same as those contained in the defendant's set-off up to the 12th December, 1883. Referring to the settlement of 1882, he said that Jeremiah did not say anything particular at that time, and that neither did Thomas; that the transaction was done by Patrick and Michael, the former doing the talking and the latter the figuring; that Jeremiah did not on that occasion ask defendant for his balance; that he did in the fall of 1884; that in 1882 he might have asked for \$5 or \$10 or \$20, but that he did not ask for his share of the account; that he, the defendant, did not tell him to come back in the morning and that he would give him some; that he might have told the defendant that he was not going into the lumber business any more; that he did not tell the defendant distinctly that he would not have anything to do with it; that he might have said to "gas" defendant into giving a little bigger price (but he did not say that there was any conversation passing as to price). The defendant would not say that Jeremiah did not say anything upon the subject. He would not deny that he did say something about it. He said that he could not deny that he did say something about it, but that he did not remember exactly what Jeremiah did say, and that it did not amount to much; that he did not think Jeremiah came back next morning; that he had no recollection of his having done so, and that neither at the settlement, in 1882, nor upon any occasion except one after that settlement did he ask the defendant for the balance due to him; that Thomas never made any claim, and that Patrick did not say that he would go on for himself. He said further that the plaintiffs opened a store at Rogersville, but he added that the only way he had any knowledge that the store business was a partnership business was that the plaintiffs were dealing together and working together. The defendant sent large quantities of goods to this store, goods, as appeared by the set-off, not

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suitable for persons lumbering in the woods, but suitable for a general country shop, and he said that on the 23rd December, 1883, this shop account was over \$16,000. These shop goods were addressed to "Patrick O'Brien, Rogersville Station." During the examination of this witness he was permitted to refer to his books of account for the purpose of shewing to the jury that in the previous years he had occasionally entered goods to Patrick alone, which were taken into account on the statement of accounts between the defendant and the plaintiffs in 1880, 1881 and 1882; the object being to get rid of the effect of the account kept in defendant's books since October, 1882, having been with Patrick alone; this evidence was objected to by the learned counsel for the plaintiffs, and as its reception constitutes the basis of an objection of misdirection taken to the learned judge's charge I shall have occasion to refer to it by and by; for the present it is sufficient to say that the result of the inspection of the defendant's books which was thus permitted was that it appeared that occasionally items were entered in defendant's books as charged to Patrick alone, in the years 1880, 1881 and 1882, but that the greater part of the items charged in those years were entered to the account of "Patrick O'Brien and Brothers," and that in this latter form the accounts, which were stated and settled in each of those years, were rendered, while subsequently to the settlement in October, 1882, the only account kept in the defendant's books appeared to be with Patrick O'Brien alone, and such was the account rendered by the defendant to Patrick in December, 1883. In answer to the defendant's claim of set-off, and for the purpose of shewing that the plaintiffs, Jeremiah and Thomas, had nothing to do with it, Jeremiah O'Brien was called, and swore that on the occasion of the settlement in October, 1882, he asked the defendant for his share, telling him that he would work in partnership no longer, and that in reply the defendant said to him that he could not give it to him that evening, whereupon Jeremiah asked him

“when can you?” to which the defendant replied: “Maybe I give it to you in the morning,” and Jeremiah said that he waited until the morning when the defendant told him that he could give him no money. Jeremiah said further that after that he never did work in partnership with his brothers, that he worked with them, but not in partnership; that he had nothing whatever to do with the bark and sleeper business further than that he worked at it occasionally; that he never had anything to do with the store or with the goods got for the store, or for bark or for sleepers; that he knew nothing about the store and never gave any person any authority to get goods in his name; that he had nothing whatever to do with the defendant from October, 1882, to 1884, or with contracting the account put in as a set-off; that he worked for Patrick in the winter of 1882-3 and got some pay from him out of his store at Rogersville; and that he got some brogans from the defendant, but on Patrick’s order. Thomas O’Brien was also called, and swore that they were a long time settling up in October, 1882; that Patrick was doing a good deal of talk; that after the balance was struck there was something said about the balance; that he then told the defendant that he, Thomas, would work no longer in partnership, and that he wanted his share; that the defendant said that he could not pay him; that he was not able, but that he would give witness as much as would take him home, to which Thomas replied: “I told him we had been working long enough, that all we had every year was a balance coming, but no money.” He swore, also, that after that settlement he no longer worked with Patrick and Jerry; that the following winter the work was carried on by Patrick alone for the defendant; that he, Thomas, worked in the woods a part of the winter for Patrick, for which he got in part payment some goods out of Patrick’s store: that he had nothing whatever to do with the store, nor had he any interest in it, nor in the bark or sleeper business; that in the spring of 1883 he worked sometimes at peeling bark and sometimes at sleepers, but

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for and by the direction of his brother Michael; that he had got some money and goods from the defendant subsequently to October, 1882, but that was upon the orders of Patrick and Michael respectively, to the latter of whom the defendant owed some money; that in the summer of 1883 he was rafting logs for Patrick and afterwards running a threshing mill; that he never was in partnership with any person in the bark or sleeper business.

Patrick O'Brien was also called, and from his evidence it appeared that the plaintiffs had always differences with the defendant over the statement of their accounts in 1880, 1881 and 1882. These accounts were always kept by the defendant, and Patrick always complained of their incorrectness as they appeared entered in defendant's books. At the last settlement in October, 1882, they had according to Patrick's account of what passed, considerable quarrelling before they could arrive at a statement of the account, Patrick complaining of what he insisted were erroneous charges, over-charges and double charges in the defendant's books, over which entries Patrick got very cross, believing, as he says, that the defendant was robbing them. After mentioning some of his objections to the account as kept by defendant, Patrick said that he said to the defendant on that occasion in October, 1882.

I will quit, I will have no more to do with you. Pay us all and let us go about our business. So I walked out of the office and walked round a piece and he came and fetched me back. After I came into the office, says John O'Brien, there is some \$2,200 and odd dollars coming to you. I said pay me and let me go about my business; he gave me about enough to take me home; that he said was all he was able to do, Jerry and Tom talked pretty cross. Tom said he was going to quit and required the defendant to pay him off. Jerry told him he was going to work no longer and to pay him off.

Patrick and Michael then left together. Patrick said further that about three weeks after he saw the defendant and told him that he was going in logging for himself and told the defendant to send him some goods; that they then had a conversation about logs; that Patrick told defendant

he was going to get out some logs and that he would want \$7 a thousand for what he should get out; that he could not say all that passed between them, but that he thinks he told the defendant that he was going up Black River if he could get the ground from one Morrison, who had promised to let him have it. He says that the defendant seemed to be very keen to get him into the woods; that he promised to supply him with goods as cheap as he could get them anywhere else, and that he agreed, as Patrick understood him, to give the \$7 a thousand for such logs as he, Patrick, should get out. The result of this conversation, he says, was that he did go into the woods and got out lumber at Black River for the defendant, and he admitted that the defendant sent him goods to Rogersville Station, which he had promised to let him have from his store as cheap as he could get the same goods anywhere else, but he disputed the correctness of the account rendered for the goods supplied, both as to the quantities delivered and the prices charged; and he denied that Jerry and Tom were in partnership with him in any of the works in which he was engaged subsequently to October, 1882, but he admitted that they worked for him when he wanted them to do so. He said that the bark business in which he was engaged in 1883 was under a contract he had with one Miller (who also testified to the same effect); he admitted that the defendant had furnished him with supplies while he was engaged in this bark business, but he denied that his brothers, Thomas and Jeremiah, or either of them, had any interest in this bark contract, or in the getting supplies for it, and he said that he had paid the defendant large sums of money for supplies furnished to him while he was engaged in getting out this bark.

Michael O'Brien was also called and testified that he was present at all the three statements of account between the plaintiffs and the defendant in 1880, 1881 and 1882. He said that at the last statement in October, 1882, they all three told the defendant that they were not going to do any more work in partnership. Patrick said that he did not

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get his rights from the defendant; that, in fact, he thought he was robbed by him, and that he would have nothing more to do with *it*; *him* I presume was meant; he added that Tom said he would work no more in partnership; Jeremiah also said the same, and he demanded his money from the defendant in Michael's presence, to which demand the defendant replied that he could not pay him then, but told him to come in the morning. He said, further, that the plaintiffs were not afterwards, to his knowledge or belief, in partnership in any work. As to the bark business he swore that in 1883 it was conducted by Patrick alone, and in 1884 by Michael himself alone, and in his own name; that Patrick had nothing to do with the sleepers; that they were got out by Michael himself; that this had been a business in which he had been engaged for some time on his own account; that neither Tom nor Jerry had anything to do with either this bark or sleeper business save that they worked at it a little, Tom for Michael and Jerry for Patrick; that Tom and Jerry both got a lot of stuff out of the store on account of their work. He said also that much of the goods charged for in the defendant's account, produced by way of set-off, was supplied by the defendant specially for the bark business, and, also, that large quantities of the goods charged for in the same account were supplied by the defendant for the store business which he said that he, Michael, was himself running for Patrick, while the latter was engaged in getting out the bark in 1883. Patrick, he said, furnished the goods for the store and he, Michael, attended to it for him.

Now, in reply to this evidence, the defendant was himself recalled, and while he said much in vindication of the honesty of his dealings and of the correctness of the accounts kept by him he did not say a word in contradiction of what Patrick had said in relation to the conversation between him and the defendant about three weeks after the settlement in October, 1882, save only that he did not promise to give Patrick \$7.00 per thousand for the logs to

be gotten out. He admitted the interview spoken of by Patrick, and that in it Patrick had asked \$7.00 per thousand, but he denied that he promised to give that sum. He said that on the contrary he refused to give it, and said that he would give only what should be the market price in the following spring.

Now, this being the evidence, it was established without contradiction that the contract whatever it was which was entered into by the defendant with Patrick after the statement of account, in October, 1882, was made with the latter alone, and about three weeks after the defendant had been informed by all of the plaintiffs that they would work no longer together in partnership. It was not contended or suggested that either Thomas or Jeremiah was present when the contract was entered into, nor was there any evidence offered to the effect that it had subsequently been communicated to them or that they had ever become parties to it. The positive uncontradicted evidence was that as matter of fact no joint interest or liability whatever existed between Patrick and his brothers, Thomas and Jeremiah, in respect of any of the matters comprised in the defendant's set-off; that no partnership existed between them; that none of the goods charged for in that account were supplied to, or upon the order of Thomas or Jeremiah; that they had no interest whatever in the store, to supply which the greater part of the goods were furnished. Indeed, the defendant himself admitted that the only reason he had for supposing Thomas and Jeremiah to be in partnership with Patrick in respect of the store was that they were working together. The defendant having failed to connect Thomas and Jeremiah by any direct evidence with his set-off account claimed the right to hold all the plaintiffs jointly responsible to him for the amount of it solely upon the ground that the plaintiffs had been jointly concerned in the contracts which he had made with them for cutting and getting out logs in 1879, 1880 and 1881. In short, his contention was that because of their having been

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jointly parties to, and interested in, these three contracts with the defendant he had a right to regard them as being in partnership together not only in respect of the contract made between Patrick and the defendant, in 1882, for getting out logs for the defendant, but also in respect of all other work in which Patrick was engaged in 1883 in getting out bark for Miller, or otherwise, and for the purposes of which work the defendant had furnished him with supplies and also in respect of the general store opened by Patrick in 1883, and to which the defendant had, upon Patrick's orders furnished goods. This seems to have been the view also which was taken by the learned judge who tried the case, for he directed the jury to find for the plaintiffs only in case they should be of opinion that "the partnership" was dissolved and to find for the defendant upon his set-off account in case they should be of opinion that "the partnership" had not been dissolved.

What is here called "the partnership" consisted solely and simply of the joint interest which the plaintiffs had in the three several contracts entered into by them with the defendant in the years 1879, 1880 and 1881 to cut and get logs out of the woods for him. These joint contracts so called "partnerships" became terminated or dissolved when the work thereby respectively contracted for in each year was completed, save as to the right of the plaintiffs jointly to receive the fruit of their joint labour. In October, 1882, the last of these contracts or partnerships became *ipso facto* terminated and dissolved upon the statement of account being made and arrived at in that month, save as to the liability of the defendant to the plaintiffs jointly to pay them the unpaid balances still remaining upon the footing of the accounts stated in 1880, 1881 and 1882. Save in so far as was evidenced by these joint contracts made between the plaintiffs on the one part and the defendants on the other, it was not contended or suggested that any partnership had ever existed between the plaintiffs. It was not alleged that they had ever held themselves forth to the world

or to the defendant as joint contractors operating in all of their transactions in partnership, so that a contract made with one should be binding upon all the others as partners. Now that three labouring men, although they should be brothers, who should jointly contract to do such work as these plaintiffs did contract to do for the defendant in 1879, 1880 and 1881, should thereafter, because of their having jointly executed those contracts, be deemed to be partners in all transactions or contracts which one alone should enter into apart from the others, or even in the names of the others which, however, does not appear to have been the case here, and that all should be bound thereby as partners unless and until they should formally announce a dissolution of partnership, would be to extend the law as to the evidence of the formation of partnership, its continuance and its dissolution, beyond anything that is warranted by any decided case or by the common sense of mankind. In the present case, it appears, however, that the defendant, at the time of the settlement in October, 1882, had express knowledge communicated to him by all the plaintiffs that they would no longer work together in partnership; and with this knowledge, three weeks afterwards he entered into a contract with Patrick for work to be done by him and goods to be supplied to him, under which contract, because the plaintiffs had all three jointly contracted with him in 1879, 1880 and 1881, to do certain work for him during the performance of which he had supplied them with goods to enable them to perform their contracts, he seeks to hold all three liable for goods supplied to Patrick not only to enable him to execute his contract with the defendant, entered into in October, 1882, but also for goods supplied to him in respect of work contracted to be done by him for others, and to enable him to execute such work; and also for other goods supplied to Patrick in 1883 to enable him to furnish a general store. When the defendant failed to produce anything by way of evidence (to displace the positive evidence of all the plaintiffs and of Michael, that no partner-

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ship existed between the plaintiffs subsequently to October, 1882, and no joint contract between them and the defendant) beyond the fact that Thomas and Jeremiah had done some work for Patrick in 1883, there was in point of fact, as regards the defendant's set-off, nothing proper to be submitted to the jury, who should have been directed that the onus lay upon the defendant to prove the joint liability of all the plaintiffs to him for the amount of his set-off which he had failed to do, and that, therefore, the plaintiffs were entitled to a verdict for the full amount of their claim which was undisputed, leaving the defendant to his recourse against Patrick alone, with whom alone his contract, whatever it was, appeared to have been made, and to whom were supplied whatever goods charged for in the set-off were in point of fact supplied. The learned judge who tried the case not only directed the jury to find for the defendant on his set-off unless they should find that the plaintiffs had dissolved partnership, but he directed them to look at the way the defendant kept his own books and which he had produced in court, for the purpose of determining by reference to them whether the plaintiffs were or were not in partnership from 1882 to 1884, during the period of the running of the account comprised in the set-off, and which account the defendant had himself opened and kept in his books with Patrick alone. This part of the learned judge's charge has been expressly objected to, for misdirection, and the objection is clearly, in my opinion, well founded. The learned judge in his charge to the jury referring to the defendant's books, which had been shewn in court, said:

You will have the accounts to shew how those accounts were kept. You will see how they were kept from 1879 to 1882 and from 1882 to 1884. Is John O'Brien dealing differently with those parties from 1882 to 1884 than what he did from 1879 to 1882, and does he thereby shew that he meant to keep a different account from 1882 to 1884 than what he kept from 1879 to 1882? It is for you to inspect the day-book and see how the account is headed in the different periods; see if you find from 1879 to 1882 "Patrick O'Brien & Bros.," at any time in the day-book, or "P. O'Brien" from 1882 to

1884, or is it all "P. O'Brien?" These are matters entirely for your consideration in determining whether these parties were in partnership during these latter years or not. At all events (he added), it seems mostly in the ledger between 1879 and 1882 "P. O'Brien & Bros.," and yet I think it is somewhere "P. O'Brien."

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The jury could not fail, I think, to understand this language as conveying to them a direction that they might, from the manner in which the defendant kept his books, infer that a partnership had existed between the plaintiffs from '82 to '84, equally as from '79 to '82. This, however, would not establish a partnership as respects the goods furnished to the store, nor as respects anything but the supplies furnished to Patrick to enable him to get out the logs contracted to be cut for the defendant. But it is difficult to understand upon what principle the plaintiffs, Thomas and Jeremiah, were to be affected by the manner in which the defendant kept his books, or the entries made therein, or to be held jointly liable with Patrick in respect of goods supplied to him in pursuance of a contract made with him alone. What the books shewed was that from '82 to '84 the account kept by the defendant was with Patrick alone. From '79 to '82 he had kept an account with Patrick O'Brien and brothers, and a separate, but smaller, one with Patrick alone. All of those accounts may have been opened and kept in the names of the proper parties, and upon the settlement of accounts in each year between 1879 and October, 1882, the accounts charged to Patrick alone may have been by consent of all the plaintiffs transferred and charged to their joint account, and so included in the defendant's statement of account with the plaintiffs; but whether this be so in point of fact or not it is impossible to conceive any principle upon which the jury could be at liberty to infer a partnership to exist between the plaintiffs from '82 to '84 because they should find in the defendant's books that goods charged to Patrick alone between '79 and '82 had been taken into account upon the statements of account between the plaintiffs and defendant in 1880, 1881 and 1882. Yet the jury must naturally, I think, have

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understood the learned judge's charge to convey such a direction to them.

There is much more of the learned judge's charge which has been objected to, and which, although open, I think, to the objections taken, it is not in the view I have taken, necessary to pronounce judgment upon. There is, however, a point, which, even if a partnership, or joint liability had been established to have existed between the plaintiffs in respect of the goods charged for in the defendant's set-off, would be sufficient to require the case to be sent to another jury. I allude to the manner in which the Supreme Court of New Brunswick have dealt with the verdict as to the sum of \$1,209 in respect of goods of the delivery of which the learned judge who tried the case has expressed the opinion, there was no sufficient proof. The court, I think, erred in refusing to grant a new trial in case the defendant should consent to a reduction of the verdict in his favour, by that amount. The practice of refusing to grant a new trial upon condition of the party in whose favour a verdict has been rendered by a jury agreeing to accept a reduced amount named by the court has been confined to cases of objection taken for excessive damages only. The rule of practice has never, I think, been applied to a case like the present; upon the main point, however, namely, the absence of all evidence to establish a partnership between the plaintiffs, or any joint liability by them to the defendant in respect of the goods charged for in his set-off, the appeal should, in my opinion, be allowed with costs, and a rule for a new trial without costs be ordered to issue in the court below.

PATTERSON, J.—My impression at the close of the argument was that this appeal should be dismissed. I have again considered the case, and I remain of the same opinion, although the views presented by my brother Gwynne, whose judgment I have had an opportunity of seeing, have caused me to be less confident of the correctness of my conclusions.

The objection to the use of the defendant's books as evidence is effectually met by the circumstance that they were first put in evidence by the plaintiffs. The plaintiffs appear to have appealed to the books with the idea that they would shew a change in the defendant's mode of dealing with them after the settlement of 1882, that the later entries would appear to be against Patrick O'Brien without the brothers, and would thus indicate a recognition by the defendant of the partnership having ceased. To rebut this inference it was proper for the defendant to exhibit the earlier accounts in support of his assertion that the same mode of book-keeping had prevailed through all the years. But when the point made by the plaintiffs had thus been neutralized the defendant's right to use his own books as evidence was exhausted. The books might or might not indicate that, after 1882, he had continued to regard the plaintiffs as partners in the same manner as he had done from 1879 to 1882. If they shewed knowledge on the part of the defendant that the partnership had ceased, they would be cogent evidence for the plaintiffs, but if they merely indicated that the defendant was not aware of any change, they would leave the issue of partnership or no partnership untouched.

It is complained that Mr. Justice Tuck gave the jury to understand that weight might be given, in favour of the defendant, on the substantive issue as to the partnership, to the fact that he continued to make his entries in the same way as he had done in the earlier years. There are some expressions in the charge of the learned judge, as reported, which are perhaps susceptible of being so construed, but they do not appear to me to be so intended, nor am I so satisfied that the jury would be probably misled by them as to feel called upon to interfere on that ground with the judgment of the court below. I think we are asked to deal with the shorthand writer's report of the charge in too critical a manner, to almost separate the expressions in question from the context which shews

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that the matter in discussion was the change of the system of book-keeping which the plaintiffs argued had taken place, and to understand the language in a way different from that in which it was understood by those who heard it. I gather this to some extent from the tenor of the judgments delivered in the court below, and from the plaintiffs' motion for a new trial in that court, which does not appear to me to take the position now assumed. The eighth of his eleven charges of misdirection is the one upon this topic. It is worded thus:

(h) In directing the jury to see how the books from 1879 to 1882 had been kept, and then 1882 and 1884, and to consider whether John had dealt differently with them by the shewing of his books from 1882 to 1884 from what he had dealt from 1879 to 1882, and whether he thereby meant to keep a different account from 1882 to 1884 from what he did from 1879 to 1882. Asking them to see if they found from 1879 to 1882 P. O'Brien & Bros. in day-book or P. O'Brien from 1882 to 1884 and directing the jury to give weight to the mode of defendant keeping his books.

I understand this to be a complaint of the direction that the jury might refer to the books to which the plaintiffs themselves had appealed; and although the closing expressions are wide enough to include a complaint that the books were made substantive, and not merely rebutting, evidence for the defendant, yet that meaning can be gathered only by inferring what ought, if it was intended, to have been distinctly expressed. It appears to me simply a repetition, in the form of a charge of misdirection, of the objection to the reception of the evidence; and, consistently with this, we find that while some objections were made by counsel for the plaintiffs at the close of the charge, upon which the learned judge then addressed some explanatory or supplemental remarks to the jury, no objection on the point in question was made.

The reduction of the verdict by disallowing certain items of the set-off is much complained of, but I am unable to see that it is probably open to objection. The reduction of the verdict was done with the consent of the defendant, and it

amounted in effect to holding that, as to those particular items, there was not evidence for the jury. What was done differs in principle from the reduction of a verdict for unliquidated damages with the assent of the plaintiff. If the party charged in an action for a debt, whether he is the defendant or, as here, the plaintiff, objects at the trial that no evidence has been given of certain items of claim, the judge, if he sustains the objection, withdraws those items from the jury or directs a verdict as to them, against the claimant. That is, to my understanding, precisely what the court has done here. It may be that this could not be done without the consent of the claimant, but I know of no principle on which the other party can insist that a new trial shall be granted for the purpose of investigating claims which are in effect abandoned.

In *Belt v. Lawes*(*b*) the power of the court to reduce a verdict for unliquidated damages, with the assent of the plaintiff, and against the will of the defendant who asks for a new trial on the ground of excessive damages, was discussed and formally affirmed by the Court of Appeal. The right of a party to relieve himself from embarrassment caused by an excessive recovery, is further exemplified by the practice of entering a *remittitur damna* on the roll, instances Upper Canada cases of *Jordan v. Marr*(*c*), and *Thomas v. Hilmer*(*d*).

Besides, the matter is after all a matter of practice, with which an appellate court should be slow to interfere when no substantial injustice is done.

The question of partnership or no partnership was one of fact. I cannot say that the court below was wrong in holding that there was evidence for the jury that the dealings on which the set-off was founded were with the three plaintiffs as partners, as the contracts and dealings of the three previous years had been. The evidence may seem to us, who merely read the shorthand writer's note of it and do

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(*b*) 12 Q.B.D. 356.

(*c*) 4 U.C.Q.B. 53.

(*d*) 4 U.C.Q.B. 527.

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not see the witnesses, to preponderate against the defendant's contention, but the jury had the whole matter before them with advantages which we do not possess. There were considerations of much force, which are pointed out in the charge of the learned judge, among the rest where were the two circumstances that the plaintiffs, Jeremiah and Thomas, did work in 1883 to some extent with Patrick, and that they made no demand on the defendant for the money due them from the settlements of 1880, 1881 and 1882. The force of these things, along with the other evidence, such as it was, may have been much or little, but it was for the jury to deal with in view of their appreciation of the testimony on both sides, and with their knowledge, which must necessarily be superior to ours, of the modes of thought and of dealing of people of the class of the parties to this contest.

There is undoubtedly much weight in the remarks of my brother Gwynne on the nature of the partnership in getting out logs, each joint contract being a matter by itself, and the so-called partnership terminating when the season's work was over.

I agree that there is a clear distinction between these contracts and an ordinary commercial partnership, and that many of the rules of law or of evidence touching the latter, including the presumption of its continuance till dissolved in some formal way, as by lapse of time under the terms of agreement, or by some other act of the partners or one of them, may have only a remote application to such a condition of things as that before us. At the same time, I cannot say that the fact of previous joint dealings, whether properly called by the technical term partnership or not, was not proper to be shewn in evidence when the terms upon which the particular dealing in discussion was entered upon were to be decided. This question of the nature of the former dealings and the anomaly of treating them on the footing or with the legal consequence of an ordinary business partnership was not, to my recollection, raised before

us on the argument, and I find no trace of the point having been made at the trial or in the court below. It seems to affect merely the weight of evidence, and does not, in my opinion, call for our interference with the decision refusing a new trial.

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I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *L. J. Tweedie.*

Solicitor for the respondent: *M. Adams.*

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 **Oct. 19, 20. *JOSHUA DAVIES (PLAINTIFF) APPELLANT ;
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¹⁸⁹³
 **May 1. JAMES ELIPHALET McMILLAN (DE- } RESPONDENT.
 FENDANT) }

AND

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Sale of goods by insolvent—Bona fides—Fraudulent preference—Interpleader order—Res judicata—Estoppel—Pleading—Bar to action.

K., a trader in insolvent circumstances, sold the whole of his stock in trade to D., who immediately took possession on the 2nd January, 1888. A few days afterwards the sheriff seized the goods under executions issued upon judgments obtained, subsequent to the sale, by T. B. & Co. and the Bank of B.C. On the 14th January an order was made for the trial of an interpleader issue between D. and T. B. & Co., and the order provided that no action should be brought against the sheriff for the seizure of the goods. Upon the trial of the interpleader issue in the County Court an order was made barring the claimant D. and declaring the bill of sale to him by K. invalid against creditors, and this judgment was affirmed upon appeal to the Supreme Court of British Columbia *in banco*, on the 21st March, 1888. On the 11th January, 1888, D. instituted an action against the sheriff claiming damages for wrongfully seizing, converting and selling the plaintiff's goods. An interpleader order was also made in which D. was the claimant and the Bank of B.C. was defendant, but upon the delivery of the judgment in the other issue between D., claimant, and T. B. & Co., defendants, the court rescinded the second interpleader order, and further ordered that D. be forever barred from prosecuting his claim against the sheriff. D. thereupon abandoned his first action against the sheriff, but instituted a new action against him on the 22nd November, 1888, claiming larger damages for the same wrongs complained of in his first action. On the trial of this cause, the jury found that K. had sold the goods with intent to prefer

*Cout. Dig. 662.

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

some of his creditors but that D. had purchased in good faith and without knowledge of such intention on the part of the vendor and, thereupon, judgment was ordered to be entered for the plaintiff for the sum of \$9,161 and costs. On appeal, the full court of British Columbia reversed this judgment (McCreight, J., dissenting), on the ground that the bill of sale from K. to D. was void under ch. 51, R.S.B.C., being an Act respecting the fraudulent preference of creditors by parties in insolvent circumstances; and secondly, that the judgment in the interpleader issue was *res judicata*. On appeal to the Supreme Court of Canada:—

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Held, reversing the judgment of the Supreme Court of British Columbia, that as the evidence shewed the goods had been purchased by D. in good faith for his own benefit, the sale was not void under the statute respecting fraudulent preferences.

Held, also, that the judgment on the interpleader issue could not operate as a bar to the present action.

Held, further, that, even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case, it appeared that no such estoppel could have been established.

APPEAL from a decision of the Supreme Court of British Columbia reversing a judgment of Chief Justice Sir M. B. Begbie in favour of the plaintiff, and directing judgment to be entered for the defendant.

The plaintiff was an auctioneer and commission agent residing at Victoria. The defendant was the sheriff of the county of Victoria in which shrievalty the city of Victoria was included. One Atwell King was carrying on business in Victoria as a dealer in china, crockery, toys and fancy goods, and being pressed by his creditors obtained one E. M. Johnston to negotiate the sale of his stock in trade, and on the 2nd of January, 1888, a sale was made to the plaintiff Davies, and a bill of sale at the same time executed by King, conveying the property sold in consideration of the sum of \$8,000, and the plaintiff immediately took possession of the goods and the building in which the same were contained.

On the 5th January, 1888, Turner, Beeton & Co., re-

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covered a judgment against King in the County Court for \$327.21 and costs, pursuant to the provisions of sec. 90 of the Consolidated Statutes of British Columbia, 1888, ch. 25, which reads as follows:

“By leave of the court, upon affidavit or other proof upon oath, satisfactory to any county court judge, that the party about to be summoned is about to abscond or defraud any of his creditors, a summons may be made returnable in such time from the service thereof as such judge may direct, and such summons may also issue when the party has absconded. Whenever a summons shall issue under this section the suit shall be deemed and taken to be brought on behalf of all the creditors of the party summoned, and any judgment which may be recovered against the party summoned, and any execution or process in the nature of execution, shall enure accordingly for the benefit of all the creditors of the party so summoned, and such and the like proceedings may be had and taken thereon as upon a creditor’s suit brought in the Supreme Court of British Columbia.”

Execution was issued on the 5th of January, and on the same day Davies gave notice to the sheriff claiming the goods.

On the 6th January, 1888, the Bank of British Columbia recovered a judgment in the Supreme Court of British Columbia against King for \$530 and costs, and on the same day issued execution thereon, and on the 11th January, 1888, Davies gave notice to the sheriff claiming the goods.

On the 13th January, Davies commenced an action against the sheriff to recover \$8,000 for wrongfully seizing the goods, and on the same day the sheriff took out an interpleader summons in the Supreme Court in the case of the Bank of British Columbia against King returnable the next day.

On the 14th January, 1888, the Chief Justice, on the application of the sheriff made an order for an interpleader issue in the Bank of British Columbia against King, which, amongst other things, contained the following provision:

“And it is further ordered that all proceedings in the suit of Joshua Davies against the sheriff be stayed in the meantime and until further order.”

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On the 18th January an interpleader summons was issued out of the County Court in Turner, Beeton & Co. v. King, returnable on the 2nd February.

On the 2nd February, 1888, the interpleader issue in Turner, Beeton & Co. v. King, and Davies claimant, was tried in the County Court by the Chief Justice sitting as a county court judge, when the following questions were submitted to the jury and answers given :

“1. Q. Was the purchase by Davies *bonâ fide* and for his own benefit? A. Yes.

“2. Q. Was the payment by Davies *bonâ fide*, *i.e.*, was the money paid by him to E. M. Johnston as agent for King simply? A. No.

“3. Q. Or did Davies pay to him in order to enable him to prefer Green and Strouss to the other creditors? A. Yes.

“4. Q. Was King at the time in fact insolvent, *i.e.*, without the command of money to meet the demands then actually due from him? A. Yes.

“5. Q. Did King intend to give Green and Strouss a preference over and before his other creditors? A. Yes.

“6. Q. If so, did Davies know it? A. No.

“7. Q. Did Strouss and Green intend to obtain a preference? A. Yes.”

The jury after these answers were read said: “We answer the third question in the affirmative because we say that Davies did not on the 3rd January know that there were any other creditors.”

On the 16th day of February, 1888, the Chief Justice on the above findings delivered judgment in favour of Turner, Beeton & Co., and against the claimant, the present appellant, in which he said: “There will, therefore, be judgment for the defendant. I declare Davies to have no right of property in these goods as against creditors.”

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On the 14th March the appeal of the claimant Davies from the judgment of the Chief Justice sitting as a county court judge in Turner, Beeton & Co. v. King, Davies claimant, was heard and judgment reserved, and afterwards, on the 21st day of March, the appeal was dismissed with costs.

On the 23rd March the Bank of British Columbia applied to the Chief Justice to rescind the interpleader order of the 14th January on the ground that the same facts would be in issue as were decided in the Turner, Beeton & Co. case. The Chief Justice refused the application, whereupon the bank appealed to the full court, and on the 16th April that court gave judgment rescinding the interpleader order and further ordered that the claimant (present plaintiff) be forever barred from prosecuting his claim mentioned and referred to in the affidavits of the defendant of the 14th January, 1888, which set out the writ of summons; and it further ordered that the present plaintiff bring no action against the defendant for anything done by him under the writ of *feri facias* dated the 6th January, 1888, nor for any moneys paid to the defendant by virtue of the order of the 14th January, 1888.

On the 22nd November, 1888, the present action was instituted, in which the plaintiff claimed to recover from the defendant the sum of \$15,000 for damages for wrongfully seizing, converting and selling the plaintiff's goods. The defendant pleaded not guilty by statute, C.S.B.C., ch. 51, sec. 191, and further pleaded, in bar of the action, the order made in the interpleader issue that the plaintiff should bring no action against the defendant for anything done by him under and by virtue of the writ of *feri facias*.

This action was tried by Chief Justice Sir M. B. Begbie and a special jury on the 19th January, 1891, and the following were the questions and answers of the jury:

"1. Was the sale on 2nd January, 1888, made in the ordinary course of business? A. Yes, as far as Mr. Davies was concerned.

"2. Then, if this were not in the ordinary course of business, you will have to come to a conclusion as to whether King was in solvent circumstances on the second day of January, 1888; that is worth 100 cents on the dollars, 20 shillings on the pound? A. He was generally solvent.

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"3. If you are of opinion that he was in insolvent circumstances, did Davies know of it? (Not answered.)

"4. And did King know of it—that is to say, did he really know his financial position, not did he fear it. He may have been afraid that he was insolvent, but you are to decide, and you have a better opportunity after hearing Mr. Mills' evidence and Mr. Johnston's evidence than was afforded in 1888, whether he was in solvent or insolvent circumstances; that is to say, was he worth 100 cents on the dollar, 20 shillings on the pound? A. He knew he was commercially insolvent, but considered he was generally solvent.

"5. Did King intend to prefer any of his creditors, that is to say, not merely as to time, but so as to prevent any of his creditors from being paid in full or perhaps at all? A. Yes.

"6. Did Davies intend that any particular creditor should be so preferred? A. No.

"7. Did Davies intend to buy out and out for himself alone or did he do it in order to assist any creditor or creditors? A. He bought for himself alone.

"8. Did the sheriff levy in regular course and with due discretion—that is, did he proceed regularly in the levying of the sale or with due discretion? A. We are of the opinion that the sheriff after being satisfied in the matter of Turner, Beeton & Co., and the Bank of British Columbia judgments, should have withdrawn and that he acted subsequently without due discretion; we, however, consider that he acted conscientiously.

"9. If the jury find on all these questions in favour of the plaintiff and against the defendant, what damages has the plaintiff sustained? A. We find damages for the plain-

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tiff for \$9,161.00, the moneys in court to form part of this amount."

On the 28th of February, 1891, the Chief Justice directed judgment to be entered for the plaintiff for the sum of \$9,161.00 and damages and costs to be taxed.

On appeal, McCreight J., dissenting, this judgment was reversed. The plaintiff thereupon appealed to the Supreme Court of Canada.

Moss, Q.C., appeared for the appellant.

Christopher Robinson, Q.C., appeared for the respondent.

THE CHIEF JUSTICE (Sir Henry Strong) concurred in the opinion of His Lordship Mr. Justice Gwynne.

FOURNIER J., concurred in the judgment allowing the appeal with costs.

TASCHEREAU J., dissented from the judgment of the majority of the court.

GWYNNE J.—This appeal must, in my opinion, be decided solely upon the contention insisted upon by the defendant, that the decision in the interpleader issue in the County Court case of *Turner, Beeton & Co. v. King*, constitutes a complete bar to the present action.

Whatever collusion there may have been between King's creditors, Gerische, Green & Co. and Strouss & Co. and King himself, to procure King, for their benefit, to make the sale which he did to Davies, of which the other creditors of King might have had reason to complain, Davies does not appear to have been a party to any such collusion. He appears to have acted solely in his own interest, and as a *bonâ fide* purchaser for value. The amount paid by him for the stock of goods purchased appears to have been the fair cash value at the time, and the evidence failed to establish either

that Davies knew of King's circumstances as being insolvent, or that his intention in making the sale was either to defraud his creditors or any of them or to give some or one a preference over others, if that knowledge could prejudice Davies's rights as purchaser and the jury have found that Davies, in making the purchase, had no intent that any creditor of King should be preferred.

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In short, the only conclusion which the evidence in the case and the finding of the jury warrant, is that the purchase made by him was in perfect good faith for valuable consideration actually paid by him and without any fraudulent intent being entertained by him.

Such a transaction cannot, in my opinion, be held to be fraudulent and void without imputing to the statute relied upon an intent in the interest of a vendor to make the courts of justice parties to the committal of fraud upon innocent purchasers for value; and no such construction can be put upon the statute.

Accordingly the learned Chief Justice of British Columbia, who tried the case, rendered judgment for the plaintiff upon the answers of the jury to the questions submitted to them; and, that such judgment is that which was warranted by the answers of the jury to the question submitted to them, upon their findings as to which, the right of the plaintiff to recover in the action depended, assuming the action not to have been barred by the judgment on the interpleader issue in the County Court case of Turner, Beeton & Company v. King, cannot, in my opinion, admit of a doubt.

Then, as to the effect of the judgment on the interpleader issue in the said County Court case, I concur in the judgment of Mr. Justice McCreight, in the Supreme Court of British Columbia, namely, that such judgment cannot operate as a bar to the present action.

To hold that such judgment, from which there is no appeal to this court, as there is from a judgment on an interpleader issue in an action commenced in a superior

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court, could so operate, would give to a judgment of an inferior court of limited jurisdiction the effect of being conclusive in an action in the Supreme Court of British Columbia and in this court, on appeal, in respect of a cause of action wholly beyond the jurisdiction of the County Court to entertain.

The action is one of trespass brought against the defendant for breaking and entering the plaintiff's shop and continuing therein for a long space of time, to wit, for four months, and taking and selling the plaintiff's goods and chattels therein to the plaintiff's damage of fifteen thousand dollars (\$15,000).

The facts of the case appear to be that on the fifth of January, 1888, the defendant, as sheriff, entered the plaintiff's shop and made a seizure and levy on goods therein to the amount of three hundred and seventy dollars (\$370), to satisfy an execution issued out of the County Court of the County of Victoria in British Columbia, at the suit of a firm of Turner, Beeton & Co. against one Atwell King, and placed in the hands of the sheriff to be executed. On the sixth of January, 1888, the plaintiff gave notice to the defendant that he claimed to be owner of the goods so seized and paid to the defendant three hundred and ninety-five dollars (\$395), as security for the judgment debt, interest and all costs, in case the plaintiff should fail to establish his ownership of the said goods, and, thereupon, the defendant then withdrew from the possession of the goods seized under the said writ of execution. On the same sixth day of January, the defendant, as such sheriff, made another seizure of goods in the said shop to the value of five hundred and fifty dollars (\$550) to satisfy an execution issued out of the Supreme Court of British Columbia at the suit of the Bank of British Columbia against the said Atwell King.

These seizures were made upon the contention that the goods so seized were the goods of King, the defendant in the said actions.

The plaintiff having given notice to the defendant that

he claimed that the goods so seized under the said execution at the suit of the bank against King were the goods of the plaintiff, the defendant, upon the fourteenth of January, 1888, obtained an order of the said Supreme Court in the suit of the Bank of British Columbia against King, which order is not produced, but whereby it appears (by a bond by way of security given in pursuance thereof) to have been ordered that, on payment of five hundred and fifty dollars (\$550) into court by the said plaintiff, or upon his giving security to the satisfaction of one of the judges of the said court for the payment of the same amount by the plaintiff according to the direction of any rule or order to be made in the said cause, and upon payment to the defendant of possession money and expenses from the said sixth day of January, the said defendant should withdraw from the possession of the said goods and chattels seized by him under the said writ of execution, and that unless such payment should be made or such security be given the said defendant should proceed to sell the said goods and chattels so seized and pay the proceeds of such sale, after deducting the expenses, and possession money, from the date of the said order into court in the said cause to abide further order, and that the parties should proceed to the trial of an issue in which the said Davies should be plaintiff and the Bank of British Columbia should be defendant, and that the question to be tried should be whether, at the time of such seizure, the said goods and chattels seized were, or any part was, the property of the plaintiff.

Subsequently, the terms of the said order having been complied with by the plaintiff upon his part, the defendant, in compliance with the said order, upon his part, abandoned possession of the said goods seized under the said writ of execution at the suit of the Bank of British Columbia against King.

By a record of the proceedings in the County Court, in the case of Turner, Beeton & Co. against King, it appears that, on the eighteenth day of January, 1888, an inter-

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pleader order issued in that cause, which is not produced to us, but which appears to have been to the like effect as the above order issued in the case at suit of the Bank of British Columbia against King, whereby it was ordered that the parties, Davies and Turner, Beeton & Co., should proceed to the trial of an issue in which Davies should be made the plaintiff and the said Turner, Beeton & Co. should be made defendants, and that the question to be tried should be whether, at the time of the seizure of the goods and chattels seized by the sheriff under the said writ of execution at the suit of said Turner, Beeton & Co. against King, the same or any part of them were the property of Davies.

This latter issue appears by the record of the proceedings in the said County Court to have been tried on the second of February and judgment to have been rendered thereon upon the sixteenth day of February, 1888.

Now, upon the seventeenth and twenty-first of January and upon the third and tenth of February, the third of March and the seventh, tenth, twelfth, seventeenth and twenty-third of April, 1888, respectively, the said sheriff made several other levies upon and seizures of the goods and chattels in the same shop of the plaintiff to the amount of in the whole of about eight thousand six hundred dollars (\$8,600), under divers executions against the said King placed in the said sheriff's hands to be executed, and, upon the tenth, eleventh, twelfth, twenty-fifth, twenty-sixth and twenty-seventh days of April, 1888, he proceeded to sell and sold the same.

It is for these seizures and sales so made upon and subsequently to the seventeenth day of January, 1888, that the present action is brought.

Now, in order to set up the judgment of the County Court upon the interpleader issues in the County Court case of Turner, Beeton & Co. against King, as a bar to the present action, the matter so relied upon as a bar must be specially pleaded by way of estoppel as in *Flitters v. All-*

frey(a), and as the judgment upon that issue could not, upon its face, shew any ground of estoppel of the present action, it would be necessary that the plea should contain suitable averments of what was the precise matter in contestation in such interpleader issue and of what is the precise matter in contestation in the present action so as to raise for adjudication the question of estoppel relied upon by the defendant.

Thus, it was not only necessary to set out what was the issue directed to be tried, namely, whether the goods and chattels seized by the sheriff under execution at the suit of Turner, Beeton & Co. against King were, or any of them was, the property of Davies, but also the particular matter of fact upon which that question of title depended, namely, whether the deed of conveyance by which the goods and chattels so seized had been conveyed by King to Davies was or was not fraudulent as against the creditors of King, and the finding of the jury upon the trial of such issue, and as, at the trial thereof, the jury rendered no verdict against Davies upon such issue, but merely answered certain questions submitted to them by the judge who tried the issue, who, upon the answers of the jury to such questions, afterwards, rendered judgment, it would have been necessary to set out in the plea of estoppel, the questions so submitted and the answers of the jury thereto and the judgment of the judge thereon, and if it should then appear that such answers of the jury did not warrant a judgment to the effect that the said conveyance by King to Davies was fraudulent and void as against the creditors of King and that, by reason thereof, the goods and chattels so seized were not the property of Davies, but that, notwithstanding, the judge who tried the issue, upon such answers of the jury rendered a judgment to that effect against Davies upon such issue, the plea of that judgment by way of estoppel to the present action would be bad in substance and could constitute no bar whatever to the present action.

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Now, we have before us, though not in the form of such a plea by way of estoppel, what were the questions which were submitted to the jury upon the trial of such interpleader issue and the answers of the jury whereby it appears that such answers did not warrant a judgment against Davies in the interpleader issue to the effect that he had no property in the goods and chattels then in question by reason of the conveyance whereby the said goods and chattels were transferred and conveyed by King to Davies having been fraudulent and void as against the creditors of King.

The jury found, as a matter of fact, in answer to the only questions submitted to them upon which the title of Davies to the goods in question mainly depended, that Davies had purchased them from King for his own benefit, and that he had no knowledge of King having had any intention to apply the purchase money paid by Davies for the goods and chattels so purchased by him to some of his, King's, creditors in preference to others.

Another of the questions submitted to the jury appears open to the question whether it was relevant to the issues being tried, but to which I make reference, by reason of the answer of the jury thereto, which was really favourable rather than otherwise to the title of Davies. The jury were asked to say whether Davies paid King the purchase money of the goods purchased by him in order to enable King to prefer two of his creditors, named Green and Strouss, in preference to his other creditors? To which they answered "Yes"; adding that they so answered the question in the affirmative because they said that Davies did not then know that King had any other creditors.

Upon these answers the learned Chief Justice of British Columbia rendered judgment against Davies in the interpleader issue in the County Court case, which judgment was maintained by the Supreme Court of British Columbia, acting as a court of appeal from judgments rendered in the County Court.

The learned Chief Justice, who also tried the present action, and not, as I think, without reason, expressed a doubt of the correctness of his former judgment and, being of opinion that the judgment rendered in the interpleader issue was not a bar to the present action, has rendered judgment for the plaintiff with nine thousand one hundred and fifty-one dollars (\$9,151) damages.

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This judgment, a majority of the Supreme Court of British Columbia has set aside and rendered judgment for the defendant, upon the ground that the judgment in the interpleader issue in the County Court is a conclusive bar to the present action.

The judgment on that interpleader issue, if it had been appealable to this court, could not, in my opinion, have been maintained. Not having been so appealable, the judgment of the Supreme Court of British Columbia was conclusive in the matter of that issue, but, for the reasons already given, it cannot operate as a bar to the present action.

It was also suggested, but scarcely argued, that, by reason of the order made in the case of the Bank of British Columbia against King for the trial of the interpleader issue ordered in that case, the present action cannot be maintained. But that order, rightly or wrongly, was rescinded by the Supreme Court of British Columbia without any trial of the issue thereby ordered, and, therefore, the order in the rescinding order that, notwithstanding that the interpleader issue between Davies and the bank never was tried, no action should be brought by Davies against the sheriff in respect of the seizure made by the sheriff under the execution in the suit of the bank against King, was *ultra vires*, and that order can have no operation as a bar to the present action.

It was, in like manner, suggested that the action of Turner, Beeton & Co. against King in the County Court was brought under the provisions of a statute of the Legislature of British Columbia, viz., ch. 7 of the Statutes of 1885, sec. 53, as amended by ch. 9 of the Statutes of 1887,

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which enacts that, by leave of the court, upon affidavit or other proof satisfactory to any County Court judge, that a party about to be summoned was about to abscond or defraud any of his creditors, a summons might be made returnable in such time from the service thereof as such judge might direct, and that such summons might also issue when the party has absconded and that, whenever a summons should issue under the section, that the suit should be deemed and be taken to be brought on behalf of all the creditors of the party summoned and that any execution or process in the nature of an execution should enure for the benefit of all the creditors of the party so summoned, and that such and the like proceedings might be had and taken thereon as upon a creditor's suit brought in the Supreme Court of British Columbia, and it was further suggested that, under the provisions of this statute, the interpleader issue in the County Court and the judgment therein operated and enured to the benefit of all the creditors of King and constituted a bar to the present action. But what the statute says is that the suit in the County Court and any execution issued therein should so operate and enure, not that an incidental proceeding at the suit of a stranger, such as an interpleader issue ordered to be tried in respect of a matter within the limited jurisdiction of the County Court, should operate and enure to the benefit of all the creditors of the defendant in the County Court case so as to determine the title to property claimed adversely to them to the amount of thousands or hundreds of thousands of dollars in excess of the jurisdiction of the County Court.

The statute is susceptible of no such construction.

Upon the whole, I am of opinion, for the reasons already given, that the appeal must be allowed with costs, and that the judgment rendered in favour of the plaintiff by the learned Chief Justice who tried the case, must be restored with costs.

PATTERSON J.—The findings of the jury in this case must, in my opinion, be taken to conclude the defendant upon the merits.

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King, the debtor, was evidently insolvent in the opinion of the jury, who say that he was commercially insolvent, but considered that he was generally solvent—a distinction which is not unintelligible as made in this and some other cases, but is, I fancy, fitted to sometimes mislead—and that, by the sale to the plaintiff, he made himself generally insolvent.

King was a person in insolvent circumstances or unable to pay his debts in full within the meaning of the Statute (ch. 10, Statutes of British Columbia of 1880). He made the sale with intent to prefer some of his creditors. But Davies, the purchaser, bought for himself alone, and out and out, not intending that any particular creditor of King should be preferred, and in what was, as far as Davies was concerned, in the ordinary course of business, though the jury do not say, and could not say, that the sale by King was a sale in the ordinary course of business.

Under these circumstances, the Chief Justice, Sir Matthew B. Begbie, acted on the rule applied by this court to the construction of cognate statutes of Ontario and Manitoba in holding that the sale was not avoided by the statute.

I struggled against that construction in this court as I had done in the Ontario Court of Appeal, but it is now settled.

Sir Matthew B. Begbie, who tried an interpleader issue between Davies and the creditors of King, called Turner, Beeton & Co. respecting goods seized on an execution, and which may have been some of the same goods now in question, or may not—I am not sure that the fact is brought out very precisely—held that, under the evidence and findings on that issue, the goods then in question were not the goods of Davies as against Turner, Beeton & Co.

I have carefully read the able judgment delivered in

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that case, and I do not doubt that it disposed of the issue correctly.

But I see no sufficient ground for holding, as the appellant invites us to hold, that the validity of invalidity of the sale to Davies of the entire stock of goods was determined by that judgment.

I have looked among the materials before us for a copy of the interpleader order or issue in the case of Turner, Beeton & Co., but have not found a copy. I assume that the issue was in the same form as that in the action of the Bank of British Columbia, which is printed at page 140 of the case, the question being,

Whether, at the time of the seizure by the sheriff, the property seized was the property of the claimant as against the execution creditor?

I am of opinion that we should allow the appeal.

*Appeal allowed and the judgment
of the trial judge restored with
costs.*

Solicitor for the appellant: *Charles Wilson.*

Solicitors for the respondent: *Drake, Jackson & Helmcken.*

NOTE.—On the 29th January, 1894, a petition by the respondent to Her Majesty in Council for leave to appeal from the judgment of the Supreme Court of Canada was granted, but the appeal was never prosecuted.

WILLIAM OSBORNE AND ROBERT }
 BRYSON OSBORNE (DEFENDANTS) . . . } APPELLANTS; ¹⁸⁸⁹
 *May 20, 21.
 *June 14.

AND

MARGARET HENDERSON (PLAINTIFF) . . . RESPONDENT;

AND

JOSEPH H. KILLEY AND WALTER
 MUIRHEAD (DEFENDANTS)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Partnership—Dissolution—New partnership by continuing partner
 —Liability of new firm—Rights of creditors—Trust—Novation.*

A firm consisting of two persons dissolved partnership, the retiring partner receiving a number of promissory notes in payment of his share in the business which notes he indorsed to the plaintiff H. The continuing partner of the firm afterwards entered into a partnership with the defendants and transferred to the new firm all the assets of his business, his liabilities, including the above mentioned promissory notes, being assumed by the co-partnership and charged against him. The new firm paid two of the notes and interest on others, and made a proposal for an extension of time to pay the whole which was not entertained.

Held, reversing the decision of the Court of Appeal (17 Ont. App. R. 456, *sub-nomine Henderson v. Killey*) and of the Divisional Court (14 O.R. 137), Fournier, J., dissenting, that the agreement between the continuing partner and the defendants did not make the defendants trustees of the former's property for the payment of his liabilities, and the act of the defendants in paying some of the notes did not amount to a novation as it was proved that plaintiff had obtained and still held a judgment against the maker and indorser of the notes in an action thereon and there was no consideration for such novation.

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

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APPEAL from a decision of the Court of Appeal for Ontario (a), on equal division in opinion, dismissing an appeal from a judgment of the Queen's Bench Division (b), which reversed the judgment at the trial of Cameron C.J., in favour of the defendants, the Osbornes, and directing judgment to be entered against the said defendants with costs.

The plaintiff by her statement of claim alleged that on or about 14th November, 1881, the defendants, Killey and Muirhead, who had been carrying on business as iron founders under the name of J. H. Killey & Co., dissolved partnership, and said Killey gave his promissory notes for \$8,000 in all to Muirhead in settlement of Muirhead's share in said business of J. H. Killey & Co., and said Killey thereafter carried on the business of J. H. Killey & Co.; that Muirhead indorsed the notes to the plaintiff before they respectively fell due, and the same were at maturity duly presented for payment and were dishonoured by Killey, of which Muirhead had due notice; that Muirhead had not appeared, and final judgment had been signed against him for the amount of said notes and interest; that, on or about 29th February, 1884, defendants Osborne (W.), Killey and Osborne (R. B.), entered into a certain agreement under seal, whereby they mutually agreed to enter into co-partnership from that date as iron founders, etc., under the name of the Osborne-Killey Manufacturing Co., said partnership to continue until a joint stock company should be formed; that said Killey was then possessed of the assets, property and good-will of the business of J. H. Killey & Co., which he agreed to transfer and deliver over to said new partnership as his contribution to the capital thereof, and said Osbornes (W. and R. B.) agreed to transfer and deliver over to said new co-partnership, as their contribution to the capital thereof, the foundry, plant, ships and pro-

(a) 17 Ont. App. R. 456, *sub-nomine Henderson v. Killey*.

(b) 14 O.R. 137.

perty appurtenant thereto, then recently rented or purchased by said Osborne (W.); and it was further provided by said agreement that all liabilities of J. H. Killey & Co. were to be assumed by said new co-partnership and charged against said Killey; that defendants Osborne (W.), Killey and Osborne (R. B.) formed said partnership, and paid certain of the liabilities of said J. H. Killey & Co. they had agreed to pay, and defendants agreed to pay and discharge said notes, and paid interest on one of said notes, and said defendants offered, if extension of time were given, to pay said notes at the rate of one hundred dollars (\$100) per month; that by reason of the promises of defendants plaintiff forbore to bring an action on said notes heretofore; that defendants refused to pay any of said notes, which were all unpaid except \$60 interest for two years on one of said notes paid June 17th, 1884. Plaintiff alleged that all times had elapsed and all acts had been done necessary to entitle plaintiff to be paid said notes and interest by defendants, and before action brought plaintiff demanded payment of said notes and interest, but received no reply to such demand; that if defendants, forming said firm of The Osborne-Killey Manufacturing Co. were not proved to be liable as debtors to plaintiff under the circumstances thereinbefore set forth plaintiff charged, in the alternative, that defendants duly received the assets of said Killey and deducted said debt of plaintiff therefrom, and took credit therefor as a liability assumed to be paid by them; and plaintiff charged that defendants, in refusing to pay plaintiff said debt, were colluding to defraud her, and so to arrange the accounts of said partnership that they might be relieved as between themselves from said liability; and plaintiff claimed that under the circumstances thereinbefore pleaded defendants were estopped from denying their indebtedness to plaintiff, and that in any event plaintiff was entitled to judgment for the amount against defendant Killey, and to a order restraining defendants from parting with the assets set apart to provide for said debt or from

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denying the nature of the accounts between said parties, and that a receiver should be appointed to receive and realize said assets and the share and interest of said Killey in said firm until said debt should be fully paid.

Defendant Killey, by his statement of defence alleged: That the said promissory notes were obtained from him, by said Muirhead, by means of representations made to him in behalf of said Muirhead that the value of said Muirhead's share of the business of the partnership's firm of J. H. Killey & Co. was \$8,000, or more than that sum; that said representation was wholly false, and the share or interest of said Muirhead in said business was at the time of the making of said notes of no value whatever; that there never was any value or consideration for the making or payment of said notes by him, Killey; that plaintiff was not, at the commencement of the action, the lawful holder of said notes, or any of them; that if plaintiff was the holder of said notes, or any of them, she took them after they became due, and with notice of the matters thereinbefore referred to, and always held the same without value or consideration.

The defendants, the Osbornes, by their statement of defence, pleaded the same defences as set up by the defendant Killey's statement of defence, and claimed, in addition, that they were induced to enter into the agreement of 29th February, 1884, by fraudulent representations made to them, on behalf of defendant Killey, that the assets of J. H. Killey & Co. were of much greater value than the same then in fact were; that upon a revision made after 29th February, 1884, of the list of the stock and tools of J. H. Killey & Co., as standing in the books of the firm, it was found that such list was incorrect, and that the assets of J. H. Killey & Co. had been greatly overvalued, and that when correctly valued they would not cover their liabilities, and in consequence of such wrong stock-taking and excessive valuation the defendants Osborne had, at the time of the release thereafter mentioned, paid more than the full value of said assets, and that defendant Killey thereupon

agreed that the defendants Osborne, having been induced to enter into the agreement of 29th February, 1884, by the false representation of value contained in said stock-list, should be released from any further claims in respect to the liabilities of J. H. Killey & Co., and defendant Killey did by deed acknowledge that defendants Osborne had paid the full value of the assets transferred to the Osborne-Killey Manufacturing Co., under said agreement of 29th February, 1884, and did thereby release and discharge defendants Osborne from all claims and demands whatsoever under or in respect of any of the debts or liabilities of J. H. Killey & Co., which might not have been paid by defendants Osborne; that all the property and assets of the firm of J. H. Killey & Co., which had not been previously sold or disposed of, was on 25th February, 1885, transferred by defendant Killey to the Osborne-Killey Manufacturing Co., of Hamilton (Limited), a company duly incorporated under the Ontario Joint Stock Companies' Letters Patent Act, and such transfer was agreed to and confirmed by defendants Osborne, and in consideration therefor defendant Killey received credit for the sum of \$5,585, as a payment upon the shares subscribed for by him in the capital stock of said company; that defendants Osborne did not admit the allegations in the statement of claim; that defendants Osborne denied that they agreed to pay and discharge said notes, or agreed, if an extension of time were given to pay said notes at the rate of \$100 per month, and they said that no such agreement or offer was made by them in writing, or was signed by them or by any person thereto by them lawfully authorized, and they claimed the benefit of the Statute of Frauds with respect to any such agreement or offer; the defendants Osborne further submitted that the statement of claim shewed no privity of contract between them and plaintiff, nor any cause of action whatever against them, and that this action should be dismissed as against them, with costs.

The action was tried before Cameron C.J., without a

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jury, who found that the defendant J. H. Killey & Co. made the notes in plaintiff's statement of claim mentioned, and that the same were indorsed by defendant Walter Muirhead before they became due to plaintiff, for valuable consideration, and that there was no fraud or misrepresentation practised to induce defendant J. H. Killey to make said notes, and that there was due by said defendant J. H. Killey for principal and interest on said notes the sum of \$5,074.17; and he directed that judgment be entered for plaintiff against defendant J. H. Killey for the said sum of \$5,074.17 with costs of suit. He found further, as facts, that the consideration for said notes was the capital or interest of defendant Walter Muirhead in the firm of J. H. Killey & Co., of which said Walter Muirhead was a partner; that after the dissolution of said firm of J. H. Killey & Co., said J. H. Killey carried on business by himself under the firm name of J. H. Killey & Co., from November, 1881, until February, 1884, when he entered into co-partnership with defendants William Osborne and Robert Bryson Osborne upon the terms that said firms should take the assets of said J. H. Killey & Co. and assume and pay the liabilities of said J. H. Killey & Co., among which was the liability of J. H. Killey & Co. on the notes in plaintiff's statement of claim; that afterwards, and after the maturity of the notes payable 24, 33 and 36 months after date, defendants, the Osbornes, as representing the firm of Osborne-Killey Manufacturing Co., paid interest on said notes; and he found that the assets of the firm of J. H. Killey & Co. were sufficient to pay all the liabilities of said old firm of J. H. Killey & Co., including plaintiff's claim, and said defendants, the Osbornes, on behalf of said Osborne, Killey & Co., paid two notes made by J. H. Killey and indorsed by said Walter Muirhead to plaintiff. He did not find that defendants, the Osbornes, made any direct promise to pay the notes in plaintiff's statement of claim mentioned, but until they positively refused the same they did not directly repudiate liability thereon, but merely stated that they had

not moneys at the time to pay with. He dismissed the plaintiff's action against defendants, the Osbornes, with costs, on the ground that they were no parties to the notes sued on, and there was no direct liability to plaintiff, and their liability was to defendant Killey, who did not require them to make the payment.

The Divisional Court reversed the judgment of the trial judge, holding that, although plaintiff might not have been able to maintain an action at law upon the partnership deed between Killey and the Osbornes, although for her benefit, because she was not a party to it, nevertheless this was an instance in which the plaintiff was entitled to treat Killey, who exacted the stipulation in the deed for the payment of his creditors, as her trustee and, through him, to enforce it.

The appeal from this judgment to the Court of Appeal was dismissed upon an equal division of opinion. The defendants thereupon appealed to the Supreme Court of Canada.

Christopher Robinson, Q.C., and *MacKelcan, Q.C.*, appeared for the appellants.

Osler, Q.C. (with him *Lazier*), appeared for the respondent.

SIR W. J. RITCHIE C.J.—I agree with the trial judge that the appellants being no parties to the note sued on there was no direct liability to the plaintiff; that the liability of the appellants is to the defendant Killey, and not to the plaintiff. I do not think J. H. Killey & Co. were trustees for the plaintiff; I think no trust attached on the partnership property of the Osborne, Killey Manufacturing Co.; that there was no transfer of this property with a declaration of trust in favour of the plaintiff or other creditors of the firm of J. H. Killey & Co.; that there was no creation of any trust for the plaintiff, nor was the contract made for the benefit of the plaintiff; it is no more than an arrange-

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ment between the parties for their own benefit and convenience. There is nothing to shew, as in *Gregory v. Williams* (bb), that the money was to be paid out of the produce of this property. This was not by any means like that case of which Lord Justice James said, *In re Empress Engineering Co.* (c) :

It appears quite clear that there was there a transfer of property was a declaration of trust in favour of a third person, which was a totally different thing from the mere covenant to pay money to that person.

The report of the *Empress Engineering Co. Case* contains the following discussion between the court and counsel :

Jessel M.R.—Jones & Pride were not parties to the contract, and were not bound by it. How can they claim the benefit of it? *Counsel for Appellants.*—The circumstances in *Gregory v. Williams* (d) were almost identical with those of the present case.

Jessel M.R.—In that case Sir W. Grant appears to have considered that there was a declaration of trust. I know of no case where, when A. simply contracts with B. to pay money to C., C. has been held entitled to sue A. in equity.

Counsel for Appellants.—In *Touche v. Metropolitan Railway Warehousing Co.* (e), the person for whose benefit the agreement was entered into was held entitled to sue.

* * * * *

Jessel M.R.—In that case the Lord Chancellor finds, as a fact, that Walker was to receive the money as a trustee for the plaintiffs. If you can make out that Jones & Pride are *cestuis que trustent* that alters the case. It appears to me that they are not. The promoters were liable to Jones & Pride, who are simply their creditors. A. being liable to B., C. agrees with A. to pay B. That does not make B. a *cestui que trust.*

* * * * *

Jessel M.R.—In *Gregory v. Williams* (f) it appears that the agreement was that the defendant would "out of the proceeds" of the property, pay what was due to Gregory on the promissory note, and apply the residue, so far as the same would extend, in satisfaction of the defendant's demand, and pay the surplus (in any) to

(bb) 3 Mer. 582.

(d) 3 Mer. 582.

(c) 16 Ch. D. 125.

(e) L.R. 6 Ch. 671.

(f) 3 Mer. 582.

Parker. It was a parol agreement part performed, and it created a trust of property.

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* * * * *
Jessel M.R.—Supposing, however, that there was, it is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract, will make that third person a *cestui que trust*. As a general rule that will not be so. A mere agreement between A. and B. that B. shall pay C; (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to a new agreement the next day releasing the old one. If C. were a *cestui que trust* it would have that effect. I am far from saying that there may not be agreements which may make C. a *cestui que trust*. There may be an agreement like that in *Gregory v. Williams (g)*, where the agreement was pay out of property and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party. So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As Lord Justice James suggested to me, in the course of the argument, a married woman may nominate somebody to contract on her behalf, but when the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract. It appears to me, therefore, that on both the grounds mentioned by the Vice-Chancellor this claim cannot be supported.

James L.J.—I am entirely of the same opinion. I think it is perhaps as well that we should say that *Gregory v. Williams (g)* seems to be misunderstood. When that case is considered with the careful criticism with which the Master of the Rolls has examined it, it appears quite clear that there was there a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person.

I think there was no novation. How could the plaintiff abandon the claim against Killey's separate estate on the notes and adopt the new firm as his debtor and at the same time sue and obtain judgment against Muirhead in the same action as indorser on the note? How can it be said that the debt on the notes was extinguished for a valuable consideration and the claim against the firm substituted? I think, therefore, there was no evidence of novation, no agreement

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on the part of the plaintiff to accept the joint liability of the new firm and discharge the maker and indorser on the notes, no extinguishment of the old contract and creation of a new one. The plaintiff's conduct in renewing the notes, giving notice of dishonour, suing the maker and indorser and the nature of this action is opposed to any such intention. The contract in the notes as regards the maker and indorser is treated as an existing contract. If the original claim was not extinguished, Where was there any consideration to support an agreement by the parties to pay this debt?

I do not think there was money had and received to the use of the plaintiff, but assets of a totally different character from money and to be treated in a totally different way.

Under these circumstances I think the appeal should be allowed and the judgment of the trial judge restored.

FOURNIER J., was of opinion the appeal should be dismissed.

TASCHEREAU and GWYNNE JJ., were of opinion the appeal should be allowed.

PATTERSON J.—This action is brought by Mrs. Henderson, the respondent, who is plaintiff in the action against four parties, Killey, Muirhead, W. Osborne and R. B. Osborne. It is against Killey, as maker of certain promissory notes payable to the order of Muirhead, against Muirhead as indorser of the notes to the plaintiff, and against the Osbornes on grounds which are not very precisely stated in the plaintiff's statement of claim, but which the court is expected to deduce in some form indicative of legal liability from the facts which are stated. These facts are:—That Killey and the Osbornes agreed by deed, to form a partnership under the name and firm of the Osborne, Killey Manufacturing Company, which partnership was to continue until a

joint stock company should be formed. That Killey, who had made these notes to Muirhead on account of Muirhead's interest in an iron foundry business which Killey and Muirhead had carried on under the style of J. H. Killey & Co., agreed to put the assets of that business as his capital into the Osborne-Killey concern, and the Osbornes on their part agreed to bring in as their capital a foundry and plant which they owned, and it was provided by the deed that all liabilities of J. H. Killey & Co. were to be assumed by the new co-partnership and charged against Killey; that the Osbornes and Killey formed their partnership, paid certain of the liabilities of Killey & Co., and recognized these notes as part of the liabilities which they had agreed to pay; that "defendants"—the term includes Muirhead—

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agreed to pay and discharge said notes and paid interest on one of said notes, and said defendants offered, if extension of time were given, to pay said notes at the rate of \$100 per month.

I quote the very words of this passage mainly because, having to allude to the absence of proof of any promise by any of the defendants except Killey outside of the Osborne-Killey deed, to pay the notes, and Killey's agreement being only that which was evidenced by the notes themselves, I call attention to the words of the pleading, which stop short of alleging an agreement by the defendants or any of them with the plaintiff. It is only vaguely stated that they agreed. I note further the absence of any allegation of acceptance of the alleged offer to pay \$100 a month if time were extended. Notice, moreover, that the alleged offer is not to pay the notes according to their tenor, but to contract a different kind of obligation.

The plaintiff then avers that

By reason of the promises of the defendants the plaintiff was foreborne to bring an action on said notes until the present time.

No promises by the defendants being averred, and the unaccepted offer, not being an offer to pay the notes, but to pay \$100 a month. The further averments are that

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all times have elapsed and all acts have been done necessary to entitle the plaintiff to be paid the said promissory notes and interest by the defendants,

the claim, as conceived in the mind of the pleader being still for the payment of the notes and not upon any contract to pay \$100 a month.

In this summary I have stated every fact pleaded that seems at all important, though I have somewhat abbreviated the pleading and have omitted a few conversational allegations of no significance.

The Osbornes might well have met the statement by a demurrer and saved much expense by so doing, for it would be out of the question to treat anything here alleged as giving a cause of action against them.

There is another paragraph which I shall quote in the language of the pleading:

11. If the defendants forming the said firm of the Osborne-Killey Manufacturing Company are not found to be liable as debtors to plaintiff under the circumstances hereinbefore set forth, then the plaintiff charges in the alternative that these defendants duly received the assets of the said Killey and deducted the said debt of the plaintiff therefrom and took credit therefor as a liability assumed to be paid by them, and the plaintiff charges that the defendants in refusing to pay the plaintiff the said debt are colluding to defraud her and so to arrange the accounts of the said partnership that they may be relieved as between themselves from the said liability; the plaintiff claims that, under the circumstances hereinbefore pleaded, the defendants are estopped from denying their indebtedness to the plaintiff, and that in any event the plaintiff is entitled to judgment for the amount against the defendant Killey, and to an order restraining the defendants from parting with the assets set apart to provide for the said debt or from changing the nature of the accounts between the said partners, and that a receiver may be appointed to receive and realize the said assets and the share and interest of the said Killey in the said firm until the said debt be fully paid.

This paragraph, which does not refer to the defendant Muirhead, seems intended to assert a charge upon the Killey assets created by their being brought into the new partnership on the terms that their value to the extent of the debt due to the plaintiff by Killey should be paid by the

three partners to the plaintiff, the residue of the value being credited to Killey on his capital account. But there is no assertion of privity with the plaintiff in what was done or of anything on which a specific charge on the assets can be founded. It is no more than a repetition in altered words of the previous statement that the Killey assets were to go into the new concern and that the three partners agreed among themselves that the new firm should assume the debt. It would not have saved the pleading if the defendants had demurred.

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There is nothing in the evidence given at the trial, as I understand it, to add to the facts pointed at in the statement of claim, although some facts which are there put rather vaguely are made somewhat more definite.

The contest resolved itself into two branches. In one branch the claim was that, by a process of novation, the debt which had been originally that of Killey alone, with Muirhead as his surety, as indorser to the plaintiff, became a debt of the Osbornes personally; not merely a debt for which the partnership assets of the new firm were liable, but one exigible against the separate estate of the Osbornes and of each of them as well as against the partnership property. That is the form of the claim to which the judgment appealed from gives effect.

There is clearly no novation in the ordinary sense in which that process is understood, because the original debtor remains liable; and the only evidence that can be pointed to as tending to prove a promise by the Osbornes is that as to which the learned Chief Justice of the Queen's Bench is reported as saying that credence should have been given, namely, what is said by the plaintiff and her daughter of conversation with one or both of the Osbornes on occasions when payment of one of the notes was asked for. I have not been able to see that that evidence, even if we believe every word of it, can fairly be taken to aid the plaintiff. Interest was paid on one or more of the notes to the plaintiff; the Osbornes, who were conducting

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the business of the new firm, recognized the notes as a debt which the new firm was to pay, and once, at least, put the plaintiff off on the excuse, real or false, that there was not money at the time, and once, at least, they, or one of them, said the firm would pay \$100 a month if time was extended.

Now the payment and the recognition of the liability of the new firm to pay, were absolutely consistent with, and went no further than the agreement contained in the partnership deed. They by no means involved any undertaking with the plaintiff, nor did they imply any consideration moving from the plaintiff. An agreement might perhaps have resulted from the proposal to pay \$100 a month if the plaintiff had accepted it, but she candidly shews that she did not accept it, and she does not sue upon any such agreement. She says she required to consult her daughter. The daughter says her mother would not extend time without interest at seven per cent., and no agreement was in fact made.

On the other branch of the contest, it is somewhat difficult to say precisely what is the position taken by the plaintiff. In the eleventh paragraph of her statement of claim, which I have quoted, she asserts a specific charge upon the assets of the Killey business, but there is no support for that claim, either as a legal result of anything done by the parties, or in the light of what they intended to do. The object, evidenced by the deed, was that the assets should go to the proposed incorporated company, the unincorporated Osborne-Killey firm being merely a temporary arrangement. The parties to that deed certainly did not intend to create a charge upon the property. Nor does it appear from the order of the Divisional Court that any such charge was supposed to be created. The order is simply a judgment against the parties personally for the payment of money, and the asserted charge or trust—for it is a trust rather than a charge that is contended for in argument—is made use of in support of the effort to fix the Osbornes with personal liability as debtors to the plaintiff.

The differences of opinion which have led to this appeal would seem partly attributable to an indistinct apprehension of the subject of trusts.

Mr. Justice MacLennan correctly points out in his judgment, in which he deals at once concisely and in an exhaustive manner with the whole subject of the controversy, both with regard to the law and to the facts, the fallacy of speaking of a trust except in relation to property, though the property may be of an intangible character, such as a chose in action.

I adopt, without entering upon an independent examination of the subject, the conclusions expressed by Mr. Justice MacLennan in both branches of the contest, and the reasons he gives for them.

There was a curious division of opinion among the four learned judges who heard the case in the Court of Appeal. Two of them held against the plaintiff upon both questions, the novation and the trust. Of the other two, one held in her favour on the question of the trust and against the novation, and the other for the novation, but against the trust. Three judges thus held against the novation and three against the trust, but the effect of two thinking the plaintiff entitled to succeed, though they differed in their reasons, was that the judgment of the Divisional Court remained undisturbed.

Our judgment will, in consequence, seem somewhat paradoxical, because while we reverse the judgment of the Court of Appeal, we affirm the conclusions of a majority of the judges of that court upon each of the two branches of the contest.

I agree that the appeal must be allowed with costs and the action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *MacKelcan, Gibson & Gausby.*

Solicitors for the respondent: *Lazier and Monck.*

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APPEAL from a judgment of the Court of Appeal for Ontario affirming a judgment of the Queen's Bench Divisional Court(a), which reversed the judgment at the trial in favour of the defendants and directed a judgment to be entered for the plaintiff.

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Charles Ross was the owner of the north half of lot 34 in the 9th concession of North Dumfries in the Province of Ontario, and died on the 8th April, 1864, intestate, and without issue, but leaving a widow, Madeline Ross, him surviving, who continued in possession until her death on the 6th October, 1881.

On the 3rd May, 1881, the widow leased the lands in question to the defendant Oliver for a term of five years, and he was in possession as tenant at the time of her death. The material part of the will of Madeline Ross was as follows:

"My will is first, that my funeral charges and just debts shall be paid by my executor hereinafter named.

"The residue of my estate and property, which shall not be required for the payment of my just debts, funeral charges and the expenses attending the execution of this my will, and the administration of my estate, I give, devise and dispose thereof as follows, to wit: (then follow a number of legacies).

"I give and bequeath to Rebecca Johnston, all the rest and residue of my estate of which I shall be seized and possessed of or to which I shall be entitled at the time of my decease, except the sum due to me by Thomas Stuart, an insolvent, etc., and I now make and appoint Thomas Marshall, of the township of North Dumfries aforesaid, yeoman, to be the sole executor of this my last will and testament."

The defendant Oliver claimed that, upon the death of Madeline Ross, he was informed by the executor Marshall that the lease expired by reason of the lessor's death, and

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that the property now belonged to the heirs of Charles Ross in the old country, and was induced to attorn and become tenant to the defendant John Ross, who claimed to be one of the heirs at law of Charles Ross, but this was denied by the executor. The plaintiff brought her action against the defendants to recover possession of the lands. The defendant Ross denied the plaintiff's title, and among other things claimed that Madeline Ross, who was entitled to dower in the lands was at her own request permitted to occupy the same during her life by the defendant John Ross, and the other heirs at law of Charles Ross, as and by way of assignment of dower in the same, and that she had always admitted the title of the said John Ross and the other heirs at law of Charles Ross.

At the trial the only evidence with respect to the nature of the possession of Madeline Ross was the following: John Linton deposed that on one occasion he saw Madeline Ross cutting thistles in the farm, and in the course of conversation she said she was bound to cut the thistles, and upon the inquiry—"Who bound her?" She said Charles Ross's heirs.

The witness, Alexander Jamieson deposed that on one occasion the deceased said that her husband's heirs would spoil the place amongst themselves after her death.

Jane Allen deposed that she had numerous conversations with the deceased when the latter said the farm would go on her decease to her husband's heirs.

Elizabeth McIntosh deposed that the deceased at one time had said to her that all the money she had when she made her will was going to her own heirs, and that it was a small sum that was going with the farm to Mr. Ross's heirs.

The action was tried by Osler, J., without a jury at Berlin, on the 4th April, 1883, who gave judgment for the defendants, saying:

"I am of opinion that I should treat Mrs. Ross's declarations and statements of the nature of her possession as evidence of an agreement with her husband's heirs that she

should occupy the land during her life in the lieu of dower. I have no doubt that up to the time of her death this was her own position and (though that is not material) it must have been the plaintiff's own view until very shortly before she brought this action."

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This judgment was reversed by the Divisional Court, and the judgment of the Divisional Court was subsequently affirmed by the Court of Appeal.

Arnoldi, for the appellants. Possession will not inure to make a title under the statute when it can be referred to a lawful title, *per* V. C. Wood; *Thomas v. Thomas(a)*; *Doe d. Milner v. Brightwen(b)*.

Mrs. Ross's statements to witnesses that the property was on her death to go to her husband's heirs are admissible in evidence as declarations which at the time that they were made were against the apparent interest of the person making them. *Baron de Bode's Case(c)*; *Doe d. Daniel v. Coulthred(d)*; *Woolway v. Rowe(e)*; *Doe d. Perry v. Henderson(f)*; *Queen v. Governors of Exeter(g)*; *The Queen v. The Churchwardens, etc., of Birmingham(h)*; Taylor on Evidence (6 ed.), secs. 617-620; Best on Presumption of Law and Fact, pp. 615-8.

Bain, Q.C., for the respondent. The evidence clearly establishes that Madeline Ross in her lifetime had acquired a title to the land by length of possession, and neither a mere acknowledgment of title made in her lifetime, nor an acknowledgment made by the respondent after her death, would affect the title thus acquired. *Sanders v. Sanders(i)*; *Workman v. Robb(j)*; *Doe d. Perry v. Henderson(k)*.

(a) 2 K. & J. 79.

(b) 10 East 583.

(c) 8 Q.B. 208.

(d) 7 A. & E. 235.

(e) 1 A. & E. 114.

(f) 3 U.C.Q.B. 486.

(g) L.R. 4 Q.B. 341.

(h) 1 B. & S. 763.

(i) 19 Ch. D. 373.

(j) 7 Ont. App. R. 389.

(k) 3 U.C.Q.B. 486.

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The court was unanimously of opinion that the appeal should be dismissed with costs. The only reasons for judgment were

SIR W. J. RITCHIE C.J.—Was there any sufficient evidence of an agreement between the heirs of Charles Ross and his widow that she should occupy the land during her life in lieu of the dower? I can discover none.

There is nothing, in my opinion, to shew that the heirs at law of Charles Ross could not have brought an action and recovered the land at any time from the death of Charles Ross till the date (the first day of July, 1877) when the right and title were extinguished or ceased by virtue of the statute, because the widow could not have resisted such a claim by the heirs by setting up that she was entitled to dower in the land. The appeal should be dismissed.

GWYNNE J.—The case appears to be free from all doubt. The right of entry of the heirs of Charles Ross, who upon the 8th September, 1864, died intestate and seized of the land in question first accrued upon the death of Charles or at the latest at the expiration of the *quarantine* of his widow, who from his death until her own death on the 6th October, 1881, remained in uninterrupted possession by herself and her tenants. She by her will dated the 19th May, 1874, after certain specific devises in her will mentioned, devised all the rest and residue of her estate of which she should be seized or possessed or to which she should be entitled at the time of her decease to the plaintiff. The Statute of Limitations then began to run against the heirs of Charles Ross not later than the 18th October, 1864, between which date and the 1st July, 1877, nothing whatever occurred of which there is any evidence to stay the running of the statute so that upon the last mentioned day the title of the heirs of Charles Ross, by force of the Ontario statute, 38 Vict. ch. 16, became absolutely extinguished and the possession of Charles Ross's widow became matured into

a title in fee simple. It would seem from the evidence that she had been advised that it would require twenty years' possession to perfect a title to her in the land by prescription, as was the law prior to the passing of 38 Vict. ch. 16, so that it is not improbable that she died in ignorance of having acquired a title to the land. At the date of her will her possession certainly had not matured into a title, but her will was framed so as to pass a future acquired estate, and as she was seized of the land by statutory title at her decease the words of the will are sufficient to pass and did pass to the plaintiff the estate so acquired. The evidence offered by the defendant John Ross in support of his defence, namely, that Mrs. Ross, the widow of Charles Ross, who died seized, had accepted an estate for her life from some persons or other not named, the heirs of Charles Ross, and that this was the title in virtue of which she held possession until her death, was wholly inadequate; indeed, there was not any legal evidence in my opinion offered in support of this contention. The loose scraps of conversations with strangers which were relied upon were quite irrelevant. The appeal must be dismissed with costs.

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Appeal dismissed with costs.

Solicitors for appellants: *Howland, Arnoldi & Ryerson.*

Solicitors for respondent: *Bain, Laidlaw & Co.*

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 *April 8, 10.
 *April 30.

IN RE MARIA KEARNEY.....APPELLANT;
 AND
 HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railway—Expropriation—Injuries to property—Crossing at embankment and cutting—Riparian rights—Access to shore—Assessment of damages once for all.

K. was the owner of certain lands bounded on one side by Halifax harbour, and the Government of Canada constructed its railway through the land cutting off her access to the shore and gave her no crossing. Proceedings having been taken in the Exchequer Court to fix the compensation to which K. was entitled, she was awarded (2 Ex. C. R. 21) for damages occasioned by reason of the absence of the railway crossing, the sum of \$500. On appeal by K. to the Supreme Court of Canada:—

Held, Gwynne J., dissenting, that the judge of the Exchequer Court erred, on a question of fact, in not taking into consideration that the character of the embankment and cutting made and the nature of the ground on each side would forbid the making of a reasonably practicable crossing, and that the consequence of the severance would remain notwithstanding all that under the circumstances could be done towards making a crossing, and also had erred, in law, in not giving compensation for the severance once for all, and that, instead of allowing K. \$125 a year for four years' severance, he should have awarded her a sum which would produce \$125 a year for all time.

Held, that there is no obligation in law to construct a crossing over a government railway apart from contract.

Held, per Gwynne J., when a railway is constructed across property and severs it into parts in such manner as to make a crossing necessary to the full enjoyment of the several parts, the owner cannot against his will be deprived of a suitable crossing and compelled to accept compensation in lieu thereof.

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

APPEAL from a decision of the Exchequer Court of Canada (a) against the amount awarded as compensation for lands expropriated by the Crown.

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In 1884 the Government of Canada constructed the Dartmouth branch of the Interecolonial Railway through the town of Dartmouth, and across the lands of the appellant, and tendered her \$150 for the right of way. No arrangement with her having been arrived at, the appellant instituted an action in the Supreme Court of Nova Scotia against the contractors for the construction of the branch railway, for trespasses alleged to have been committed upon the property in question. The defendants justified the acts complained of by alleging entry under direction of the Government of Canada for the purpose of constructing the railway. A judgment in favour of the appellant in that action having been reversed by the full court, and an appeal from the last-mentioned court having been taken to the Supreme Court of Canada, an arrangement was come to between the Crown and the appellant that, without prejudice to her appeal, it should be referred to the Exchequer Court of Canada to determine the amount to which she was entitled as compensation for the damages complained of, and that the evidence taken in the case of the appellant against the contractors should be used as evidence on the said reference, along with such other evidence as might be taken before a commissioner and transmitted to the registrar of the Exchequer Court.

The reference came on for hearing before a judge of the Exchequer Court, who gave the following decision with respect to the damages by reason of the absence of a railway crossing:

“Apart from the general question of the depreciation of the claimant's property by the severance of the part expropriated, she contends, and I think justly, that she has suffered loss by reason of the absence of a railway crossing.

(a) 2 Ex. C. R. 21.

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This I think she was entitled to, and without it she has no convenient access to the shore. It has prevented her, as she alleges, from selling ballast and sea manure, and from gathering drift wood, as had previously been her custom to do, and from which in some years at least she derived a profit, according to her own estimate, of about \$125. For such damage I shall allow her \$500.''

The total amount of compensation awarded the appellant by the Exchequer Court was \$2,012 and interest. Alleging that the compensation was inadequate, the appellant appealed to the Supreme Court of Canada.

T. J. Wallace appeared for the appellant.
Hogg, Q.C., appeared for the Crown.

The judgment of the majority of the court was pronounced by

PATTERSON J.—This is an appeal from an award of compensation by the learned judge of the Exchequer Court for the value of land expropriated from the property of Mrs. Kearney, the appellant, for the use of the Dartmouth branch of the Intercolonial Railway and for injury to the remainder of the property.

Mrs. Kearney owns some eighty acres of land near the town of Dartmouth, bounded on one side by the water of Halifax harbour. The land is described as rising rather steeply from the shore. It is mostly woodland, a few acres only being cleared and cultivated. Mrs. Kearney made some profit out of the shore by selling stones for ballast and seaweed for manure, and by collecting driftwood for fuel. There is on the property a sandy beach which is said to be the only place in the vicinity suitable for a bathing resort, the next similar place being Cow Bay, twelve miles farther down the harbour. A bathing establishment was set up at the place, which is called Sandy Bay, by a company who paid Mrs. Kearney a rental of \$50 a year, but the venture was not a financial success.

The railway runs along the shore, and, owing to the irregular character of the ground it passes everywhere either upon an embankment or through a cutting, thus practically cutting off access to the shore from Mrs. Kearney's remaining land, and destroying the traffic in ballast and seaweed and the carrying of driftwood. It forms a walk for the public, and so destroys the privacy of the bathing place, which is overlooked from the embankment, and it is urged that it interferes with a project entertained by Mrs. Kearney of offering her property for sale in building lots.

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These are the general grounds on which compensation, over and above the value of the land taken, is sought.

The amount to be awarded must be, as in the bulk of such cases, to a great extent speculative, and arrived at after weighing against each other the estimates given in evidence, which are apt to differ pretty widely.

In this court we have not the aid in comparing one witness with another and forming opinions as to their good faith and judgment, which may often be derived from seeing them and hearing their evidence given, nor do we inspect the locality, which may be said to be in many cases essential to a correct appreciation of the matters in controversy. Those advantages are usually enjoyed by the tribunal to which the legislature has committed the duty of adjudging in the first instance the compensation appropriate to the particular case, and, as I have before had occasion to remark, an appellate court cannot reasonably be expected to interfere except in cases where the award appears to have proceeded upon some erroneous principle or to have been affected by some oversight or misunderstanding of facts.

It happens in the present case that by reason of circumstances which I suppose were exceptional, the witnesses were not examined in the presence of the learned judge of the Exchequer Court, and that he did not inspect the premises in connection with the investigation. We may therefore feel more free to form opinions that, even on questions

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of mere value, may not entirely coincide with his, than we should have felt if his means of forming a judgment had been better than those which we possess, without relieving the appellant from the burden of shewing that the judgment which he attacks should be modified or varied.

We are indebted to the learned judge for a distinct statement of the grounds on which he proceeded.

He allowed for the land taken and the injury from all causes except the cutting off of access to the beach, \$1,512, and he arrived at that figure by computing \$1,200 an acre for the quantity of land actually expropriated. Mrs. Kearney had once spoken of \$1,200 as what she valued that land at, and the judge considered that that was about its value. She had some years before sold some land to the provincial government for the use of the lunatic asylum which adjoined her property at \$1,200 an acre and, without asserting any strict logical connection between that price and the compensation now in question, the learned judge adopted \$1,200 an acre as sufficient compensation for the land and the damages resulting from the work, including the injury to the bathing ground, but not including the injury from the severance of the shore from the rest of the 80 acres. The learned judge had the impression that the \$1,200 an acre was more than the worth of the $3\frac{1}{2}$ acres sold to the asylum, that is a matter which we need not discuss, nor need we inquire into the analogy between the sale of that parcel remote from the water and the expropriation of the 50 feet belt along the stony beach. The estimate does not proceed upon any such assumed analogy, and whether we may or may not be inclined to adopt the same criterion of value, it might be difficult in a matter depending so much on speculative ideas to pronounce any other suggested criterion more certain or less open to criticism.

I should leave that estimate undisturbed; but I do not regard the question of the severance in the same light as the learned judge. He considered that the appellant was entitled to a crossing of the railway, and therefore awarded

\$500 for the want of a crossing for the time past, taking no account of the future.

I ought to have said that the severance for which damages were not awarded was such severance only as in the opinion of the learned judge would be cured by a crossing, which he assumed would give access to the shore for ballast, seaweed and driftwood, and also afford a way to the bathing ground.

The bathing ground had suffered from another cause for which the Dominion Government was not responsible, viz., the sewer from the lunatic asylum. Dr. Weeks clearly shewed that circumstance. Dr. Weeks said, in his evidence :

Mr. Dickson, under the instructions of the local government, built an expensive culvert that destroyed the property largely as a bathing place. The debris from the lunatic asylum, in the next property to Mrs. Kearney's, helped to destroy the most lovely place for bathing purposes that, so far as I know, is hereabouts.

Question.—To what extent did Dickson's proceedings, as alluded to before, injure or interfere with the cove or bathing place? Answer.—Dickson, representing the local government, built a drain so close to the line of Mrs. Kearney's property that it rendered it disgusting to many people at times, particularly when the tide was rising, so that many who had bathed previously bathed there no more. Many persons I know who used to bathe—and it was a source of remuneration to her—discontinued.

To what extent this consideration affected the award we do not know.

I think the learned judge failed in two respects, one in regard to the facts and one in regard to the law, to fully appreciate the question of the severance. There is evidence, on which I should rely, that the character of the embankment and cutting and the nature of the ground on each side would forbid the making of a reasonably practicable crossing. In other words, the consequences of the severance would remain notwithstanding all that under the circumstances could be done towards making a crossing. That is the matter of fact. Then, in law, as I understand the law to be, there is no obligation to construct a crossing over a Government railway apart from contract, and the evidence

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(bearing in this on both the fact and the law) is that there was no idea of a crossing mooted or entertained by either party. I shall not repeat what I have said in other cases on the subject of farm crossings and the absence of any provision respecting the construction of them in the Government Railways Act (a) (b). The facts of this case illustrate the greater wisdom of leaving parties to stipulate for crossings or to be compensated for the severance of their land, rather than imposing a duty to construct a crossing whenever land is divided by a railway. In this case the chief injury is done by the severance. It touches all the branches of injury which the appellant advances, the bathing ground, the ballast, the manure and the firewood, and also the vision, which the learned judge by no means ignores the force of though he is not insensible to the touches of fancy by which it is adorned, of a colony of marine villas. This severance should be compensated once for all, and the award should therefore be increased.

The allowance of \$500 for four years, or \$125 a year, represents a capital sum of say \$2,100, and it is not computed upon all the subjects affected by the severance. On the other hand there is evidence, no more speculative than much of that on which the appellant relies, that the effect of the railway may be to increase, or at all events not to diminish the marketable value of the property as a whole. I think it will be reasonable to compute about \$2,500 in place of the item of \$500, making the whole award \$4,000, to bear interest from the 13th of August, 1884.

The appeal is allowed with costs.

GWYNNE J. (dissenting).—When a railway is constructed across a man's property and severs it into parts in such a manner as to make a crossing necessary to the full enjoyment of the severed parts, he cannot, in my opinion, against his will, be deprived of a suitable crossing, the char-

(a) *Vézina v. The Queen*, 17 Can. S.C.R. 1.

(b) *Guay v. The Queen*, 17 Can. S.C.R. 30.

acter of which, if the parties differ, must be determined by the courts. Neither the Government, in the case of expropriation by the Government, nor a railway company, in other cases, can compel a man to accept compensation in money in lieu of a crossing, if a crossing be practicable. If the railway crosses the property in such a manner as to be impracticable, or so difficult and expensive as to make it unreasonable that it should be constructed then, unless an agreement can voluntarily be arrived at with the owner the Government or the railway company, as the case may be, expropriating by compulsory process should be obliged to pay for and take all the land severed lying at one or other side of the railway. Parliament during the present session has passed an Act enabling the Exchequer Court in cases of expropriation by the Government to make an order in the expropriation proceedings which will have the effect of doing justice in cases of this description. In the present case I can see no material by which to determine whether a crossing is or not impracticable or where from, if it be, to estimate the compensation proper to be paid for the want of one; assuming it to be impracticable, it appears to me that justice would require the Government to take and pay the full value of the piece lying between the railway and the seashore.

I think, therefore, that we should remit the case to the Court of Exchequer to be there dealt with under the powers conferred by the recent statute.

Appeal allowed with costs.

Solicitors for the appellant: *T. J. Wallace.*

Solicitor for the Attorney-General for Canada: *Wallace
Graham.*

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 1890
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 **Nov. 10.
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 JAMES DUNCAN (PLAINTIFF)..... RESPONDENT.

AND

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Title to land—Easement appurtenant—User of lane—Prescription
 —Agreement for right of way—Construction of contract—Prac-
 tice.*

In 1860 J. D. conveyed to J. D. the younger (the plaintiff) the east half of lot 19 in the 5th concession west of Yonge street in the township of York "together with all and singular the * * * ways * * * easements * * * and appurtenances whatsoever in the said land * * * belonging or in any wise appertaining or therewith used and enjoyed, etc." 19 and 18 were contiguous lots of which 18 lay to the south of 19, and both lots were bounded on the east by the 5th concession road and on the west by the 6th concession road. At the time of the conveyance and for many years preceding, the occupants of the east half of lot 19 were accustomed to drive to the 6th concession road across the west half of lot 18, and by his statement of claim the plaintiff claimed a right of way as an easement over the west half of 18 by reason of the conveyance from his father and twenty-five years' user of the same. J. D. died in 1877, and by his will devised to J. D. the younger the north-east quarter of lot 18, and to W. D., the grantor of the defendant, the residue of lot 18, and, by an agreement between J. D., the plaintiff, and W. D. the latter conveyed to J. D. a right of way over a lane then existing upon the west half of lot 18 and over an extension to be made of said lane, so as to give him access to the 6th concession road, in the following language: "Agree and permit the said J. D., his heirs, etc., a full and free right of way along the lane where it now is, on lot number 18, leading from the 6th line and extending 40 rods east from the centre of said lot so as to allow a free communication for all his and their teams, etc." The lane on the west half of lot 18, if extended easterly in a

*XVIII. Can. S.C.R. 710.

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

straight line, would be upon the north-east quarter of lot 18, the lands devised to J. D., and one matter in dispute between the parties was whether a proper construction of the agreement required that the extension of the lane should be by means of a jog continuing solely upon the land of W. D., or should be extended in a straight line upon the lands of J. D. Upon the trial before Galt, J., and a jury, a verdict was found that the plaintiff was entitled to the right of way over the west half of 18 to the 6th concession road by reason of grant and continuous user, and also that the extension of the lane should be wholly on the defendant's land. An order *nisi* to set aside the verdict and to enter a nonsuit or verdict for the defendant was made absolute by the Divisional Court, and judgment entered for the defendant. On appeal to the Court of Appeal this judgment was set aside and the judgment at the trial restored. On appeal to the Supreme Court of Canada:—

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Held, Ritchie C.J., dissenting, reversing the judgment of the Court of Appeal, that a way must be a defined way in order to pass by the general words "all ways used and enjoyed," when the way is not an existing easement or way of necessity, and that in this case the way claimed as an easement was not a well defined, permanent road or way, but simply a track in no settled or defined direction, and that all J. D. obtained from his father was a user purely of tolerance, under license and permission, and one which neither constituted an easement in fact at the time of the conveyance, nor a user which however long its continuance would ripen into an easement by prescription.

Held, affirming the judgment of the Court of Appeal, that according to the true construction of the agreement between J. D. and W. D., the extension of the lane was to be wholly upon the lands of W. D., and not in a straight line.

Held, that under Con. Rule 755, the court having all the material before it necessary for determining the case, and as no useful purpose would be served by sending the case back for a new trial, the court should give the final judgment in the action.

Rule 755 being a transcript of the English Order 40, Rule 10 of 1875, and there being no rule in Ontario corresponding to Rule 568 of the English Rules, which restricts the court to such inferences of fact as are not inconsistent with the findings of the jury, the observations of the Lord Chancellor in *Toulmin v. Millar* (12 App. Cas. 746) have no application.

APPEAL from a decision of the Court of Appeal for Ontario, reversing a judgment of the Divisional Court(a), whereby a verdict and judgment at the trial in favour of

(a) 15 O.R. 699.

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the plaintiff were set aside and judgment directed to be entered for the defendant.

The facts of the case are sufficiently disclosed by the head note, and the following judgment of the Court of Appeal, unreported, pronounced by

MACLENNAN J.—The facts in this case are these:—Jas. Duncan, sr., owned west half 19 and lot 18, 5th concession, York, before 1847, and he lived on west half 18, his building standing near the road between 5th and 6th concessions. At the same time his brother, William Duncan, sr., owned, and one Reed occupied, the east half of 19 in same concession on which was a house and other farm buildings. A great part of these lands were then bush and the road between the 4th and 5th concessions was not yet opened, and Reed's only way of going in and out to his farm was by a road for the most part through the bush passing over the west half of 18, by Jas. Duncan, sr.'s, house and barn, thence through part of the west half of 19, and thence to the east half of 19. This road is delineated on plan (b).

In 1847 Jas. Duncan, sr., bought the east half of 19 from his brother, and from that time until 1860 let it to different tenants, who farmed the land and occupied the buildings thereon. These tenants used the same road as Reed for getting in and out to and from their places, and there was no other road for eight or ten, or perhaps more, years afterwards.

In 1860 Jas. Duncan, sr., conveyed to the plaintiff, his son, the east half of 19 by a deed which granted all ways used therewith, and the plaintiff has ever since resided thereon and used the road as formerly, although in recent years the road on the 5th concession has been opened. At the place where this road passed from lot 19 to lot 18 it was still bush in 1862 and also marshy and curved to the east, and the father then told the son that he had better straighten the road at this point and make it upon a new line, and this the plaintiff did, and from that time used this new part in substitution for the old, having bestowed a good deal of labour in making the change.

In 1877 Jas. Duncan, the father, died, and by his will devised the west half of 19 to his daughter Charlotte. The west half and south-east quarter of 18 to his son William, and the north half of the east half of 18 to the plaintiff. After their father's death and before the agreement next to be mentioned, the plaintiff and William had the line run between the north and south halves of the east half of 18. On the 20th March, 1878, William and the plaintiff executed an indenture whereby the plaintiff gave William the right

to draw water from certain springs on the east half of 19, and to lay down and repair pipes for that purpose, and William gave James a right of way described as follows, that is to say: a full and free right of way along the lane where it now is on lot No. 18, 5th concession west, said township of York, leading from the 6th line and extending forty rods east from the centre of said lot so as to allow a free communication for all his and their teams, vehicles, etc., at all times from said lot No. 19 along said route to the 6th line. James also covenanted to perform a reasonable share of the labour of repairing the lane and to keep the gates shut. The agreement was registered. William got the benefit of the water supply, but the lane was not opened. William, however, says that the lane was laid out and opened by the plaintiff and himself, and that each cut down the timber on one half, but this is disputed by the plaintiff. In 1881, William sold and conveyed his land to the defendant and went away to Manitoba. The defendant lately obstructed the old road, or that part of it lying between Charlotte's line and the elbow where it turns west to the 6th concession, by putting logs and cordwood on it, and digging a ditch along the centre of it. The plaintiff then brought this action for a declaration of right, and an injunction in respect to the old road and to the new. The plaintiff had a verdict from the jury and judgment for the old road and an injunction, and also a declaration that he had the right to have the new road run on the defendant's land.

At the time the learned Chief Justice thought the plaintiff could not maintain his right to the old road under the deed from his father, and he left it to the jury on the question of prescription and told them that if the plaintiff had used and enjoyed the way as a defined road for upwards of twenty years before action they should find for the plaintiff, and they were not asked to find whether it was used as a defined road at the date of the plaintiff's deed in 1860.

Mr. Justice McMahon, in delivering judgment in the Divisional Court, says that the jury were not asked explicitly to find nor have they found that there was in 1860 or 1862 a defined road through the west half of 18, and he does not consider that the evidence would have supported such a finding if it had been made.

On this point, after hearing the case argued before us, and after a very careful perusal and consideration of the evidence, we feel compelled respectfully to differ from the judgment of the Divisional Court. We think if the question had been submitted to the jury there was not only ample evidence to warrant such a finding, but that they could not properly have found otherwise, and that there can be no doubt whatever that such would have been their verdict. Indeed, we have difficulty in seeing how it could possibly have been otherwise. The undisputed fact is that some time prior to 1847 the plaintiff's land had been built upon and occupied as a farm, and from that time until the date of the deed and long afterwards, the occupiers had no other way or road for going in and out to and from

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this farm than over the road in question. It is hard to imagine how this road could, at the date of the deed in 1860, be otherwise than a defined road after being constantly used for over thirteen years. The jury had no difficulty in finding the fact to be so for the twenty years preceding this action, although there was no evidence of any difference in its condition during these years and in the period prior to 1860.

When we look at the evidence of the witnesses, it agrees entirely with the probabilities of the case. The plaintiff himself is very clear throughout that the road was well defined in 1860. His wife says the same thing—that it was a well defined road in 1858 when she and her husband went to live there first. To the same effect is Griffith, in cross-examination. He says the road in 1860 was made through the bush out to the line. You could go along it with any load at that time. It was not a turnpike road. You did not have to go around trees. So also Henry Walsh. There was a well defined track thirty or thirty-one years ago. We think all this is corroborated by William in his evidence.

The road or way in question then having been used and enjoyed with the east half of lot No. 19 by James Duncan, the elder, and his tenants before and at the date of his conveyance to the plaintiff, nothing more was required to make it pass by the deed, it comes within the very words of the deed. In such a case the previous history of the title of the dominant and servient tenements is immaterial, both tenements being owned by the grantor, he had the power when conveying the one to grant a way over the other as an easement appurtenant to the land granted.

The doubts cast on the effect of such a conveyance have now been entirely removed by a number of decisions. *Kay v. Oxley* (c); *Watts v. Kelson* (d); *Barkshire v. Grubb* (e); and *Bayley v. Great Western Ry. Co.* (f).

We are therefore of opinion that when the plaintiff received his deed of the north half of 19 from his father he obtained along with it by virtue of the deed itself a grant of a right of way over the road in question leading to the 6th concession, to be used in connection with the north half of 19.

We think, then, that the plaintiff, having obtained from his father by the deed of 1860 an express grant of this right of way, it was quite competent for him and his father by agreement to alter its actual *situs* at any particular point without in any manner impairing his right. This was done in 1862 as to that part of the road which ran southerly from west half of 19 across the west half of 18. At this place the plaintiff, at his father's suggestion, at some labour and expense, changed the line of the road, and used the altered

(c) L.R. 10 Q.B. 360.

(e) 18 Ch. D. 616.

(d) 6 Ch. App. 166.

(f) 26 Ch. D. 434.

line afterwards in lieu of the old line. We think the plaintiff has a right to the new line in place of the old.

Our judgment on the effect of the conveyance makes it unnecessary to say anything on the question of prescription, but we think the finding of the jury was amply warranted as to the use and enjoyment of this road by the plaintiff for the twenty years next before this action.

We have now to consider what rights the plaintiff has under the agreement of the 20th March, 1878, made between him and his brother. The jury found in favour of the plaintiff and that he was entitled to have the old lane, which ran easterly, on lot 18 extended easterly forty rods beyond the centre line of the lot, and that it should be wholly on the defendant's land. A good deal of evidence was given about this agreement and as to what was done by the respective parties in relation to it, both as to what they intended by it and as to what they did in the way of carrying it into effect. It is clear that William got the benefit of the agreement so far as the use of the springs and the waterpipes is concerned, and in answer to question 48, he says in substance that the plaintiff and he laid out the lane intended by the agreement for forty rods east of the centre of the lot so that half of the lane was contributed by each, and that each cut down the timber and cleared his half of the lane. The plaintiff, however, denies that he was to give any part of the land, or that he cut the timber or cleared the land as part of the lane, and he asserted that the whole width of the lane should come off the defendant's land. It was also proved that the defendant had offered to buy from the plaintiff a strip of land for the north half of the lane. The jury by their finding must be considered to have found the facts in favour of the plaintiff. The substance of the agreement is that William was, for valuable consideration, to allow the lane to be extended for forty rods east of the middle of the lot, so as to allow a free communication for the plaintiff's teams and vehicles at all times from lot 19 along said route to the 6th line. Now, the fact is that if the extension of the lane was to be made in a straight line it would be wholly in the plaintiff's own land for the forty rods particularly mentioned, and the plaintiff required no permission for that. The judgment appealed from suggests that the plaintiff, having no previous right to any part of the lane, obtained a valuable concession for the water privileges granted by him, in getting the permanent use of the old part of the lane, even if the forty rods extension should pass through his own land. But this leaves wholly unexplained the express concession by William to the plaintiff of the forty rods of new lane over the plaintiff's own land, if that is what was understood. It is also said that the plain meaning of the agreement was that the lane should be extended in a straight line, but the agreement does not say so, and William says that his understanding of it was that he was to give at least half the land for the lane, and that there would have to be

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a jog in it. The plaintiff swears, and is not contradicted, that they had the line run between two quarters of east half of 18 before they made this agreement, so that when making the agreement they knew quite well where the line between these properties was. They must have known then almost to a certainty that if the lane was extended on a straight line the forty rods east of the middle line would be wholly on the plaintiff's land. That consideration makes the provision in the writing about the forty rods almost unaccountable. Then William says in his evidence that after the agreement they did lay out the lane, half on his side and half on the plaintiff's side of the line, and that this required a considerable jog to be made. William's understanding, therefore, was not that the extension should be straight. His understanding must also have been that the lane was to be partly, one half at all events, on his land.

There are also two other important pieces of evidence. The defendant, while objecting to allow the lane to be wholly on his land, offered to buy a strip from the plaintiff for one-half and to give the other half from his lands, and the plan which he got prepared for the trial described a lane with a jog in it, one-half on the land of each.

The plaintiff, on the other hand, asserted that by the agreement the lane was to be wholly on the defendant's land.

The question put to the jury on this branch of the case in effect was looking at the writing and at the parole evidence together,—“What was the real agreement between these parties as to the situation of the lane?”

The case having been conducted and presented to the jury in that way, and the jury having found as they did, we think there was evidence, on which they might properly have found and that their verdict should not be disturbed.

S. H. Blake, Q.C., appeared for the appellant.

Fullerton and *Wallace Nesbitt* appeared for the respondent.

SIR W. J. RITCHIE C.J.—As at present advised I think the judgment of the appeal court was right, and that there was evidence that the road claimed by plaintiff was a well-defined road, and that the right to use it passed to him under the deed from James Duncan, and I think that the agreement contemplated that the lane should be laid out on defendant's land and not wholly or in part on plaintiff's land, and the general evidence appears to me to shew that this was the understanding of the parties to the agreement.

Can it be said that the verdict in this case was such as

no reasonable men could find. See *Bryant v. The North Metropolitan Railway Co.*(ff).

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STRONG J.—For a statement of the facts I refer to the judgment of the Court of Appeal delivered by Mr. Justice Maclennan, where the evidence, so far as it is material to the present appeal will be found clearly and concisely stated.

As regards the only proposition of law involved in that part of the case which relates to the way claimed by the respondent across the west halves of lots 18 and 19, I entirely agree with the Court of Appeal. Upon the modern authorities quoted by Mr. Justice Maclennan, to which may be added a reference to two other decisions of a date still more recent (*Thomas v. Owen*(g); *Brown v. Alabaster*(h)), each containing a very clear and decisive affirmance of the principle in question, it is not open to doubt that, as a general rule of the law of property, upon a conveyance by the owner of two adjoining properties of one of the tenements so held by him, all permanent ways existing at the time of the grant used for the better and more convenient enjoyment of the property granted over the property retained by the grantor pass to the grantee under the general words "all ways now used and enjoyed," words which in the present case are to be found in the conveyance from James Duncan, senior, to his son James Duncan, the present respondent, whereby the former granted to the latter the east half of lot number 19. If, therefore, the way leading from the east half of lot 19 across the west half of 19, and the west half of 18 to the 6th concession now claimed by the respondent to have existed *de facto* prior to the conveyance of 1860 had been previously, and was, at the date of that grant to the respondent by his father, in fact used and enjoyed as a permanent way for the convenience of the occupants and tenants under the respondent's father of the

(ff) 6 Times L.R. 396.

(g) 20 Q.B.D. 225.

(h) 37 Ch. D. 490.

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east half of 19, and not as a mere temporary outlet and mode of access to the 6th concession, then, I think, it undoubtedly passed as an incident to the land conveyed by the deed of the 1st May, 1860. I am unable, however, to concur in the conclusion of the Court of Appeal in this branch of the case, inasmuch as I feel an insuperable difficulty in adopting the view of the evidence which was taken in the judgment under appeal. There can, on the one hand, be no doubt upon the evidence and the finding of the jury, that in fact from the time of the occupation by Reed as a tenant of William Duncan, senior, from a date anterior to 1847, in which year William Duncan, senior, conveyed the east half of 19 to his brother James, the respondent's father, down to the date of the death of James Duncan, senior, in 1877 and later, the only mode of egress to the 6th concession used by the successive occupants of the east half of 19 was in an irregular south-westerly direction over the west half of 19 and the west half of 18 to a lane which entered the concession line at the point shewn on the lithographic plan at p. 73 of the appeal case. These facts, however, are by no means conclusive in the respondent's favour. In order to make out a title to an easement claimed as having passed as an incident to the land conveyed under the general words before referred to, the respondent was bound to establish that the way used by him and his predecessors in enjoyment and title was so used as a well defined permanent road or way, and this requirement is not satisfied by shewing that the parties in possession of the east half of lot 19 had been from the time of Reed's possession by the mere license and sufferance of James Duncan, senior, in the habit of crossing his property partly through the woods and partly across pieces of swampy land, but in no settled or defined direction, in order to get from their house to the 6th concession. Then what was the character of this user? Had there been an actual agreement, though by parol only, restricting the user to one in the exercise of a mere license, or had the successive owners of lot 18, James Duncan, senior, his son William and the present defendant, expressly

reserved to themselves the right of stopping the use of the way at their will, or when the line between the 4th and 5th concessions should be opened, there would have been no doubt but that no prescriptive right was acquired and that the user, up to and at the time of the conveyance by James Duncan, senior, to his son James Duncan, the present respondent, had not been and was not such as to constitute an easement *de facto*, which would pass as an incident in a conveyance of the east half of 19.

It is not, however, essential that the character of the user as a user by sufferance should be shewn by an express agreement or license; it may also be implied as a just inference from the surrounding circumstances. In the present case the facts and circumstances attending the passing across lot 18 do, in my opinion, most unequivocally point to a user purely of tolerance under license and by permission, and one, therefore, which neither constituted in any sense an easement in fact at the time of the separation of the east half of lot 19 from the other tenement, previously holden with it, nor a user which, however long its continuance, would ripen into an easement by prescription. In order that a right of way can pass under general words granting all easements contained in a conveyance of a *quasi-dominant* tenement upon the separation of two tenements, previously held by the same owner, it is essential that such right of way should be apparent and the user of it so far as consists with the nature of such a servitude should be permanent and continue; essentials both of which were wanting in the present case. To my mind it is just as satisfactorily proved as if it had been established by a formal written instrument that all James Duncan, senior, ever intended either as regards his own tenants, whilst the east half of 19 was in their occupation or as regards his son James after the conveyance to him, was to give a permissive use to enable the occupants of the east half of 19 to reach a public road by going across lots as it is termed, viz., until the road adjoining their land on the east, the line between con-

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cessions 4 and 5, should be opened. Further, I consider it to be a just inference from the evidence that any user by James Duncan, senior, whilst the whole of lot 19 as well as lot 18 remained in his own occupation, of a passage across lot 18 was not in the nature of the ordinary use of an apparent way, such as a defined and established lane or road, but just such use as the owner of a piece of land ordinarily makes of it by passing over or through it as a mode of egress from the settled part of his land to reach a public highway, a devious and irregular pathing running in no certain direction. The great weight of the evidence goes to shew that no distinct and well-defined line of road was ever marked out or kept in repair—no work seems to have been regularly done upon the way used as it undoubtedly would have been had a permanent road been intended, and the direction is shewn to have changed from time to time to meet the convenience of the owners of the land and that of the parties using the way. All goes to shew that what was intended was merely to provide for the temporary needs of the occupiers of the east half of lot 19 until the established public highway adjoining their property should be cleared and opened. It would, I conceive, be to set a most dangerous precedent, were we to lay down that such a permissive use accorded in a neighbourly spirit, of a passage across adjoining lots for such a purpose as that just indicated, might be treated as permanent, and that the land of one who, according to the prevailing custom, thus accommodated his temporarily land locked neighbours should, as a consequence of his good nature, be forever burdened with a servitude. Such is never the intention of adjoining owners who thus in conformity with the common practice of backwoods settlers permit this sort of precarious passage, and so to hold would be to operate a surprise upon parties whose friendly tolerance would thus be made to work a forfeiture of their property.

I do not feel called upon to enter upon a particular examination of the evidence. I have stated what, in my opinion, are the general results from it.

My brother Gwynne has prepared and will deliver a very full judgment which I have been permitted to read, and in which I concur so far as it relates to the part of the case which I have just considered, and to that I refer for a complete demonstration of the conclusion that neither by grant nor prescription did the respondent ever acquire any easement in favour of the east half of 19 of a right of way across the west half of lot 18 to the 6th concession line.

I am, therefore, of opinion that the finding of the jury to the contrary was altogether against the weight of evidence and should be set aside.

Next arises the question as to how the case is to be further dealt with, whether the judgment should be pronounced by the court on the evidence, or whether a new trial should be ordered. After some hesitation I have come to the same conclusion on this head as my brother Gwynne and the learned judges of the Common Pleas Division. It is not likely that new evidence can be obtained, and the case appears, therefore, to be one which may properly be dealt with under Consolidated Rule 755 (which is a transcript of the English Order 40, Rule 10 of 1875) by which it is provided that when the court, on a motion for a new trial, is satisfied that it has before it all materials necessary for determining the case they may give judgment accordingly. The condition mentionéd being complied with here, no useful purpose would be served by sending the case back to trial before another jury. It is to be observed regarding this Rule 755 that it is not in the same terms as the English rule which was the subject of the Lord Chancellor's observations in *Toulmin v. Millar* (i). The rule there referred to was 568 of the English Rules of 1883, by which the original order of 1875, was altered in a most material particular by restricting the court to such inferences of fact as should not be inconsistent with the finding of the jury. This qualification is not found in the Ontario order under consideration, and there is therefore nothing to prevent the disposition of the

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case so far as this part of it is concerned which was adopted by the Common Pleas Division.

There remains to be considered the effect and operation of the agreement of the 20th of March, 1878, entered into between the present respondent and his brother William, the predecessor in title of the appellant. This is exclusively a question of construction, and as such was one entirely for the judge and not for the jury. It was, however, left by the learned Chief Justice, who presided at the trial, to the jury as a question of fact. This, in my opinion, was erroneous. The Court of Appeal have held that this deed operated as a grant in favour of the respondent of a right of way wholly upon the land of the grantor William Duncan, extending a distance of 40 rods from the centre of lot 18 in extension of the existing lane. The words of the instrument are:

A full and free right of way along the lane where it now is on lot number 18, 5th concession leading from the 6th line and extending 40 rods east from the centre of said lot so as to allow a free communication for all his and their teams, vehicles, etc., at all times from said lot number 19 along said route to the 6th line.

I am of opinion that the construction adopted by the Court of Appeal is the correct one, and that the appeal on this branch of the case wholly fails and must be dismissed.

Where a right of way is granted across certain described land it is to be presumed in the absence of any context restricting or qualifying the grant, that such way is to be wholly on the land of the grantor notwithstanding the fact that a portion of the same lot of land immediately adjoining the grantor's land is owned by the grantee and forms part of the land included in the general description of the property of the grantee as well as of that of the grantor. This must be the construction merely on the application of the maxim requiring the deed to be most strongly construed against the grantor. This grant was for valuable consideration; such consideration consists of an easement or right of leading water across the respondent's land granted to his

brother William by the same agreement or grant. There is therefore no reason why the rule of interpretation mentioned should not be applied. Then the *primâ facie* construction being thus in favour of the respondent, there is nothing in the circumstance that it is to be in extension or production of the existing lane which can properly have the effect of altering it. The description does not call for an extension in directly the same corner as the existing lane, and if such an extension would have the effect of throwing the additional part wholly on the respondent's land it would be entirely inadmissible as rendering the grant wholly nugatory, and thus in direct contravention not only of the maxim requiring the interpretation to be that operating most strongly against the grantor, but also of that other canon of construction which says a grant is to be interpreted "*ut res magis valeat quam pereat.*" And as regards the construction which would place the lane granted half on the respondent's land and half on the appellant's land, such an interpretation would, though in a less degree, still be obnoxious to the sound and well-established rules and principles of construction just mentioned. That the parties did not themselves understand that the deed was to be wholly inoperative, as is now insisted, is shewn by the facts mentioned in the judgment of the Court of Appeal, viz., that a survey was had before the deed was executed and the exact location of the existing lane thus ascertained and that a plan shewing the lane as produced with a "jog" in it was produced at the trial. Further, the offer of William Duncan to purchase from the respondent one-half of the width of the lane shews that he did not consider the present contention that the lane was to be wholly on the respondent's land and that he (William) had in fact assumed to grant nothing, was tenable. I therefore consider that this branch of the case is susceptible of decision upon the plain principle that when a man for valuable consideration assumes to grant a way or other easement, he must be taken to grant something of value and is not to be considered as executing

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a mere illusory deed, and that the presumption is, unless a contrary intention is apparent on the face of the deed itself, that what is assumed to be so granted is to be located wholly in the land of the grantor. Nothing in this grant requires that the lane should be produced in an exactly straight line or on the same corner as the old land, nor that the extension should be without any jog in it.

The result is that whilst the appellant succeeds as regards the old road across the lots, he fails as to the extension of the lane granted by the deed of 20th March, 1878, and judgment, in my opinion, should now be ordered to be entered accordingly; and, as each party succeeds as to one of his contentions and fails as to the other, there should be costs to either party, a disposition of the costs which is within the powers conferred by Consolidated Rule 1170—since the respondent's failure on one part of the case made by his statement of claim constitutes a "good cause" for depriving him of his costs in respect of the residue of his cause of action, notwithstanding the finding of the jury in his favour in that part of the case which was improperly left to them, is as a matter not of fact but of law sustained. Therefore my judgment is to allow the appeal to the extent above indicated and to order that judgment be entered accordingly in the Common Pleas Division, without costs to either party either here or in any of the courts below.

GWYNNE J.—The plaintiff in his statement of claim alleges that by a deed dated the 2nd of May, 1860, his father, the late James Duncan, since deceased, granted, bargained, sold and conveyed to him the east half of lot No. 19 in the 5th concession of the township of York, and that, at the time of the making of the said deed, there was a roadway in existence extending from the said east half of said lot No. 19, westerly across a part of the west half of said lot No. 19, thence southerly upon the west half of lot No. 18 in said fifth concession until it reached a lane or roadway on the said west half of lot No. 18, running in a

southerly and westerly direction through the said west half lot past the house and buildings of the plaintiff's father on the said lot No. 18 to the 6th concession road, and that such roadway across the west half of the said lot No. 18 had theretofore been and then was used as an appurtenant to the east half of said lot No. 19, and that by the said deed of the 2nd of May, 1860, a right of way over such roadway was granted and conveyed to the plaintiff, and that, until interrupted by the defendant, the plaintiff has ever since used the said roadway as of right for the purpose of obtaining access to and from the said east half of the said lot No. 19 across the said west half of said lot No. 18 to the 6th concession of the said township of York.

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The plaintiff then asserts a claim to the said roadway by user of the same for, as was alleged, 25 years.

He then alleged the death of his father on the 16th day of June, 1877, having first made his will whereby he devised to the plaintiff in fee the north-east quarter of said lot No. 18, and to plaintiff's brother, William Duncan, the residue of the said lot No. 18, and that subsequently thereto and on the 20th day of March, 1878, they entered into an agreement under their hands and seals whereby it was witnessed that

For and in consideration of the conditions and provisos herein-after specified said James Duncan for himself, his heirs, executors, administrators and assigns doth by these presents covenant and agree to permit the said William Duncan, his heirs, executors, administrators and assigns to have and use the privilege and right of, at all times, taking and conveying from the spring and springs of water which he now uses, from where he now has the water pipes laid under ground across said James Duncan's lot number 19 in the 5th concession of the said township of York. He also covenants to permit the taking up, repairing, laying down again and covering up said water pipes whenever repairing them is rendered necessary. Any injury that may be done to the crops in making such repairs is to be paid for at a valuation by said William Duncan, his heirs and assigns. It is clearly understood that said springs do not include the springs on said lot now used by the said James Duncan for his own purposes. In consideration whereof the said William Duncan for himself, his heirs, executors, administrators and assigns doth by

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these presents covenant and agree to permit the said James Duncan, his heirs, executors, administrators and assigns, a full and free right of way along the lane, where it now is on lot number 18 in the 5th concession west in the said township of York leading from the sixth line, and extending 40 rods east from the centre of the said lot so as to allow a free communication for all his and their teams, vehicles, etc., from said lot number nineteen along said route to the 6th line, and the said James Duncan for himself, his heirs and assigns covenants to perform a reasonable share of the labour required in repairing said lane, and that whatever gates may be in the said lane requiring to be kept shut, it shall always be so done whenever he or they pass and repass said gate and gates.

He then claims that the defendant had interrupted him in and deprived him of the use and enjoyment of both of the rights of way as claimed by him, namely, first, that over the roadway described as running from the place where the roadway as claimed from the east half of lot No. 19 across the west half of that lot entered the west half of lot 18 and proceeded southerly until it reached the lane on the west half of lot 18 running westerly to the 6th concession line; and, secondly, the right of way granted by the deed of the 20th day of March, 1878.

The defendant's contention is that the plaintiff never had any right to the way as firstly claimed by him in, upon or over any part of the west half of lot No. 18, as appurtenant to the east half of lot No. 19, by grant or prescription, in both of which ways he had laid claim thereto in his statement of claim, and he insists that the only right of way the plaintiff has over any part of the west half of lot No. 18 is that granted by the deed of the 20th March, 1878, with which his contention is that he has never interfered.

The plaintiff has, in my opinion, failed to establish that at the time of the plaintiff acquiring title to the east half of the said lot No. 19, there was any way across any part of the west half of the said lot No. 18, which was appurtenant to the east half of the lot No. 19 or used therewith otherwise than by the mere sufferance, permission and favour of the plaintiff's father, who was then the owner in fee of the whole of the said lots 18 and 19. It appears that the plain-

tiff's father with his brother, the plaintiff's uncle, some few years prior to 1847 went into the said 5th concession of the township of York and settled upon these lots, which were then a wilderness. The plaintiff's uncle settled upon the east half of lot No. 19 and his father upon the lot No. 18, abutting on the 6th concession line, of the whole of this lot and of the west half of lot No. 19, he was seized in fee. The plaintiff's father made a lane for his own convenience upon his lot No. 18, running from the 6th concession line and his house situate thereon, easterly to a point near the centre of his lot 18. The only evidence of any right of way across this lot having been made appurtenant to the east half of lot 19 consisted in this, that the plaintiff's father was in the habit of permitting his brother and others in occupation of the east of 19 under him to have access between the 6th concession line and plaintiff's uncle's east half of lot No. 19 by this lane, and from thence by bush trails through the west halves of lots 18 and 19. While things were in this condition plaintiff's father, in 1847, purchased from his brother the east half of the lot 19 and thence forward was owner in fee of the whole of the lots 18 and 19 until in May, 1860, he conveyed the east half of lot No. 19 to the plaintiff and from thence until his death, in 1877, he permitted the plaintiff to cross along the lane already spoken of and the west halves of 18 and 19 through the bush in summer, along certain bush trails there, and across the fields in winter, between the 6th concession and his father's house there, and the plaintiff's own house on the east half of lot 19; but there was no evidence whatever that the plaintiff enjoyed this way otherwise than by the mere sufferance, permission, grace and favour of his father, and that the plaintiff did not upon his father's death claim otherwise would seem to be the rational way of accounting for the deed of the 20th of March, 1878, made between the plaintiff and his brother William.

The latter appears to have had certain pipes passing through his land on the west half of lot No. 18 into the

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east half of 19 to draw off water from a spring on the east half of 18 to William's house and premises on lot 18, of which the defendant is now seized in fee and in consideration of the plaintiff granting to William, his heirs and assigns the right to maintain these pipes in the east half of 19 and to draw water from the springs there, William granted to the plaintiff, his heirs, and assigns a right of way upon and over the lane leading out to the 6th concession line, which is the same line upon and over which the plaintiff in his statement of claim claims a way both by grant contained in the deed of 2nd May, 1860, as appurtenant to the east half of lot 19 and also by prescription; but, in my opinion, the plaintiff has failed to establish any right of way over any part of the west half of lot No. 18, otherwise than in virtue of the grant contained in the deed of the 20th March, 1878, and the extent and precise site of the right of way so granted is the real point in controversy between the parties, and which has given rise to this litigation, for if it had not been for the difference which has arisen upon this point I cannot think that any claim for the other right of way insisted upon by the plaintiff would have ever been asserted.

The plaintiff has a roadway or avenue leading westerly from the concession line between the 4th and 5th concessions of the township of York upon which the east half of lot 19 abuts to his house, situate upon that east half lot. He has also constructed a lane from his house in a southerly direction running across the north-east quarter of lot 18 devised to him by his father's will to the south-east quarter of said lot 18. Now the arrangement between the brothers James and William in March, 1878, would seem to have been entered into with the design of enabling the plaintiff to have access from his house on lot 19 to the 6th concession line by the above lane so made from his house to the south-east quarter of lot 18, and the lane from the 6th concession line as it then existed in the west half of lot 18 continued to connect with the plaintiff's said lane on his own land. The

lane as contemplated by the deed of the 20th March, 1878, from the termination of the lane on the west half of 18 as it then existed, and which did not then reach quite to the centre of the lot, to the plaintiff's lane running southerly from his house does not appear to have been opened while the plaintiff's brother William remained seized of the west half of lot 18. A difficulty as to its site and as to the construction of the deed of the 20th March, 1878, has arisen between the plaintiff and the defendant, who derives title to the west half and the south-east quarter of lot 18 by purchase from William, and who is bound by William's grant of right of way contained in the deed of the 20th March, 1878. Now the grant in that deed is of

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a full and free right of way along the lane where it is now on lot number eighteen, 5th concession west, said township of York leading from the sixth line and extending forty rods east from the centre of the said lot so as to allow a free communication for all teams, vehicles, etc., etc., (of plaintiff, his heirs and assigns), at all times from lot number 19 along said route to the 6th concession line.

This free communication here spoken of would be completed by continuation of the lane as it then existed on the west half of 18 to the lane of the plaintiff running southerly from his house across the north-east quarter of 18. This latter lane of the plaintiff was situate 40 rods easterly from the centre line of lot 18. What was plainly contemplated was, I think, the connection of this lane of the plaintiff with William's lane from the sixth concession which, as it existed in March, 1878, did not quite reach the centre of the lot. At the time of the execution of the deed of the 20th March, 1878, it does not appear whether or not the parties thereto or either of them knew whether the lane being continued 40 rods east from the centre of the lot would be upon the north-east quarter of lot 18 devised by his father to the plaintiff, or upon the south-east quarter of that lot which was part of the land devised by his father to the plaintiff's brother

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William or partly on one of and partly on the other of these quarters of lot 18. When the lane was continued by the defendant to and reached the centre of lot 18, the difficulty arose, for, if continued straight on east for the 40 rods, it was found, as is said, that it would pass wholly upon the plaintiff's north-east quarter of lot 18, and he insisted that the lane should, at the centre line of the lot, be made with a right-angled turn southerly so as to pass wholly upon the defendant's south-east quarter of lot 18. To this the defendant objected, but, as I understand the case, agreed to such a jog as would take half of the width of the lane off the south-east quarter and the other half off the plaintiff's north-east quarter of the lot 18. To this the plaintiff would by no means consent, and hence has arisen the whole difficulty which has caused this litigation and which, as the parties cannot agree to settle among themselves, we have to decide by putting a construction upon the deed of the 20th March, 1878; and, in my opinion, the true construction of that deed is that the lane as then in existence upon the west half of lot 18 was to be continued from the centre of the lot east for 40 rods, in order to meet, and until it should reach the plaintiff's said lane running south from his house. What William was granting, as it appears to me, was a right of way over his lane from the 6th concession to the centre of the lot 18, being the boundary of William's land, such lane to be continued thence east to connect with plaintiff's lane, over whosoever land the continuance should be, namely, over William's own or James's land wholly or partly over the land of each as the case should appear to be necessary in order that the lane should be continued straight on for the 40 rods east of the centre of the lot until it should reach the plaintiff's lane running southerly from his house, and this being, in my opinion, the true construction of the deed, I am of opinion that this appeal should be allowed with costs and that the judgment of the Divisional Court should be restored.

PATTERSON J.—The farm of James Duncan, the plaintiff, comprises the east half of lot 19 and the northeast quarter of lot 18 in the 5th concession of the township of York in the county of York in Ontario. He claims two rights of way to his farm over lands of the defendant Rogers in the next half of the same lot 18, and complains of their obstruction by the defendant.

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The obstruction is not disputed, and the contest is as to the existence of the rights of way.

The allowances for roads between the 4th and 5th concessions and between the 5th and 6th concessions, which are conveniently spoken of as the 5th concession line and the 6th concession line are public highways by statute and are also travelled roads.

Lot 19 lies on the north of lot 18 and each lot is bounded on the east by the 5th concession line and on the west by the 6th concession line.

The plaintiff's father, whose name was also James Duncan, owned both the lots 19 and 18. His house and farm buildings were on the west part of lot 18 near the 6th concession line.

In 1858 he let the plaintiff into possession of the east half of 19, which had up to that time been occupied either wholly or in part by tenants, and in 1860 he conveyed it to him by deed. The north-east quarter of lot 18 came to the plaintiff under the will of his father who died in 1877.

The general facts necessary to shew how the question of the right of way arises appear by the evidence without serious dispute, though the determination of the question may depend on facts or inferences which are less free from controversy.

The fifth concession line is said to be hilly and in other respects less convenient for the plaintiff's purposes than the sixth. He has a good lane from his house to the fifth line, which he seems to have made shortly after he came to live on lot 19. Speaking in 1887 he said that he made the lane between twelve and twenty years ago. His wife said eigh-

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teen or twenty years ago, and his brother William said it may be twenty-five or thirty years ago.

Before that lane was made the only way used by the plaintiff from his farm buildings was by the route to the sixth line, and he continued to use that route, though not exclusively, until the interruption now complained of, which occurred in 1886.

He reached the sixth line by a track leading westerly through his own half lot, and in the same direction for some distance into the west half of the lot, then turning towards the south and continuing southward through the west half of lot 19 and the west half of lot 18 until it struck, nearly at right angles, a lane that ran westerly, on lot 18, past the father's homestead to the sixth concession line.

This is one of the ways to which the plaintiff now asserts a right.

He claims in the first place by the effect of his father's conveyance of 1860, which was a deed on an ordinary printed stationer's form—not the statutory short form—granting the half lot with all ways, etc., and appurtenances to the parcel of land belonging or in any way appertaining or therewith used and enjoyed; and he claims in the alternative by prescription.

The residue of lot 18, or the lot less the plaintiff's north-east quarter, was devised by James Duncan, senior, to his son William, who sold it to the defendant. The west half of lot 19, except half an acre, was devised to Charlotte Duncan, and the defendant has no interest in it.

The plaintiff acquired from William, before the defendant bought from him, another title to the way over the lane already mentioned leading to the sixth concession line.

Therefore the only part of the track now directly in question is that part crossing lot 18 from the line of lot 19 to the lane.

It happens that that is not part of the track which was travelled in 1860. It was substituted in 1862 for the original track at the suggestion of James Duncan, senior, by

the plaintiff, to get rid of the drive through the woods which was dark at night, the new track being along the fence of the clearing.

It is this substituted way that has been blocked by the defendant, but I apprehend that while the period from 1862, when it was first used, until 1886 when the interruption took place, is longer than that twenty years required for a prescriptive title under R.S.O. [1887] ch. 111, sec. 35, and therefore the change of way does not prejudice the claim by prescription, the claim by grant from the plaintiff's father will also be good, provided it appears that the original way through the woods passed by the deed. If the effect of the deed was to vest in the plaintiff a right of way by the track that was used in 1860, his right as against his father to the new way for which he gave up the other would, in equity, if not at law, be just as valid. Therefore the change of the travelled track from one place to the other does not appreciably alter the questions to be decided.

I speak of the road in question as a track, for want of a better name, and in order to avoid the use of the term "trail," which appears to have been much used at the trial, particularly by counsel for the defendant. That term has a meaning in connection with travels in bush and prairie, but is not, as I understand it, appropriate here.

I believe there is no witness who speaks of the track from personal knowledge before the plaintiff's time, though its existence is spoken of. The lots were apparently to a great extent in a state of nature when the track was first used, and naturally something had to be done to make it passable for vehicles, such as making rude bridges over streams or swampy places with logs of corduroy causeways, levelling in one hilly place, and sometimes cutting trees out of the way. In one place on lot 19 a bridge was made of planks seven feet long laid on stringers five feet apart, and there was some ditching. In other respects the road was merely a waggon track, not fenced or graded, but which is said to have always occupied the same position.

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Before dealing with the claim of prescriptive title let us consider the effect of the deed of 1860. If it gave the right of way as an easement, appurtenant to the half lot, it, of course, did so immediately on its execution.

Whatever may be the legal operation of those general words contained in the printed part of the deed, it cannot be seriously supposed that, when the father conveyed to his son the tract of land abutting on a highway, he intended to give, or supposed he was giving, a private way of nearly two miles in length running in an irregular route through the rest of his land. If he had intended to impose such a servitude on his remaining land the intention would doubtless have been expressed in particular terms. Far from that being the case, the plaintiff when asked about it, cannot say that it was even spoken of.

It was natural that no objection should be made to the plaintiff crossing the farm by the track that was there, or by any other route, when he visited the old home or even when he took the same road to church or market, that he had always used when he lived with his father, and which the father himself had used when the farm was all one farm, whether the produce for market was from the nearer or the farther fields. Much more must appear before the way can be recognized as used and enjoyed with the half lot conveyed to the plaintiff.

It is said that the occupiers of the house in which the plaintiff first lived on his half lot used the way before James Duncan, senior, bought lot 19. The evidence of that is merely the plaintiff's recollection from the time he was twelve or thirteen years old, but what of it? On lot 19 the owner went where he pleased. When he crossed into lot 18 was it that he had a right of way appurtenant to his lot 19? No such thing is pretended. He was either a trespasser or had leave. Doubtless that tacit permission by which uncultivated lands are so commonly crossed by way of short cut or because for the time it is more convenient to cross them than to go by the highway. Thus the user

previous to James Duncan senior's ownership adds nothing to the effect of the user by him after he purchased.

It is well settled in England by modern decisions that a way must be a defined way in order to pass by the general words "all ways used and enjoyed" when the way is not an existing easement or a way of necessity.

I shall cite, without discussing in detail, some of the recent cases on the subject. In the case of *Harris v. Smith(j)* I examined pretty fully the decisions down to 1876, and I refer to my judgment which begins at page 55 of the report.

More recently I had occasion to discuss the subject of the creation of easements by general words in a conveyance of lands in the Province of Ontario, and I expressed opinions to which I adhere. I allude to my judgment in *Carter v. Grasett(k)*—not the case of *Grasett v. Carter(l)* that came to this court—particularly to my remarks beginning on page 704 of the report, and to the discussion of the cases there referred to.

The case of *Langley v. Hammond(m)* probably affords the most direct example among English cases of what is or is not a defined way. A hard gravelled roadway had been made for convenience of carting heavy loads to and from a yard and farm buildings. A surrender of part of the farmyard bounded on one side by the roadway had general words which included all ways, etc., therewith used, occupied and enjoyed. It was held that no right to use the roadway passed. Bramwell, B., said:

The ground on which I think this rule ought to be discharged is that there is here really no defined road. It is said that it is hard and gravelled, but in truth as soon as you turn out of West street you do not come into what is a road and nothing else, kept for no other purpose, but into a brick-yard when the occupier could, and no doubt did, go in any particular direction he desired. But this is not a way of such a definite kind as to pass under general words. It is no more a way (if I may use the illustration) that the short cut

(j) 40 U.C.Q.B. 33, 55.

(l) 10 Can. S.C.R. 105.

(k) 14 Ont. App. R. 685.

(m) L.R. 3 Ex. 161.

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a man may take across his room from the piano to the fireplace is a way. In one sense, no doubt, it is a way that he may use, but he only uses it equally with ways in other directions, by virtue of his rights of possession, not because there is any road made there, but because it is the shortest cut to the place he wishes to get to.

The necessity for the way being a defined way in order to pass under the general words has been in subsequent cases uniformly insisted on, following the principle thus stated by Bramwell, B., and usually with express reference to the passage I have quoted from his judgment. In *Kay v. Oxley*⁽ⁿ⁾ his statement of the law was expressly approved. So also in *Brett v. Clowser*^(o), where the general words were "ways, etc., to the said premises belonging or in any wise appertaining" which were held by Denman, J., not to be equivalent to the words "now used and enjoyed." The rule is stated by Mellish, L.J., in *Watts v. Kelson*^(p) in these terms:

We may also observe that, in *Langley v. Hammond*^(q), Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words.

That passage is quoted by Fry, J., in *Barkshire v. Grubb*^(r) the learned judge adding:

I adopt that view. I think that when there are two adjoining closes, and there exists over 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 general words "together with all ways, now used and 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.

In *Bayley v. Great Western Ry. Co.*^(s), Fry, L.J., again

(n) L.R. 10 Q.B. 360.

(q) L. R. 3 Ex. 161.

(o) 5 C.P.D. 376.

(r) 18 Ch. D. 616, 622.

(p) L.R. 6 Ch., at p. 174.

(s) 26 Ch. D. 434, 457.

enunciating the rule, speaks of the way to which it applies as "a made and visible way."

In the case before us the lane that ran east and west through lot 18 appears to have been a defined way, but the track which led into it from the north would not in my judgment come within that definition as I understand it to be used in the English cases. It was merely the track made by the waggon wheels, not a strip of any fixed width separated or capable of being separated from the adjoining land. The track on the ground was doubtless evidence of the fact, which might have been proved if the tracks were not there, that the driving from year to year was substantially over the same ground, but there was nothing that approached a made or constructed road such as the English cases deal with. A right of way might doubtless be acquired by express grant or by prescription or as a way of necessity where no characteristics of a formed road existed. An instance of such a way occurs in the case of *Wimbledon and Putney Commons Conservators v. Dixon* (t), where the title was by immemorial user. Such a way would not, as I apprehend, pass under a conveyance like that before us, unless it were a way of necessity.

But the English rule, while it is the rule in Ontario, requires to be applied with attention to circumstances, such as the condition of the lands when the conveyance was made, the statutory arrangement of highways between concessions and on certain side lines between lots, and the practice through the country of making ways for convenience over uncultivated lands.

It has been always well understood in such cases (said Sir J. B. Robinson, in *Reg. v. Plunkett* (u)), that whenever the public allowances should be opened and made fit for use they would be adopted, according to the evident intention, and the "trespass roads," as they were commonly called, would be abandoned.

Reg. v. Plunkett was an indictment for obstructing an alleged highway which had been a travelled road for many

(t) 1 Ch. D. 362.

(u) 21 U.C.Q.B. 536.

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years and on which public money had been expended. It was held not to have been dedicated to the public. The facts concerning the user of the road in such cases and the principles acted on in dealing with them are essentially similar to those which we are considering. In *The Queen v. Ouellette* (v) the same question arose, and was dealt with in the same way, and in *Dunlop v. The Township of York* (w) the late Chief Justice of Ontario, then Spragge, V.C., holding that the dedication of a highway there set up had not been established, remarked (p. 222):

I may add that in a new country like Canada it would never do to admit user by the public too readily as evidence of an intention to dedicate. Such user is very generally permissive, and allowed in a neighbourly spirit, by reason of access to market or from one part of a township to another being more easy than by the regular line of road. Such user may go on for a number of years with nothing further from the mind of the owner of the land, or the minds of those using it as a line of road, than that the rights of the owner should be thereby affected.

Features of this kind will not be looked for in contests respecting ways in the English courts, yet something of the same sort entered into the discussion of *Macpherson v. Scottish Rights of Way and Recreation Society* (x), where a way over a mountain in the Highlands was in question.

I discussed in *Carter v. Grasett* (y) the propriety of construing the general words "therewith used and enjoyed" in deeds of lands in Ontario with reference to the circumstances under which the deed was given, the words not being satisfied by any actual use and enjoyment that happened to come within their literal meaning, but such use and enjoyment being necessary as bore something of the character of an easement appurtenant to the dominant tenement. The easement there claimed was light. The owner of building lots 8 and 9 which adjoined each other, built a house on lot 8 and sold the lot granting, by the original general printed

(v) 15 U.C.C.P. 260.

(w) 16 Gr. 216.

(x) 13 App. Cas. 744.

(y) 14 Ont. App. R. 685.

words all lights used and enjoyed with lot 8. Lot 9 being vacant, light was in fact received over it by a cellar window, by a pantry window and by a window in a room at the rear which had another window looking in another direction. A space of six feet had been left between the house and lot 9, and the whole arrangement of the house with respect to lights indicated, to my mind at all events, the intention of the builder that the windows looking into the six foot space should receive merely the light afforded by that space. These indications agreed with what would, as a matter of course, be presumed under the circumstances, and, in my opinion, the use and enjoyment of the light passing over lot 9 was not a use and enjoyment with the lot 8 in the sense intended by the grantor and understood by the purchaser of the lot. The line of reasoning is apposite in this case, and I may be permitted to read a passage from my judgment, at page 714 of the report:

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The same general expressions in the deed apply to ways. Suppose the very common case of a short cut diagonally across an adjoining vacant lot to reach the back part of the house. If the grantee under a deed like this made so extravagant a claim as that such a right of way passed by the express grant of ways used with the house, what would be the answer? Not that as a matter of fact the way was not used and enjoyed with the house. It was literally so used and enjoyed. The answer would be that the use was temporary and accidental, not appurtenant to the house or in the nature of an easement; that access from the street to the rear had been provided on the land conveyed, possibly not so convenient when coming from one direction as the short cut, but still what the vendor intended and the purchaser understood when the bargain was made, and the price agreed upon; and that all the surrounding facts were evidence of this; the nature of the property, the ordinary course of dealing, known to every one, in cases of the kind, and the facts that access had been provided on the granted lot while the so-called way had not been defined or made into a road (like the tracks across the farm yard in *Langley v. Hammond*); and possibly other facts; but all being matters of evidence.

I may refer to the case of *Roe v. Siddons*(z) as an instance in which the literal force of the language of a deed

(z) 22 Q.B.D. 224.

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was held to be qualified by facts existing when the deed was made. The way there in question had once been used with a house, but that use had been discontinued, a wall being built across the end of the road. On a subsequent conveyance of the house with all ways "heretofore used and enjoyed" it was held that the right of way was not revived, although it had once been used with the house. A remark made by Lord Esher in that case has much force when applied *mutatis mutandis* to the deed before us.

If the general words in the grant (he said) were not ordinary words, words commonly (though I agree, not always) used in a conveyance when there is nothing in fact corresponding to them, I should say it was impossible to hold that they did not apply to a state of things existing at any previous time. But from the judgment of Hall V.C., in *Hall v. Byron* (a), I am satisfied that such words are frequently used in deeds when there is nothing to which they can apply, that they are mere common form words, and that it is not necessary to imply that they are used in their strict grammatical sense. But I think that the fact that such words are used in a deed, is *prima facie* evidence of an intention to use them according to their grammatical construction.

Now, reverting to the date of 1860, as of which we have to construe this deed, we have a track through lot 19 which the owner of that lot, and the tenants he may have had in the houses on it, used for egress and ingress in preference to taking a more direct route to either concession line, but no evidence that it was specially appropriated to the east half of the lot. When lot 18 was reached the track seems to have been through the woods, as the whole had originally been, or nearly all of it. The incident of the plaintiff being recommended by his father, in 1862, to make a way beside the clearing does not, to my mind, go to shew that the way was looked upon as having been granted by the deed. It tends in my view in the opposite direction. When the clearing had been made does not appear, but there was a clearing, and we have the father saying to his son, why need you keep to the dark woods now that by some work in removing

(a) 4 Ch. D. 667.

trees, standing and fallen, you can make a way by the clearing. Whatever effect the transaction may have on the question of the acquisition, after twenty years, of a prescriptive right to the new way, I do not see that it reflects any light on the original transaction.

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There was nothing left to the jury directly touching the facts affecting the construction of the deed. They were directed to find for the plaintiff on the issue of prescription in case they found that the plaintiff had had twenty years use without interruption of this track on lot 18 as a defined way, and they found for the plaintiff.

The verdict may seem to involve the finding that that was a defined way, but there are more reasons than one why it cannot be held to touch the operation of the deed.

The jury were asked only to consider the issue of prescription. They had to say whether a prescriptive right had been acquired to the particular track which the defendant had blocked, and their finding was that that particular track had been used for twenty years. That was the sense in which, as the matter was left to the jury, and as they pronounced upon it the way was defined, and the finding does not touch the question of there being such a formed and constructed road or such a definite way used with the half lot, in 1860, as to pass an easement by the general words of the grant. Besides, the jury had to deal with only the twenty years preceding 1886, and with the way first used in 1862, and were not asked to find any fact concerning the state of things in 1860.

Two facts were essential to the passing of the way by the deed, and there was not, in my opinion, evidence on which the jury could properly have found either of them for the plaintiff.

One fact was the existence of such a distinct way, whatever term may be used to describe it, formed, constructed, set apart, or defined—or having the quality, which Bramwell, B., found wanting in the hard and gravelled track in *Langley v. Hammond*(b), of “a road and nothing else, kept

(b) L.R. 3 Ex. 161.

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for no other purpose"; and the other fact no less essential if such a road was there, that it was, within the meaning of the conveyance, used and enjoyed with, or as *quasi* appurtenant to that part of his land which James Duncan, senior, conveyed to this son in 1860.

My opinion on this topic agrees with what I understand to have been the view of the learned Chief Justice of the Common Pleas at the trial and with that of the Divisional Court. In the Court of Appeal the judgment proceeded substantially on the opposite view of the effect of the deed though concurrence was expressed with the finding as to prescriptive right.

In connection with the question of prescription, there are one or two other facts to be stated. I have mentioned the lane made by the plaintiff from his buildings eastward to the fifth concession line. He has another lane from his buildings southward to the south boundary of his part of lot 18. I do not observe any distinct description of it in the evidence. It is shewn on the surveyor's plan made for the plaintiff and marked "lane." William Duncan says it was made in 1877 or 1878, and I think the plaintiff gives the same date. The plaintiff appears to have desired to have access from this lane, or from the part of his land near the southern terminus of the lane, to the sixth concession line along the old lane which ran easterly from that line, but did not extend so far as the plaintiff's part of lot 18. In 1878, the year after the father's death, and while William Duncan owned the land that now belongs to the defendant, William and James made an agreement in writing which I shall read. It would seem to have been made in consequence of William wishing to secure his right to take water from springs on the land of James.

This agreement made this twentieth day of March one thousand eight hundred and seventy-eight.

Between James Duncan of the township of York in the county of York, and Province of Ontario, farmer, of the first part, and William Duncan of the said township of York, farmer, of the second part.

Witnesseth that for and in consideration of the conditions and provisos hereinafter specified the said James Duncan for himself, his heirs, executors, administrators and assigns doth by these presents covenant and agree to permit the said William Duncan, his heirs, executors, administrators and assigns, to have and use the privilege and right of at all times taking and conveying from the spring and springs of water which he now uses from where he now has the water pipes laid under ground across said James Duncan's lot number nineteen in the fifth concession of the said township of York; he also covenants to permit the taking up, repairing, laying down again and covering up said water-pipes whenever repairing them is rendered necessary. Any injury that may be done to the crops in making such repairs to be paid for at a valuation by said William Duncan, his heirs or assigns.

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It is clearly understood that said springs do not include the springs on said lot now used by the said James Duncan for his own purposes.

In consideration whereof the said William Duncan for himself, his heirs, executors, administrators and assigns, doth by these presents covenant and agree to permit the said James Duncan, his heirs, executors, administrators and assigns, a full and free right of way along the lane where it now is on lot number eighteen, fifth concession west, said township of York, leading from the sixth line and extending forty rods east from the centre of said lot so as to allow a free communication for all his and their teams, vehicles, etc., at all times from said lot number nineteen along said route to the sixth line, and said James Duncan for himself, his heirs and assigns, covenants to perform a reasonable share of the labour required repairing said lane and that whatever gates may be in said lane requiring to be kept shut, it shall always be so done whenever he or they pass and re-pass said gate and gates.

Signed, sealed and delivered

in the presence of (Sgd.) JAMES DUNCAN.
 (Sgd.) JOHN PAUL, (Sgd.) WILLIAM DUNCAN.

One of the charges against the defendant is for blocking the way granted by this document in extension of the old lane. That has to be considered by itself. In the meantime let us see how the agreement affects the claim by prescription to the other way.

By the Statute R.S.O. [1887] ch. 111, it is sufficient to allege the enjoyment to have been as of right, for the statutory period without averring it to have been from time immemorial. That is provided by sub-sec. 2 of sec. 38. By

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sec. 37 the prescriptive period is the period next before some action wherein the claim or matter to which such period relates is brought into question; and sec. 35 fixes the period for the acquisition of a right of way as twenty years' actual enjoyment by any person claiming right thereto, and makes the right absolute and indefeasible when so enjoyed for forty years;

unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Much of the discussion has centered on the bit of road leading across lot 18 to join the lane, and the finding of the jury seems to be that that bit, which is what has been called the substituted track, has been used by the plaintiff for over twenty years; but we must not forget that no right is asserted to that bit of road by itself.

The claim is for access to the sixth concession line, the way including the lane as well as the track by which the lane is reached.

There are serious difficulties in the way of finding evidence on which a jury could reasonably find that the way was at any time used by the plaintiff as claiming right thereto. The circumstances already dwelt upon go far to forbid the founding of such an assumption on the mere fact of user, and the inference to the contrary following the ordinary course of things, to which Sir J. B. Robinson adverts in the judgment in *Regina v. Plunkett*(1) already cited, is borne out by the conduct of the plaintiff in providing an outlet by the fifth concession line, and also the lane by which he obtained access through his own land to the sixth line under the agreement of 1878. The character of the plaintiff's enjoyment of the way, that is to say, whether he claimed as of right within the meaning of the statute, does not seem to have been treated at the trial as an important matter, or in fact to have been present to the mind of the learned Chief Justice when he charged the jury; where-

(1) 21 U.C.Q.B. 536.

fore no finding on that topic is properly involved in the verdict.

The consent of the owner of the land to the making of the substituted track was more than once mentioned to the jury, as appears from the shorthand writer's report of the charge, as a fact of importance. It probably was so on the inquiry whether the road was one of a defined character, but it would tell against the inference that the road was enjoyed as of right, rather than for it, unless a right to the use of the original track were established.

But the writing of 1878 seems to be fatal to any claim by prescription. It brings the case distinctly within the exception of sec. 35. After it was executed, the way along the lane was beyond question enjoyed by consent or agreement expressly given or made for that purpose by writing. If there had been an existing right, as, *e.g.*, if the right of way had been granted by the deed of 1860, it may be that it would have continued, unaffected by the agreement, but there was no existing right. As a piece of evidence, the agreement is so inconsistent with the assumption either that the way was understood to be used with the plaintiff's land so as to pass by the deed, or that he used the way claiming right thereto within the meaning of the prescription Act, as to interpose an obstacle not easy to surmount in the way of maintaining either of those propositions, but it comes so clearly within the exception of sec. 35 as to take the case out of the statute.

A suggestion that the consent may be read as applying only to the extension of the lane receives no countenance from the terms of the instrument, and no reason for so confining the consent can be given, unless upon the ground, which wants a foundation of fact, that the plaintiff already had a right of way over the original lane.

It will further be noticed, in connection with my remark, that the question of the right of way, though chiefly pressed in relation to the track on lot 18, is one question touching the whole route to the sixth line, that this instru-

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ment, while granting a right of way along the lane where it then was on lot 18 and extending forty rods from the centre of the lot expressly grants it as a communication from lot 19, which the lane did not go near, to the sixth concession line.

Thus the plaintiff fails on his claim of prescriptive right, and it remains to consider whether his rights under the agreement of 1878 have been infringed by the defendant.

I have bestowed a good deal of time and attention upon the materials touching this part of the case.

A critical examination of the issue joined respecting this right of way would suggest some curious questions, and the evidence touching the condition of the way, the attempts to use it and the obstruction complained of, which I understand to be a fence, is not easy to grasp very clearly, and still less easy to fit to the issue on the record.

I have satisfied myself that it would be useless now to enter upon a dissertation on these matters, and that our proper course is to treat the dispute as it was treated in the courts below, very much as a question of the proper construction of the agreement. If the lane on the west half of lot 18 were extended in a direct line into the east half of the lot it appears that the part within the east half lot would be wholly within the north-east quarter of the lot, or upon the land of the plaintiff.

William Duncan, when he made the agreement with James would seem from his evidence not to have contemplated this, but to have thought that the extension should be half on his land and half on that of James, and he tells us that he did some clearing by way of making the extension, clearing on his own land and making a jog in the lane in order to bring it far enough south to come half on his land.

It will be understood that the old lane was not made as far as the centre line of the lot. It stopped some forty rods short of the centre. Therefore the extension of forty rods

beyond the centre which the agreement speaks of involved the making of eighty rods, half of which ran wholly through William Duncan's land.

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There are three courses among which we have to decide.

Was the extension to run straight on and so be wholly on the plaintiff's land, as it is argued for the defendant the agreement requires?

Or was it to come half off each party, as William Duncan thought it should, and as the defendant would be willing to make it?

Or was it to be wholly on William Duncan's land, which is what the plaintiff contends?

I have come to the conclusion, after much consideration and some fluctuation of opinion, that the last mode gives the proper construction to the instrument.

A knowledge of the surrounding circumstances is in this case, as in most cases, an essential requisite to the proper understanding of the agreement. We must know at least the nature and relations of the properties affected by the agreement. Without such knowledge we could not say that the extension in a straight line would not run into the lands of a stranger or into a river or lake. We now know that it would lie wholly within the plaintiff's land.

I am not inclined to assume, as was done in the court below, that because the parties had had the line between their quarter lots ascertained they made the agreement knowing that the lane was wholly north of the middle line of the lot. The lane as found did not come within forty rods of the centre, and there were woods intervening. It is not said by any witness, and it is not probable that the line of the lane was compared with the work of the surveyor nor do we know that the lane ran at a uniform distance from the side lines. It may not be likely that a jog in the line was contemplated, but the conduct of William in making the jog is some evidence that the direction the lane would take when it reached the centre line was either not a

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matter thought of in particular or was not thought of as necessarily a straight course.

The terms of the agreement, no doubt, import, *prima facie*, an extension *simpliciter*, but no violence is done to them by interpreting them according to the other facts appearing just as would have to be done if the straight extension were physically or legally impossible.

One fact is that the gift of the extension was no gift at all if it was on the plaintiff's land. The lane might as well have stopped at the line.

That would not be by any means a conclusive consideration, because, if the agreement necessarily required a straight road, the fact that it was worded by mistake in the use of its language or in ignorance of the true course of the lane and so led to a result that was not intended might afford ground for reforming the instrument, but could not be allowed to control the construction of it. But where the terms are satisfied by an extension deflected from the right line the consideration is admissible *quantum valeat*.

Then we read the covenant to permit the said James Duncan a full and free right of way along the lane where it now is on lot 18 leading from the sixth line and extending forty rods east from the centre of the lot, with the knowledge that there was not then a lane extending from the sixth line to the centre of the lot and that forty rods of lane had to be constructed before the centre line was reached, that part being necessarily on the land of William and being an extension of the lane as it existed. The expression "extending forty rods from the centre" we know, from our knowledge of the position, does not mean extending merely from the centre. It means extending from the lane that was there so far as to reach forty rods beyond the centre, or eighty rods in all. "Permit" therefore includes "provide." The plaintiff was to be provided with a way to and from the designated place, which we know from what the surveyors tell us, as well as from William Duncan and the plaintiff, was where the plaintiff's lane came down to

that lane which was the outlet from lot 19, communication with which lot was stated by the instrument to be the purpose of the proposed way.

On the whole I see no good reason for separating one part of the extension from the other and for refusing to hold that the obligation to provide the lane, as well as to permit the plaintiff to use it, on the terms of his doing his share of repairs and shutting the gates after him, did not apply to the whole extension.

I think, therefore, that the plaintiff should retain his judgment for one dollar damages for the interference with the right of way granted by the agreement of 1878, and that so far the appeal should be dismissed. As to the other right of way claimed the appeal should be allowed and the action dismissed. The action being for two independent claims, on one of which the plaintiff succeeds, and on the other of which he fails, I would give no costs of the appeal. I would also leave each party to bear his own costs in the Court of Appeal and in the Divisional Court. In other respects the plaintiff should have the general costs of the action, the adjustment of costs with reference to the several issues being left to the ordinary taxation.

*Appeal dismissed in part and allowed
in part. No costs to either party in
the Supreme Court, Court of Appeal
or Divisional Court.*

Solicitors for the appellant: *Mulock, Tilt, Miller, Crowther & Montgomery.*

Solicitors for the respondent: *Fullerton, Cook, Wallace & Macdonald.*

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 **March 12. (PLAINTIFF)..... } APPELLANT;
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 AND
 1885 }
 **Jan. 12. HENRY JULIUS FISK (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, THE
 PROVINCE OF QUEBEC (APPEAL SIDE).

Husband and wife—Institution of action by divorced wife—Judicial authorization—Arts. 176, 178 C.C.—Art. 14 C.C.P.—Divorce—Decree by foreign tribunal—Jurisdiction—Effect in Quebec—Comity of nations.

S. and F., both being domiciled in the State of New York, were married there in 1871 without ante-nuptial contract. Shortly after the marriage F. received his wife's fortune from her trustees. Subsequently F. established a business in the city of Montreal and resided there when the action was instituted. S. followed her husband to Canada, but only resided there a short time. In 1876 S. was granted a decree of divorce from F. by the Supreme Court of New York and, in 1881, brought this action for an account of his administration and management of her property, but without obtaining the authorization of a judge as provided by Art. 178 of the Civil Code. The defence was that the divorce obtained in the United States was invalid in the Province of Quebec, and secondly that S. was not authorized to institute the action. The Superior Court overruled the pleas and held that the divorce alleged in the declaration was good and valid in the Province of Quebec (5 Leg. News 79), but the Court of Queen's Bench reversed this judgment on the ground that the alleged divorce had no force in the Province of Quebec and that consequently S. being still the wife of F. could not institute her proceedings without marital or judicial authorization (6 Leg. News 329). On appeal to the Supreme Court of Canada,

Held (Strong J., dissenting), *per* Ritchie, C.J., and Henry and Gwynne JJ., that S. having obtained without fraud or collusion a decree for divorce from the Supreme Court of New York, this

*Cout. Dig. 474; 8 Legal News 42, 53.

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

decree, upon the principle of the comity of nations, should be recognized as valid in the courts of the provinces of Canada. (*)

Per Ritchie, C.J., and Henry and Gwynne, JJ., that F. having submitted to the jurisdiction of the Supreme Court of New York when served with the proceedings in the action, could not now be allowed to affirm that that court had no jurisdiction.

Per Fournier, Henry and Gwynne, JJ.—The fact being established that in the State of New York, where the parties were married, S. could have sued her husband without previous authorization, Art. 14 C.C.P., which gives to all persons having the right to sue in their own country the like power in the Province of Quebec, had the effect of clothing the plaintiff with the same right to sue as a *feme sole* in the Province of Quebec as she had in her own country, notwithstanding the provisions for authorization contained in Arts. 176 and 178 C.C.

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APPEAL from a decision of the Court of Queen's Bench (appeal side) (1), Province of Quebec, reversing the judgment of the Superior Court, District of Montreal, in favour of the plaintiff.

On the 7th of May, 1871, the appellant and respondent, both being domiciled in the city of New York, were duly married in that city without ante-nuptial contract. By the laws of the State of New York no community of property is created between persons married there without ante-nuptial contract, and the wife holds and acquires property in her own name, entirely free from marital control, as if she were a *feme sole*. Before and at the time of her marriage with the respondent, the appellant had a fortune in her own right, amounting to \$220,775.74, inherited from her father, and consisting of cash, bonds and other moveable property. On the 8th of January, 1872, the appellant received this fortune from her trustees, and thereupon placed it in the hands of the respondent, who administered and controlled it until the 25th day of September, 1876. The respondent kept his domicile in New York for about eighteen months after the marriage, when he suddenly removed to Montreal, where he established himself in business, and where he has resided ever since. The appellant followed her husband to

**Cf. The Queen v. Wright* (1) 6 Legal News 329.
 (17 N.B. Rep. 363).

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Canada in 1872, but does not appear to have actually resided there for much more than a year. Since 1872 the appellant seems to have lived alternately in Paris and in New York. In 1876, being dissatisfied with her husband's administration of her fortune, she demanded the return of her securities, and obtained a small portion of them.

In the latter part of February, 1880, the appellant, being then a resident of the State of New York as required by the laws of that State, instituted proceedings for divorce in the Supreme Court of New York on the ground of her husband's adultery. The respondent was personally served with process, and appeared in the suit by his attorneys, who were present at every step in the procedure, but filed no pleas. In December, 1880, the appellant obtained from that court a decree of divorce absolute in her favour, on the ground of her husband's adultery. The effect of this decree, according to the laws of New York was to dissolve the marriage tie, and to place the appellant in the same position as if she had never been married.

On the 29th of August, 1881, the appellant took the present action in the Superior Court at Montreal to force her husband to render an account. The respondent filed three pleas to this action:—A demurrer, a preëmptory exception, and a general denial. By his demurrer he asked that the plaintiff's action should be dismissed, because it appeared from the declaration "that the said plaintiff and defendant were duly and legally married, and at the time of the institution of the present action, and for years previous, were domiciled in the Province of Quebec, and no dissolution of said marriage had ever been effected according to the laws of the said province or the Dominion of Canada." This demurrer was dismissed by Mr. Justice Rainville on the ground that even if the parties were still husband and wife, the wife would nevertheless have the right to sue for an account of her husband's administration of her private fortune.

By his second plea, the respondent raised the same ob-

jection, and contended that the divorce set up in the declaration was null and void according to the laws of the Province of Quebec, inasmuch as it was obtained while the consorts were domiciled in that province, and that the appellant was not legally authorized to institute her proceedings. The plea also alleged that immediately after their marriage the consorts removed to Montreal, and there took up their residence, with the intention of making it the seat of their permanent and principal establishment.

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The principal grounds of defence relied upon by the respondent were: 1st. That the appellant was still his wife, and 2nd. That she was not authorized to institute the action.

The Superior Court overruled the defendant's pleas, and held that the divorce alleged in the declaration was good and valid in the Province of Quebec, but the Court of Queen's Bench, by a majority of a single judge, reversed this judgment, on the ground that the alleged divorce had no force in the Province of Quebec, and that, consequently, the plaintiff, being still the wife of the defendant, could not institute her proceedings without marital or judicial authorization.

In addition to the judgments of the Court of Queen's Bench, reported in 6 Leg. News, p. 329, the following was pronounced (unreported):

SIR A. A. DORION C.J.—This is an action which the respondent, as the divorced wife of the appellant, has brought against him for an account of a sum of \$220,775.74, which she alleges she placed in his hands after their marriage to manage for her, as her agent and trustee, and for which he refuses to account.

The facts, about which no controversy arises, are these:

In 1871, the parties were married in the city of New York, where they then had their domicile. In 1872 they both came to Canada and took up their residence in the city of Montreal, with the intention, as declared at the time by the appellant under his own signature, of permanently fixing his residence in this province. Since that time the appellant has been carrying on business in this city, where he has uninterruptedly continued to reside.

Some time about 1876 the respondent, who had also resided here since 1872, left the appellant's domicile, and has since been living

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either in Europe or in the United States. In 1880 she sued her husband before the New York Supreme Court, and, in December of that year, she obtained a divorce on the ground of adultery. The appellant filed an appearance before the court, but did not contest the suit.

On the strength of the decree of the New York Supreme Court granting her a divorce, the respondent, assuming to be single and an unmarried woman, and without any previous authorization from a court or judge, has entered the present action against the appellant for an account of moneys she had entrusted to him during their marriage.

The appellant has demurred to the declaration, which demurrer has been dismissed. He has also filed a plea to the merits by which he alleges that at the time, and for years previous to the pretended divorce invoked by the respondent, the parties had acquired a new domicile in the Province of Quebec, and that the pretended divorce is null and void; and also that the respondent has not been and is not authorized to institute the present action.

The respondent has answered by asserting the validity of the divorce pronounced by the New York Supreme Court, and by alleging that even if the divorce were not valid, she would nevertheless have a right to demand from the appellant an account of the administration of her fortune, both under the laws of the State of New York and under those of this province.

Three questions arise under this issue:

1. Does the divorce which the respondent has obtained in the State of New York affect the appellant who, at the time it was obtained and for years previously had his domicile in the Province of Quebec?

2. If the decree of the New York Supreme Court granting a divorce to the respondent is not binding here, could the respondent bring the present action without being previously authorized to do so?

3. Has the appellant properly raised, by a plea to the merits, the questions as to the validity of the divorce obtained by the respondent and her want of authorization to sue, and should not these questions have been the subject of preliminary exceptions?

A change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment. (Art. 80 C.C.) The proof of such intention results from the declarations of the person and from the circumstances of the case. (Art. 81 C.C.).

In the present case we have the declaration made in writing by the appellant to the custom house officers on entering this province, that he came with the intention of settling permanently in this country, coupled with the facts that he has opened a business and has uninterruptedly resided at Montreal since he made that declaration, ten or eleven years ago. There can, therefore, be no doubt that

the appellant has abandoned his domicile in the State of New York and has acquired a new domicile here.

The respondent has followed her husband here, where she has resided four years with him, and our Civil Code (Art. 83) establishes that "a married woman, not separated from bed and board, has no other domicile than that of her husband." Both the appellant and respondent have therefore had their legal domicile in the Province of Quebec since they arrived here in 1872, the absence of the respondent for the last few years notwithstanding.

It is also undeniable that, according to the laws of the Province of Quebec, the marriage tie is indissoluble, and that divorce is not allowed, but is, on the contrary, considered as opposed to public policy. There are no tribunals here authorized to grant a divorce, that is, to dissolve, for any cause whatsoever, a marriage lawfully contracted; and to allow a divorce pronounced by a foreign court to affect here the personal status of persons having their domicile in this country would be to admit that foreign tribunals have a jurisdiction and power over persons domiciled here which our own courts have not.

No case has been cited and no authority adduced to shew that judgments rendered in a foreign court, contrary to the public policy of the country where the parties concerned have their domicile at the time, has anywhere a binding effect on such parties in the country of their domicile, and we may safely assert that no such authority is to be found. The books are full of decisions to the contrary, and the application of the rule is not confined to any particular country, but seems applicable to all.

Felix, *Droit International Privé*, (2. ed.) pp. 12, 13, says:

"No. 9.—Le premier principe général, en cette matière, résulte immédiatement du fait de l'indépendance des nations. 'Chaque nation possède et exerce seule et exclusivement la souveraineté dans l'étendue de son territoire.' De ce principe il suit que les lois de chaque état affectent, obligent et régissent de plein droit tous les propriétés immobilières et mobilières qui se trouvent dans son territoire, comme aussi toutes les personnes qui habitent ce territoire qu'elles y soient nées ou non, etc.

"No. 10. Le second principe général c'est qu'aucun état, aucune nation ne peut, par ses lois, affecter directement, lier ou régler des objets qui se trouvent hors de son territoire, ou affecter ou obliger les personnes qui n'y résident pas, qu'elles lui soient soumises par le fait de leur naissance, ou non.

"No. 11. Les deux principes que nous venons d'énoncer engendrent une conséquence importante, et qui renferme notre doctrine toute entière; c'est que tous les effets que les lois étrangères peuvent produire dans le territoire d'une nation, dépendent absolument du consentement exprès ou tacite de cette nation."

Page 19. "Aucune nation ne renonce, en faveur des institutions d'une autre, à l'application des principes fondamentaux de son

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gouvernement; elle ne se laisse pas imposer des doctrines qui, selon sa manière de voir, sous le point de vue moral ou politique, sont incompatibles avec sa propre sécurité, son propre bien-être, ou a la consciencieuse observation de ses devoirs ou de la justice. Ainsi aucune nation chrétienne ne tolère en son territoire l'exercice de la polygamie, de l'inceste, l'exécution de conventions contraires à la morale."

Page 39. "Après le changement de nationalité ou de domicile, dont nous parlerons ci-après, la loi de la nouvelle patrie ou du nouveau domicile exerce sur l'individu les mêmes effets que celle de la patrie originaire ou du domicile d'origine avait exercés jusqu'alors. Mais il va sans dire que la loi de la nouvelle patrie n'a pas d'effet rétroactif sur les actes passés antérieurement par l'individu."

Story, Conflict of Laws, par. 25, expresses the same doctrine when he says: "No nation can be justly required to yield up its own fundamental policy and institutions in favour of those of another nation; much less can any nation be required to sacrifice its own interests in favour of another, or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness or conscientious regard to justice and duty." And again at par. 32: "It is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect when those laws are prejudicial to the rights of other nations or to those of their subjects."

It is a maxim, said Lord Wynford, (Best J.) in *Forbes v. Cochrane* (a), "that the *comitas inter communitates* * * * cannot prevail in any case where it violates the law of our own country, the law of nature or the law of God."

In the case of *Inhabitants of Hanover v. Turner* (b), in which a divorce obtained in the State of Vermont was held to be null, because at the time the parties were domiciled in Massachusetts, Putnam, J., said: "If we were to give effect to this decree we should permit another state to govern our citizens in direct contradiction of our own statute, and this can be required by no rule of comity."

Apart from the question of public policy, and which deprives the decree obtained by the respondent of any binding effect, it is also null and void on the ground that it was obtained *in fraudem legis*. It is evident that the defendant, who was domiciled here with her husband, has withdrawn from the jurisdiction of our courts to seek in a foreign tribunal a relief which she could not have obtained in those of her own domicile.

The remarks of Spencer J. in the case of *Jackson v. Jackson* (c) are so appropriate to this case that I deem it proper to cite here a short extract of what he said in giving the judgment of the court:

(a) 2 B. & C. 488, at p. 471.

(b) 14 Mass. 227.

(c) 1 Johns. (N.Y.) 424, at p. 432.

"The case being thus open for examination the question at once arises, how far this court will lend its assistance to carry into effect, between its own citizens a judgment of a foreign court, where the plaintiff has resorted to that court with the avowed object of gaining relief in a case not provided for by our laws and against the policy of them. I say against the policy of our laws, because our own legislature, having authorized divorcees but in one case, intolerable severity of treatment does not warrant a divorce. * * *

"Here is a plain attempt by one of our own citizens to evade the force of our laws. The plaintiff, to obtain a divorce which our laws do not allow, instituted her proceedings in Vermont, whilst she was an inhabitant and an actual resident of this state, and while her domicile continued within this state, for she was incapable, during her coverture, of acquiring a domicile distinct from that of her husband. The plaintiff having acted with a view of evading our laws, it would be attended with pernicious consequences to aid this attempt to elude them.

"It may be laid down as a general principle that, whenever an act is done *in fraudem legis*, it cannot be the basis of a suit in the courts of the country whose laws are attempted to be infringed."

The principle so broadly laid down in this case was acted upon in a judgment rendered by the *cour royale de Poitiers* on the 7th January, 1845 (*d*), and a divorce obtained in Switzerland by a Frenchman who had become a naturalized subject of that country, and the two subsequent marriages which he had there contracted while his first wife was living were declared null and void, as having taken place in fraud of the laws of France. (Felix, vol. 1, p. 68, note *a*).

I may venture to say, that this rule prevails everywhere, and on this ground also the decree of the New York Supreme Court should be held to have no binding effect in this province.

It is, however, contended that in matters of divorce it is not the laws of the actual domicile of the parties, but the laws of their matrimonial domicile, to which reference must be had; and that as appellant and respondent were married in the State of New York, where marriage was then and is still dissoluble either party had a right to resort to the tribunals of that state to have the marriage dissolved for causes for which a divorce is allowed by the laws which are there in force.

The respondent, who urges this claim, proceeds on the assumption that divorce is a remedy on the contract of marriage which has taken place between the parties—and that either of them has an acquired right to claim a dissolution of the marriage tie for causes which at the time it was contracted were held, by law, sufficient to obtain a divorce.

This doctrine of an acquired right to a divorce has been denied

(*d*) S.V. 1845, 2. 215; *DeMaynard v. Chopin*.

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by all the French writers. Mailler de Chassât, de la *Rétroactivité des Lois* (e) says on this subject: "Le divorce ou l'indissolubilité du mariage est dans le domaine de la loi; et la disposition qui consacre l'un ou l'autre est une disposition d'ordre public et par suite une pure concession qui ne confère aucun droit acquis aux individus."

The author quotes Merlin in support of the view he takes of this question, and concludes, by saying: "Cette doctrine est incontestable," etc.

If a marriage contracted in a country where divorce is recognized conferred on the contracting parties a right which followed them wherever they might be domiciled, they ought, according to the comity of nations, to be able to enforce such right, as all their other matrimonial rights, before the tribunals of their actual domicile without having to resort to those where their marriage has taken place. Yet it cannot seriously be contended that the respondent could have claimed that a divorce should be granted to her by our own courts on the ground that she was married in the State of New York, where divorce is allowed.

The question in the precise form in which it is presented in this case, does not appear to have been yet decided either in the United States, in England or in France.

Story, par. 230, asks this question: "What would be the effect of a marriage in Connecticut, a subsequent *bonâ fide* change of domicile to New York, and then a divorce in Connecticut, both parties appearing in the suit, remains as yet undecided."

It must be observed that in the supposed case there would arise a mere conflict of jurisdiction and not a conflict of laws, since the laws of the State of New York admit of divorces as well as those of Connecticut, and notwithstanding, it seems to have been a subject of serious doubt, whether a divorce in such case, when both parties had appeared, could be recognized by the courts in the State of New York, and on this point Story expresses no opinion. If, in addition to the conflict of jurisdiction, which in most cases may be covered by the coluntary submission of the parties to the tribunal seized with the contestation, there was a conflict of laws, as there is in the present case, there can be little doubt of what would have been the views of the author.

Westlake, in his work on Private International Law p. 215, No. 360, referring to the question of a divorce pronounced in a country where the parties are only transiently sojourned, says: "And, as the government of their domicile has the strongest interest in the morals of men, it is not probable that any country will recognize these foreign divorces of its resident subjects. They are certainly not recognized in England."

(e) Com. Code Civ., Vol. 1, p. 229.

At number 361, the writer says: "Admitting, then, the necessity that the jurisdiction shall be founded on domicile, etc."

The courts in England, in their recent decisions have acted on the rule that actual domicile gives jurisdiction, irrespective of the matrimonial domicile, and this is unmistakably shewn by the rulings in *Foster v. Foster and Berridge (g)*, *Brodie v. Brodie (h)*, *Wilson v. Wilson (i)*, *Gillis v. Gillis (j)*, *Lesneur v. Lesneur (k)*, *Firebrace v. Firebrace (l)*, and *Harvey v. Farnie (m)*.

This somewhat indicates what would be the decision in a case exactly similar to the present one.

In France the courts have gone much further than it is necessary for the purposes of this case, and much further than we perhaps would be disposed to go. They have refused in several cases to recognize the validity of divorces pronounced in a foreign country between persons domiciled in such foreign country. The *arrêts* are mentioned by Demolombe (n), but the more recent jurisprudence seems to have recognized the validity of such divorces.

The present case must, however, be decided by the rules to be found in our own code, and we believe that these rules are express and to the point. Art. 6 C.C. provides "that the laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there; subject as to the latter, to the exception mentioned at the end of the present article."

"An inhabitant of Lower Canada" (which by section 21 of the schedule to Art. 17 of the code, means a person having his domicile in that part of the province, now the Province of Quebec), "so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada who, as to their status and capacity, remain subject to the laws of their country.

The exception here mentioned does not apply to the parties in this cause who have their domicile in this country. Their status and capacity must, therefore, be governed by the laws of this province. They came here as a lawfully married couple, as man and wife, and they cannot change that personal status, except according to the laws in force in this province; and as there is no law authorizing a divorce they must be held to be married as long as they retain their domicile in this province. There is no plainer provision of law than the one just cited—and to shew that it is not susceptible of any other interpretation than the one given, we have only to quote a short passage from the report of the commissioners. At

(g) 10 Jur. N.S. 254.

(h) 4 L.T. 307.

(i) 27 L.T. 351.

(j) 8 Ir. Rep. Eq. 597.

(k) 34 L.T. 511.

(l) 39 L.T. 94.

(m) 42 L.T. 482.

(n) Vol. 1, No. 101.

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p. 144 of their second report^(o) the commissioners say, on art. 7— which is now the 6th article of the code: "This article is intended to replace article 3 of the Code Napoléon, which determines what persons and property are governed by the French law." . . .

"This article, which is of the utmost importance, has been prepared with care, and is founded on the numerous authorities cited after each of its paragraphs."

One of the authors cited is Félix, which we have already quoted at length. Boullenois is another, and at p. 157 of the first of his *Traité des Statuts Personnels*, etc., he says: "L'on sent que c'est la nature même des choses et la nécessité qui exigent que lorsqu'il s'agit de déterminer l'état et la condition des personnes, il n'y ait qu'un juge qui doit être celui du domicile, à qui ce droit puisse appartenir." * * * "C'est donc avec beaucoup de sagesse que l'on a réglé que la personne recevait son état et sa condition du lieu de son domicile."

The effect of this rule is that, in case of a change of domicile, the status obtained under the laws of the first domicile is retained until another status is acquired, according to the laws of the new domicile. In the present instance the parties when they came from the State of New York were legally married according to the laws of that state, and they were recognized as such by the laws of this country. If they had been mere transient travellers they might have returned to their domicile, obtained a decree of divorce under the laws in force there, and on coming back here they would, on principle (although this has been the subject of much controversy in France: *Demolombe*, vol. 1, No. 101), have been held to be freed from the bonds of wedlock and treated as single persons *are*. The moment, however, they acquired a domicile here their status could not be changed, except according to the laws in force in this province, that is the laws of their new domicile. This is what Félix clearly expresses in the passage of his work already cited:—"Après le changement de domicile, la loi du nouveau domicile exerce sur l'individu les mêmes effets que celle du domicile d'origine avait exercé jusqu'alors."

Bourjon, tit. xi., ch. 4, sec. 2, No. 11, p. 114, of the edition of 1770, shews so clearly, by the examples which he gives, the effect, on a change of domicile, of the laws of the new domicile on the status of an individual, that I may be permitted to quote his observations on this subject:

XI. "Si un homme" (says this author) "originaire du pays de droit écrit, vient s'établir à Paris, avant d'avoir acquis l'âge que la Coutume de Paris requiert pour tester, il ne pourra tester aussitôt que le droit écrit le permet, mais seulement lorsqu'il aura acquis l'âge requis par cette coutume; il est venu à Paris incapable, il y reste tel jusqu'à ce que la loi qui régit sa personne lève l'incapacité."

(o) Vol. I., pp. 144, 145, 146, 147.

XII. "La raison est, que c'est elle, alors, qui régit sa personne et non le droit écrit, et, par conséquent, sa capacité qu'il ne peut avoir que par sa disposition, puisqu'il ne l'a jamais eu par la loi même de son premier domicile; mais si cet homme n'avait quitté le pays de droit écrit qu'après avoir acquis l'âge pour tester, et qu'il fut constaté que son testament est antérieur à son changement de domicile, en ce cas le testament serait bon, quoique le testateur mourût à Paris avant l'âge que la coutume requiert pour tester, c'est droit acquis et consommé."

XIII. "Cela est fondé sur ce que le changement de domicile ne peut lui faire perdre un droit et une capacité qu'il avait acquis lors du changement, et qu'il avait consommé avant icelui; mais il faut cette consommation et qu'il soit constaté qu'elle s'est faite avant le changement."

XIV. "La nécessité de cette consommation est fondée sur ce que n'ayant pas consommé dans le temps la faculté que la loi de son ancien domicile lui donnait, cette loi par la suite lui est étrangère, et il ne peut l'invoquer pour un acte fait dans un temps, où la loi de son nouveau domicile, celle par conséquent qui régit sa personne, lui dénie cette faculté."

By substituting the word "divorce" for that of "testament" in the above citation, we have the exact position of the parties in this cause defined under the rules of law prevailing before the code, and which the code has preserved in its integrity, in preference to the new rules adopted by the French code, which, however, does not expressly touch the point in issue in this case. On the strict interpretation of the language of the code we are, therefore, also led to the conclusion that the divorce obtained by the respondent in the State of New York can have no effect here.

The appellant is, therefore, still a married woman, and could only bring an action against her husband to recover her *dot* on being thereto authorized in the manner required by law. (Arts. 176 and 178 of the Civil Code.) This authorization is more specially required when the woman under coverture wishes to institute judicial proceedings against her husband. (Guyot Rep. *co.* "Autorization," No. 16, p. 844).

The want of such authorization constitutes a cause of nullity which nothing can cover, says art. 183 of the Code: Pothier, "Puissance Maritale," No. 74. (ed. Bugnet, Vol. 7. p. 28.)

Duranton, vol. 2, No. 509; says: "Dans l'ancienne jurisprudence, le défaut d'autorisation produisait une nullité absolue, qui pouvait être invoquée aussi bien par celui qui avait traité avec la femme, que par elle et son mari; du moins tel était le sentiment commun des auteurs. Aujourd'hui la nullité est seulement relative, etc."

Notwithstanding this change in the law it has been repeatedly held under the code that the want of authorization could be invoked at any stage of the procedure, even in appeal. Sirey, Code Annoté, art. 215, Nos. 44, 45 and 46, cites these *arrêts*.

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Our code differs somewhat both from art. 224 of the Custom of Paris, and from art. 215 of the French code, with regard to the necessity of the authorization required by the wife to *ester en justice*; and therefore in deciding the present case particular attention must be given to the stringent terms of our code, and in doing so we have come to the conclusion that the respondent could not bring the present action without a previous authorization from a judge and that the objection was well taken by the appellant.

The majority of the members of the court are, therefore, of opinion that the action of the respondent should be dismissed on the two grounds that the pretended divorce cannot be recognized here and that she has not been authorized to bring her action.

Laflamme, Q.C., and *Laflaur*, for the appellant. New York being the actual and also the intended domicile of the parties at the time of the marriage, their proprietary rights must be governed by the laws of that State, *Rogers v. Rogers (p)*, *Astill v. Hallée (q)*, *Dalton v. King (r)*, *Wiggins v. Morgan (s)*; and these laws give the wife the entire control over her fortune without any conjugal partnership just as if she were a *feme sole*. We rely on the following propositions:

I. The appellant, even if she be still the wife of the respondent, can institute the present action without authorization.

II. The want of authorization, even if fatal, had been badly pleaded.

III. If authorization was necessary, the court should not have dismissed the action, but should have authorized the wife *séance tenante*, or at least have sent back the record to the court below to enable plaintiff to get the necessary authorization.

IV. The divorce alleged in the declaration is good and valid and entitled to recognition in this province; and its pretended invalidity cannot in any event be set up by the respondent.

As regards the first point, the appellant submits that.

(p) 3 L.C. Jur. 64.

(r) 9 R.L. 548.

(q) 4 Q.L.R. 120.

(s) 9 R.L. 546.

even if she be still the wife of the respondent, being separate as to property, she can institute an action against him to account; and that the demanding of an account of the administration of her moveable property, being a mere act of administration, does not require authorization. Art. 176, C.C. Our Civil Code differs from the Code Napoléon on this point, and is based on the old law. Pothier, *Puissance du Mari*, Nos. 61 and 62(t): "La Coutume de Paris, en l'article ci-dessus rapporté, fait une seconde exception à l'égard des femmes, par ces termes, ou séparées par justice et ladite séparation exécutée."

"Ce pouvoir que la coutume donne aux femmes séparées d'ester en jugement sans l'assistance de leurs maris, étant une suite du pouvoir que la séparation donne aux femmes d'administrer leurs biens, sans avoir besoin pour cela de leurs maris, il est évident que, cette exception pour les femmes séparées, ne doit s'entendre que des actions qui concernent l'administration de leurs biens, qu'elles peuvent intenter, et auxquelles elles peuvent défendre sans leurs maris."

Pothier goes on to explain that the words *séparées par justice* do not restrict this right to cases of judicial separation, but that it exists also *a fortiori* in cases of contractual separation.

Nouveau Denizart, *vo.* "Autorization," par. 2, No. 4:

"Si à l'exclusion de la communauté portée par le contrat de mariage, on a ajouté que la femme souiroit séparément de son bien, et qu'elle y soit expressément autorisée, elle peut alors administrer et disposer de ses revenus, faire des baux, et suivre en justice, tant en demandant qu'en défendant, les actions mobilières et possessoires, qui lui appartiennent."

Rousseau de Lacombe, *vo.* "Autorisation," No. 12:

"Femme séparée ne peut s'obliger sans l'autorité de son mari. Peut s'obliger seulement jusqu'à concurrence de ses meubles et revenus."

(t) Ed. Bugnet, vol. VII, pp. 23 and 24.

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Also see Ancien Denizart, *vo.* "Autorisation," No. 16; Rousseau de Lacombe, *vo.* "Mineur," No. 13; Merlin, Rép. *vo.* "Séparation de biens," sec. II., par. 5, No. 10 (Vol. 30, p. 402).

From these authorities it is apparent that under the old French law as reproduced in Article 176, C.C.L.C., the appellant would not require any authorization to institute an action to obtain an account of her private fortune consisting entirely of moveable property as in the present case. And the jurisprudence of the Province of Quebec is uniform on this point. See *Erickson v. Thomas(u)*, *Desmar-teau v. Perrault(v)*, *Owens v. Laflamme(w)*.

By the laws of the State of New York, which was the actual and intended domicile of the consorts at the time of the marriage, the appellant required no marital or judicial authorization to contract or to plead, but was in the position of a *feme sole* with regard to her private fortune. Even admitting that the husband's subsequent removal to Canada involved the change of his wife's domicile to such an extent as to prevent her from ever acquiring another than his—a point which will be discussed further on—still, the status and capacity which she acquired by her marriage followed her into this country. On this point the authorities are unanimous. See *Rogers v. Rogers(x)*, *Astill v. Hallée(y)*, *Dalton v. King(z)*, *Wiggins v. Morgan(a)*; 1 Laurent, pp. 133-5; Brocher, *Cours de Droit International Privé* (1882), vol. 1, pp. 296-6; *Nouv. Code Sirey*—sous l'art. 3, Nos. 41 *et seq.*

Secondly: The appellant further contends that the want of authorization should have been pleaded by preliminary exception, and not by a plea to the merits: *Antaya et vir v. Dorge et al.(b)*.

Thirdly: Even if the Court of Queen's Bench was right

(u) 8 L.C. Jur. 134.
 (v) 3 Leg. News 100.
 (w) 24 L.C. Jur. 207.
 (x) 3 L.C. Jur. 64.

(y) 4 Q.L.R. 120.
 (z) 9 R.L. 548.
 (a) 9 R.L. 546.
 (b) 6 R.L. 727.

in holding that the appellant required authorization, the action should not have been dismissed. It was quite competent for the court, as a court of equity, to authorize the appellant *séance tenante*, or at least to send back the record to the court of first instance in order that she might obtain the necessary authorization: 16 août 1810, Florence (D.A. 11 606); 1 oct. 1810, Bésançon (P. 1810, p. 601); 14 mars, 1828, Poitiers (P. 27-28, p. 1287); 21 nov., 1832, Cass. (S. V. 33.1.401); 17 janv., 1838, Cass. (S.V. 38.1.638); 16 janv., 1838, Rej. (S.V. 38.1.225); 11 août, 1840, Cass. (S. V. 40.1.858); 7 déc., 1840, Rheims (S.V. 41.2.423); 21 nov., 1843, Cass. (S.V. 44.1.235).

Moreover, there are numerous instances of what the law terms "nullities," which are every day covered by amendment, *e.g.*, the attestation and signature of writs, mistakes in the names, domicile or qualities of the parties to a suit, and omissions in the writ or declaration. See Arts. 46, 48, 49, 50 and 51 of the Code of Civil Procedure. They are absolute and fatal nullities if they are not rectified in time, but the court always has a discretionary power to allow amendments which have a retroactive effect.

Fourthly: The divorce alleged in appellant's declaration is valid in the Province of Quebec, and that in any event its validity cannot be called in question by the respondent in the present suit. It will be observed that our courts are not asked to give execution to a foreign judgment, but only incidentally to recognize the status of the parties as established by a foreign decree. The action of the appellant is perfectly maintainable even if she be the wife of the respondent, and the only significance of the decree of divorce is as to the quality of the plaintiff in the suit, involving merely a question of procedure. Now the authors distinguish clearly between the recognition of a foreign judgment in such an incidental way, and giving executory effect to the decree of a foreign tribunal. Félix, Droit Int. Privé, (1866) vol. II., p. 117.

In the next place, the respondent cannot in a proceed-

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ing like the present set up the invalidity of the divorce after having appeared in the suit by his attorneys, without declining the jurisdiction of the Supreme Court of New York. Even supposing that such a submission to the jurisdiction did have the effect of estopping the respondent from urging any valid grounds of defence which he might have pleaded in New York, and so bringing up the merits of the case a second time, it will be noted that he does not allege a single objection to the decree of divorce except the fact that he was domiciled in the Province of Quebec when the proceedings were taken, and this ground of objection is covered by his appearance without protest, since the defect (if any existed) was merely *ratione personae*, and could be covered by voluntary submission to the tribunal. *Zycklinski v. Zycklinski* (c), *Bond v. Bond* (d), *Callwell v. Callwell* (e), *Niboyet v. Niboyet* (f). See opinion of Brett, C.J., referring to *Callwell v. Callwell*. *Wilson v. Wilson* (g), *Kinnier v. Kinnier* (h). See opinion of Church, C.J. (i); Wharton, *Conflict of Laws*, ch. 4, par. 238, *sub-fin.* (p. 332); Dicey on Domicil (1879), p. 233.

The learned Chief Justice of the Court of Queen's Bench appears to say that this divorce was obtained in *fraudem legis*, and that a collusive appearance could not give jurisdiction to the foreign court. Appellant submits that there is nothing in the record affording any ground for a suspicion of fraud or collusion; the appellant instituted the action before those whom she considered her natural judges, and the appearance of the respondent without protest points to the same conviction on his part. But apart from the question of voluntary submission to the jurisdiction, the appellant contends that the Supreme Court of New York was competent to pronounce the decree of divorce in question.

(c) 2 Sw. & Tr. 420.

(f) 4 P.D. 1.

(d) 2 Sw. & Tr. 93.

(g) 2 P. & D. 435.

(e) 3 Sw. & Tr. 259.

(h) 53 Barb. 454, 58 Barb. 424.

(i) *Kinnier v. Kinnier*, 45 N.Y. 53.

There can be no doubt that in France the divorce in question would be recognized by the courts. There the jurisdiction in such matters is held to depend on the nationality or allegiance of the parties. I Laurent. p. 142, s. 99; Brother, Op. cit. p. 304; Calvo. Droit International, 2 ed., t. I., p. 366, par. 247. See the citation made by Cross, J., at pp. 41 and 42 of the printed case; Merlin, Rép., vo. "Divorce," *re McMahon*; Fœlix, Droit Int., Privé (1866), Vol. 1, p. 68, note (a); Cass. 28 fév., 1860, *Bulkley v. le Maire du 7e Arrondissement de Paris*(k) Cass. 15 juillet, 1878, *Placquet v. le Maire de Lille*(l), *eod. sensu*.

The Italian authorities agree with the French in regarding nationality as the test of jurisdiction. See Fiore, Droit International Privé, trad. par P. Pradier-Fodéré (Paris, 1875), pp. 22 *seq.*, par. 131, quoted in the opinion of Mr. Justice Cross, at p. 42 of the case.

In England, in spite of numerous decisions rendered on this subject, the jurisprudence is far from settled. The old doctrine laid down in *Lolley's Case*(m), and followed in *McCarthy v. De Caix*(n), that an English marriage could not be dissolved by the decree of any foreign court, has in all recent decisions been entirely discarded. In the latest English case on the subject, *Harvey v. Farnie*(o), it was held that: "The English courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England."

Domicile is one of the grounds of jurisdiction, but it is certainly not the only one. English tribunals will take jur-

(k) Dal. 60, 1, 57-60;

S.V. 60, 2, 196.

(l) S.V. 78, 1, 220.

(m) 2 Cl. & F. 567.

(n) 2 Cl. & F. 568.

(o) 8 App. Cas. 43.

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isdiction where the parties are (or even one of them is) of English origin, and the complaining party is resident in England at the institution of the suit. *Niboyet v. Niboyet* (p). See also *Brodie v. Brodie*(q), where British origin and a residence in England, not amounting to domicile, was held to give jurisdiction. An English divorce court will also assume jurisdiction to dissolve an English marriage between British subjects on the petition of a wife who is resident merely in England, when the husband is, at the time of the proceedings, domiciled abroad, and when he has been personally served abroad with the citation, although he files no appearance: *Deck v. Deck*(r). See also *Bond v. Bond*(s), where the English divorce court took jurisdiction in a suit for the dissolution of an English marriage on the ground of adultery and cruelty against a foreigner, who was served abroad with the citation, but did not appear in the suit.

Jurisdiction has been asserted in England *ratione contractus* to annul a marriage. "The parties," says Sir C. Creswell in *Simonin v. Mallac*(t), "by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal." See also *Dolphin v. Robins*(u), *Tovey v. Lindsay*(v), *Pitt v. Pitt*(w), *LeSueur v. LeSueur*(x), McQueen on Divorce (2 ed.), p. 251. Compare also the remarks of Phillimore, *International Law* (2 ed.), vol. IV., pp. 71 and 349.

In the United States, the doctrine just stated and approved by English judges and text writers has become the settled jurisprudence of the courts. *Cheever v. Wilson*(y), *Colvin v. Reed*(z), *Ditson v. Ditson*(a). See also *State v.*

(p) 4 P.D. 1.

(q) 2 Sw. & Tr. 259.

(r) 2 Sw. & Tr. 90.

(s) 2 Sw. & Tr. 93.

(t) 2 L.T. 327.

(u) 7 H.L. Cas. 390.

(v) 1 Dow. 117.

(w) 4 Macq. H.L. 627.

(x) 1 P.D. 139.

(y) 9 Wall. 108.

(z) 5 Smith, Pa. Rep. 375.

(a) 4 R.L. 87.

Schlachter(b), *Dutcher v. Dutcher*(c), *Pate v. Pate*(d),
The Republic v. Skidmore(e), *Hopkins v. Hopkins*(f), 2
 Bishop on Marriage and Divorce(g), Wharton, Conflict of
 Laws (par. 225, p. 317).

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Under our own law, moreover, the courts will not always press the legal fiction that the husband's domicile is that of the wife. In a case of *Langevin v. Barette*(h), the Superior Court took jurisdiction to annul a marriage at the instance of the wife, although the husband was at the date of the institution of the action, and had been for seventeen years previous thereto, domiciled in the United States.

The question now before this court is not, therefore, whether or not the Superior Court in the Province of Quebec would, under Article 6 of the Civil Code, be entitled to assume jurisdiction in the matter, but whether the comity of nations requires that the jurisdiction of the foreign court taken under the circumstances above detailed should be recognized. It is not denied that the present appellant might sue in our courts for rights concerning her capacity and status, but this by no means implies that no other courts are open to her for enforcing such rights. But the learned Chief Justice of the Court of Queen's Bench appears to have been largely influenced in forming his opinion by his belief that the divorce in question was obtained *in fraudem legis*, and the cases which he has cited from the American reports as applicable to the present case, were decided upon facts which left no doubt in the mind of the court that there had been collusion between the parties and removal from the jurisdiction with intent to evade the laws of their domicile. In the present case there are absolutely no grounds for suspecting fraud or collusion.

Another objection made by the learned Chief Justice is that the decree rendered by the Supreme Court of New

- (b) Phillips, N.C. Rep. 520. (c) 2 Tex. 261.
 (e) 39 Wis. 651. (f) 35 N.H. 474.
 (d) 6 Mo. App. 49. (g) (1881), pp. 125-6, par. 125.
 (h) 4 R.L. 160.

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York is contrary to the public policy of the Province of Quebec, and cannot in consequence obtain recognition from our courts, inasmuch as divorce is not allowed under our law. Now, the appellant does not for a moment contest the general principles laid down by the learned Chief Justice that a State will refuse to give effect to foreign judgments which are *contra bonos mores*, but it is respectfully submitted that divorce *a vinculo* for adultery is not comprised in the category of laws or customs which civilized nations regard as contrary to public policy. In Canada the remedy has been left to the discretion of the Federal Parliament, which acts judicially in granting divorces *a vinculo*. Divorce, then, cannot be said to be against the public policy of Canada, since Parliament will grant it for sufficient cause, and especially on the ground of adultery.

Kerr, Q.C., for the respondent. The evidence shews the respondent's intention to abandon his old domicile in New York and to acquire a new domicile in some part of Canada. But his New York domicile being his domicile of origin, continued to be his domicile until he had, in fact, acquired a domicile of choice. Art. 80, C.C.; Guthrie's Savigny, pp. 54, 59; Foote, Priv. Int. Law, pp. 10-15; Dicey on Domicil, rule 8, pp. 86-90. The respondent acquired a new domicile of choice so soon as he had fixed his residence in the Province of Quebec, with the intention of there remaining. Dicey on Domicil, rule 7, pp. 73-86. The acquisition of a domicile of choice in Quebec by the husband gave to the wife a Quebec domicile. The principle common to the law of nearly every State being that the domicile of the wife, not separated from bed and board, is that of her husband. Art. 83, C.C.; Art. 108, C.N.; Guthrie's Savigny (1 ed.), sec. 10, par. 353, pp. 56, 60; Wharton, Conflict of Laws, par. 43, 44; Westlake, par. 241 (2 ed.).

The appellant and respondent being domiciled in the Province of Quebec during the whole of the year 1880, were, therefore, in June of that year, when the action for divorce

was instituted before the Supreme Court of the State of New York, subject to the laws of that province, and amongst others to those respecting the status and capacity of persons. So that if the status of a person be governed by the law of one State which prohibits a change therein under any circumstances, no action or proceeding in a foreign State by which a change in that status is sought to be effected can be regarded as effective by the tribunals of the first-named State. A judgment rendered in the foreign State affecting that status would be regarded by the tribunals of the first-mentioned State as void for want of jurisdiction. *Dogliani v. Crispin(i)*; Foote, pp. 473, 474; 2 Bishop, Marriage and Divorce, par. 134, 38, 144; Dicey on Domicil, pp. 258-264.

Marriage is recognized everywhere as producing a great change in the status of the consorts. Foote, pp. 474, 475; Bard, Droit Int. Privé, Nos. 139-141; Chassat, *Traité des Statuts*, No. 191; 4 Phillimore, sec. 322; 1 Bishop, par. 1-19; 2 Bishop, par. 193; Dicey, p. 155. Divorce is also recognized as producing a change of status in the persons divorced. Foote, pp. 473, 474; Chassat, No. 197; Dicey, p. 156. It therefore follows that a marriage to be valid and binding must not be contracted in violation of the laws which govern the status and capacity of the contracting parties at the time of the marriage. And, as a corollary hereto, that a divorce to be valid must not be in violation of the law which governs the status and capacity of the parties divorced pending proceedings for such a divorce. Upon these principles is founded the doctrine that the only tribunals competent to decree divorce are those authorized so to do by the State whose laws govern the status and capacity of the consorts.

In Germany it is admitted that the court of the actual domicile of the consorts alone can pronounce a valid divorce. Wharton, sec. 210; Guthrie's Savigny, sec. 379, p. 248. In England, previous to the 20 and 21 Vict. ch. 85,

(i) L.R. 1 H.L. 301.

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the jurisprudence may be considered to have been settled in the same sense as in Germany, viz.: That the court of the actual domicile of the consorts alone had jurisdiction to pronounce a divorce between them. *Warrender v. Warrender (j)*, *Shaw v. Atty.-Gen.(k)*, *Manning v. Manning(l)*, per Lord Penzance; Foote, p. 70. The contract is indissoluble and contemplates perpetuity. Divorce is a penalty imposed by the court of the domicile. Marriage is founded on the *jus publicum*, and the parties are therefore unconditionally subjected to the *jus publicum* of the place where they are domiciled. Wharton, par. 211, and authorities cited par. 237, 206; Story on Conflict of Laws, par. 15; par. 230 *a, b* and *c*; Guthrie's Savigny, par. 379, p. 243; Fiore, Nos. 122, 123, 126; Bishop, par. 180, 198; Dicey, p. 240.

Another ground taken for the recognition of the decree of divorce is that the respondent appeared in the suit, and that thereby jurisdiction was vested in the Supreme Court of the State of New York to proceed and make a decree dissolving the marriage tie between him and the appellant. Consent in a case such as the present is of no avail to vest jurisdiction in a foreign court. In the first place an act by a domiciled inhabitant of Quebec by which a divorce should be decreed between him and his wife in a foreign State is an attempt to evade the law of his domicile, it is an attempt on his part to violate a law *d'ordre publique* of the province, and as such cannot be countenanced by that law. Fiore, No. 92, p. 186, No. 121; Chassat, No. 197, p. 263.

Lastly, if the divorce upon which is based the action of the appellant be held to be invalid, she is still the wife of the respondent, and in order to enable her to take out the writ of summons against him in that action it was absolutely essential for her to be duly authorized in the manner required by law. A married woman cannot bring such an action as the present one against her husband without being authorized either by him or by a judge having jurisdiction,

(j) 2 Cl. F. 488.

(k) 2 P. & D. 156.

(l) 2 P. & D. 223.

and the want of such authorization is an absolute nullity which nothing can cover.

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RITCHIE, C.J.—This is one of the most difficult, and I may say at the same time one of the most interesting cases in relation to private international law and the comity of nations with which I have ever had to deal.

The conflicting authorities on the principles which I think must govern this case—the absence of direct authority on a case similar in all its particulars and the consequent unsettled state of the law, together with the very great importance of the case generally, as well as to the parties immediately interested, particularly to the plaintiff, have impressed me with the very grave responsibility of its determination.

After the fullest and most careful investigation that I have been capable of bestowing on this case I have (not, however, without doubts and misgivings) at last arrived at the conclusion that this appeal should be allowed and the judgment of the first court re-instated.

I think the evidence establishes that the plaintiff had a sufficient residence in New York to enable her to obtain under the law of New York a valid divorce there, and that she did in accordance with the laws of the State of New York without fraud or collusion obtain such divorce from a court competent to pronounce it, and I think such divorce should be recognized by the courts of Quebec. At any rate if the question of jurisdiction turns on the question of the husband's domicile, the burthen was on the husband to shew that he had actually changed his domicile of origin and his matrimonial domicile, *animo et de facto*. Being cited before the court of New York and appearing in the suit and submitting to and not disputing the jurisdiction of the court, the legitimate and fair presumption against him is that he had not changed his domicile *animo* and *de facto*, and, therefore, the decree of divorce was valid and should be recognized as such in the courts of Quebec.

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Independent of any question of domicile, he having appeared and submitted to and not questioned the jurisdiction is bound by the decree and cannot now be allowed to affirm that the court had no jurisdiction to pronounce it and claim that the marriage dissolved in New York in a proceeding to which he was an unobjecting party and which he does not appear ever till now to have questioned, is subsisting in Quebec.

STRONG J.—In this case I am of the opinion that as regards the question on which there was a difference of opinion in the Court of Queen's Bench—that as to the validity of the divorce—the court below were perfectly right.

As regards the other question, one peculiar to French law—that as to the plaintiff's right to institute and maintain this action without the authorization of justice—I of course speak with less confidence, but upon that the court below were unanimously against the plaintiff, and from the best consideration I have been able to give the point, I am of opinion that they were right in this also.

The appeal should be dismissed.

FOURNIER J.—This action was brought by the appellant as the divorced wife of the respondent in order to obtain from the latter an account of the personal fortune she brought him at her marriage and which she had given him to manage and administer.

The parties were married in May, 1871, in the State of New York, where they had their domicile. In 1872 they both came to Canada with the intention of permanently fixing their residence in the city of Montreal, where, since that time, both parties have been domiciled (until 1876). The appellant then left her husband to return to the United States.

The parties not having made any ante-nuptial contract they must be presumed to have intended to subject themselves to the general law of the State of New York, which

declares that in such a case there is no community of property between the husband and wife and that the wife remains the absolute and exclusive owner of her property and continues to exercise her rights over the same as if she were a *feme sole*.

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It appears that at the time of her marriage the appellant had moveable property in her own right amounting to \$220,775.74, which she received from her trustee on or about the 8th January, 1872, and that she thereupon placed this fortune in the hands of the respondent, who administered and controlled it until the 25th day of September, 1876, at which date, being dissatisfied with her husband's administration, she demanded the return of her securities and an account of his administration.

Respondent returned her only a small portion of it, and refused to account for the balance, which he still withholds. In December, 1880, at the request of the appellant, the Supreme Court of New York decreed a divorce in her favour. Believing the marriage tie to have been dissolved, and that she had the control over her property as if she had never been married, she (the appellant) brought the present action without having previously obtained any authorization from a judge. To this action the respondent pleaded, first, by a demurrer which was overruled; secondly, by a plea to the merits, alleging that long before the divorce relied on by appellant, the parties had acquired a new domicile in the Province of Quebec, and therefore the divorce was null and void; and thirdly, that the plaintiff was not authorized to institute the present action.

By a special answer to the respondent's plea, the appellant reiterated the allegation of the validity of the divorce obtained in the New York Supreme Court, and stated further that, even if the divorce were invalid, she would nevertheless have a right to demand from respondent an account of his gestion of her fortune, both under the law of New York and of the Province of Quebec.

There are several important questions raised under this

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issue, and which are submitted as follows in the appellant's factum:

The appellant even if she be still the wife of the respondent can institute the present action without authorization.

The want of authorization, even if fatal, has been badly pleaded. If authorization was necessary the court should not have dismissed the action, but should have authorized the wife *séance tenante*, or at least have sent back the record to the court below to enable plaintiff to get the necessary authorization.

The divorce alleged in the declaration is good and valid and entitled to recognition in this province; and its pretended invalidity cannot in any event be set up by the respondent.

If the first proposition propounded by the appellant is good in law, it is evident that for the purpose of determining this suit, it is not necessary to inquire into the other questions submitted.

The first question, therefore, is: Could appellant under the circumstances bring the present action without any previous authorization, even supposing that the decree of the New York Supreme Court granting a divorce is not binding here? The majority of the Court of Queen's Bench have answered this question in the negative.

The judgment of the Court of Queen's Bench is based upon the provisions contained in the articles of the Civil Code relating to the rights and status of persons commencing with the third paragraph of art 6, which enacts:

the laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there; subject as to the latter, to the exception mentioned at the end of the present article,

and upon the fact that the parties having abandoned their domicile in New York, with the intention of fixing themselves in Montreal and acquiring a new domicile, the laws of the Province of Quebec must govern their status and capacity. The court also relied on articles 176 and 178 which forbid married women to appear in judicial proceedings without the husband or his authorization or that of a judge, as well as on article 183, which enacts that

the want of authorization by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, etc., etc.

And upon these articles, and the authorities cited by the learned judges in their opinions, they arrived at the conclusion that the present appellant had no right to bring the present action without having previously obtained the authorization of a judge.

I do not intend to discuss the correctness of the propositions they laid down in order to arrive at the conclusion they did. I will be permitted, however, to say that I do not admit that they are applicable in the general and absolute form in which they are laid down in the judgment of the court. Then I am led to inquire if, without considering the general law as to the status and capacity of a foreigner in this province, there is not in his favour some exception or legislative provision which will dispense the appellant from the obligation of first obtaining the authorization of her husband or of the court in order to bring the present action.

As already stated, the appellant was married under a system of law which recognizes to a married woman, married without any ante-nuptial contract, the absolute right of disposing of her property independently of all control by the husband. The law of the State of New York has been set up and proved in the most positive manner. The testimony of Sidney F. Shelbourne, a barrister of the State of New York, is so clear and precise on this important point that I will quote it at length.

Q.—Will you state to the court what is the law of the State of New York regarding proprietary rights of consorts who were married on the seventh of May eighteen hundred and seventy-one (1871)?

A.—The laws of the State of New York since the year eighteen hundred and forty-eight (1848) down to the present time, with reference to the separate property of the wife, which she has at the time of her marriage, have been that such property is entirely separate and free from the control of the husband; it does not enter into the community; she has absolute control over it, and the power to dispose of it and to alienate it without any control on the part of her husband.

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Q.—That is when there is no ante-nuptial contract?

A.—Yes; she is just as if she were a *feme sole* with regard to such property; there is no conjugal partnership.

It is clear from this evidence that according to the law in the State of New York, the appellant, even during the continuance of her marriage, could without any authorization whatever, have instituted the present action in her own country, and that she would still have that right if her husband could be summoned within the jurisdiction of the State of New York.

The fact being established that in the State of New York the appellant could have sued her husband without any previous authorization as she did in this case, there remains to consider the question whether, under such a state of facts, the laws of the Province of Quebec do not dispense the appellant with the necessity of first obtaining her husband's authorization before suing. I have not the slightest hesitation in stating that, in my opinion, this question must be answered in the affirmative, being clearly settled by the 3rd paragraph of art. 14 of the Code of Procedure, which declares that

all foreign corporations or persons duly authorized under any foreign law to appear in judicial proceedings may do so before any court in Lower Canada.

Now this article, based on chapter 91 of the Consolidated Statutes of Lower Canada, has given to strangers in a general way the same rights as are recognized and given to them by section 2 of the Con. Stats., of suing (*ester en jugement*) when they have that power or right in their own country. The section in the statute being more explicit and positive than the article of our code, I will quote it at length. Chapter 91 C.S.L.C., sec. 2:

All joint stock or other companies or bodies politic or corporate, who have a legal capacity in the jurisdiction wherein they were respectively erected or recognized, and all persons on whom by any properly constituted authority or law (whether of the heretofore Province of Upper Canada, or of the Imperial Parliament of Great

Britain and Ireland, or of the United States of America, or any of them, or of any other foreign state, colony or dominion) the right or power of suing or being sued has been conferred, shall have the like capacity in Lower Canada, to bring and defend all actions, suits, complaints, bills and proceedings whatsoever, and shall, by and before all courts, judges and judicial authorities whatever in Lower Canada, be held in law to be capable of suing and being sued in the same name, manner and way as they could or might respectively be within the jurisdiction wherein such executors or administrators or persons, bodies politic and corporate, joint stock companies or associations of persons were respectively created, erected or recognized.

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This provision is couched in the very same words as section 2 of ch. 6, 22 Vict. (1858). The words are very general and apply to all persons, on whom by any properly constituted authority or law the right or power of suing has been conferred, and gives them the power of exercising the same right in Lower Canada. Though domiciled in the Province of Quebec, the appellant never changed her nationality; she is still a foreigner, never having lost the quality of an American citizen.

Now, according to the law of the State of New York, the appellant having been married without having made an ante-nuptial contract, is entitled to manage her property as if she were not married, just as if she were a *feme sole*, with regard to such property, and is consequently entitled here by said article 14 to take the present action. Considering the question settled by the effect of art. 14, C.C.P., it is not necessary for me to determine whether or not, in the absence of that article, the present appellant under the laws of the Province of Quebec relating to marital power could exercise in this country the right she had in her own country to sue as a *feme sole*. But admitting for the sake of argument that in such a case she would not be entitled to sue as a *feme sole*, it seems to me that by the enactment of art. 14, C.C.P., recognizing (as it does as to the right to sue) the personal status of a foreigner to be the same in this country as in his own, the legislature has at least declared that the laws of the province concerning marital power as

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interpreted by the court below, shall not apply to persons situated as the present appellant is. Therefore she can sue for the revindication of her property.

It seems to me that art. 14, C.C.P., settles the point in favour of the appellant so clearly that I need scarcely refer to any other authorities. I shall, however, cite one in order to shew that jurisprudence in France is in accord with the law as laid down in our Code of Procedure. See Sirey, Codes Annotés, art. 215 (1875):

A foreign married woman in order to sue in France need not previously obtain her husband's authorization if in her own country such authorization is not necessary. 16 Fév. 1844, Bastia, 8, Vo. 44, sec. 66, 33.

It is the result of the principle recognized by all authors that the necessity of an authorization depends on the personal status. I Félix, Dr. Int., p. 117, No. 65, et Massé, Dr. Com., t. 2, No. 63.

For these reasons I am of opinion that the judgment of the Court of Queen's Bench should be reversed and the judgment of the Superior Court ordering an account to be rendered should be restored with costs.

HENRY J.—The appellant and respondent are natural born citizens of the United States of America, and in the month of May, 1871, being residents of and domiciled in the State of New York, were married in the city of New York, according to the laws of that State.

The appellant at the time of her marriage was the owner in her own right of money, securities and other personal property amounting to about \$220,000, which by the law of that state continued, after her marriage, to be her separate property, uncontrolled by her husband, as fully as before her marriage.

After her marriage the securities and property owned by her were by her given to the respondent as her agent and trustee. In 1872 they moved to Montreal, where the respondent has since resided. The appellant resided with

him there until the month of October, 1876, when she abandoned her domicile there on account of the improper conduct of her husband, and returned to New York, her original domicile, to live with her mother.

In 1880, the appellant, then residing in the city of New York, commenced an action in the Supreme Court of that State against the respondent for the purpose of obtaining a divorce *a vinculo matrimonii* and dissolution of her said marriage on the ground of the adultery of the respondent.

There was no court in the Province of Quebec that had jurisdiction in the matter of divorce, but the Parliament of Canada had and has power to deal with such a matter. In 1880, when the appellant took the proceedings for divorce in New York, she might have obtained the desired result by an application to the Dominion Parliament, as many others have done. By the law of the State of New York, the Supreme Court of that State had jurisdiction to deal with the subject matter of the appellant's suit, although the respondent at the time resided in Montreal. The summons and complaint were duly served on him personally at Montreal, and he appeared by an attorney, of the court out of which the summons and complaint were issued and filed, specially appointed for that purpose. The charge of adultery was proved and a decree of the court was duly made by which the marriage of the parties was dissolved. It was satisfactorily shewn that after that decree was made the appellant was authorized to commence and prosecute actions in her own name in the State of New York in the same manner as if she had always been a *feme sole* and unmarried—and that her property in her husband's hands was under her sole control. The general rule is that the domicile of the husband is that of his wife, but in England and in the United States the domicile of the husband is not necessarily that of the wife when she is seeking by legal means to have their marriage dissolved. The appellant was a natural born citizen of the United States, and so was her husband. They were married in New York, where their domicile then was.

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By the law of that state, the court had full jurisdiction over the subject matter of the divorce applied for by the appellant and the decree of the court duly dissolved the marriage. I consider, therefore, that by the comity of nations respect must be paid to a legal decision and judgment of a foreign court shewn to have had jurisdiction over the parties and the subject litigated by them and adjudicated upon. In England there are cases to sustain that proposition and many in the United States. When the respondent appeared to the suit and submitted to the jurisdiction of the court, I cannot conceive what difference it makes where he then resided, and the jurisdiction of the court, I take it, would be the same as if he then resided in New York. His appearance would not of itself give the court jurisdiction if it had it, not otherwise, but by the law of New York: the court had jurisdiction without such appearance if the necessary service of process were made according to the laws and rules prevailing in such cases. In the absence of such appearance the court would no doubt decide upon the sufficiency of the service before passing a decree—and in such a case we should assume that such had been done. If the respondent, when served with the summons and complaint in question expected any legal benefit from the fact of his domicile being then in Montreal, he should then have contested the right of the court in New York to deal with the matter. After appearance and defence, I think his objection is too late.

The same objection might be raised to the dissolution of a marriage by the Parliament of the Dominion, and it would apply equally well to the one as to the other.

It was contended that because in the Province of Quebec there is no law by which a marriage could be dissolved the courts in that province cannot give effect to a decree of a court in the United States for the dissolution of a marriage, even where the latter court had full jurisdiction. Suppose that such a decree had been made in England, where the parties had been born and were domiciled when mar-

ried in that country, and they had removed to and lived in Montreal, as the parties in this case did. That the wife subsequently returned to where she had been born and married, and proceeded in the divorce court of that country for a dissolution of the marriage and obtained a decree dissolving it; Could it be said that the parties continued to be man and wife in the Province of Quebec because of the absence in the latter of judicial jurisdiction for the same purpose, while in England and elsewhere they held no longer such relation? If not, why should not a decree duly made in New York or any other country having the necessary jurisdiction in such cases have the same result and value? We are not trying whether there is, in the Province of Quebec, jurisdiction to try and adjudicate upon such a case, or whether, if there is not, there should be; but—Whether in some other country a court, if properly constituted and having jurisdiction according to the law of that country over the parties and cause of action, has made a valid decree dissolving a marriage? Such is the governing rule in England and in the United States, and in my opinion it should be the same here.

In such case no authority to commence the present action was necessary. In ordinary cases a married woman in the Province of Quebec requires authority either from her husband or a judge to appear in court or commence legal proceedings, but I don't think such a provision is applicable where the wife takes proceedings against her own husband to account for his administration of her estate. The wife could hardly be required to obtain from her husband authority to sue himself. In this case the respondent administered the appellant's property and estate and she is but calling upon him to account as she would any other agent and I think that, it being a case of administration, the rule requiring authority to sue does not apply to it.

I am of opinion that the judgment below should be reversed and judgment entered for the appellant with costs.

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GWYNNE J.—The plaintiff and defendant being natural born citizens of the United States of America, the plaintiff being a native of the State of New York and the defendant a native of the State of Vermont, and both being in the month of May, 1871, resident inhabitants of and domiciled in the city of New York, in the State of New York, were in that month married to each other at the city of New York, according to the law of the State of New York. At the time of the solemnization of the said marriage the plaintiff was possessed of a large separate estate, consisting of personalty amounting to over \$220,000, which property by the law of the State of New York continued, after the marriage, to be her separate property absolutely free from the control of her husband as if she were still sole and unmarried. Shortly after the marriage the whole of the securities in which the above sum was invested were placed by the plaintiff's authority in the possession of the defendant, who thereby became the agent of the plaintiff in respect thereof and accountable to her for his administration thereof. In the month of October, 1872, the defendant moved with his wife from the State of New York into the Province of Quebec, and he has since resided and still resides at the city of Montreal in that province. His wife lived with him at Montreal until some time about the month of October, 1876, when she returned to her mother in the city of New York, the plaintiff's original domicile.

Whether or not the defendant took her back to her mother upon this occasion does not clearly appear, for being asked in his examination in this cause

Whether he did not a short time previous to October, 1876, accompany the plaintiff to New York City and part with her there for the last time?

the only answer which the defendant gives to this inquiry is that he does not remember. But whether he accompanied her or not upon that occasion does not appear to be important.

In the month of February, 1880, the plaintiff, being

then a resident and inhabitant of the State of New York, residing with her mother in the city of New York, instituted proceedings in the Supreme Court of the State of New York against her husband for the purpose of obtaining a divorce *a vinculo matrimonii* and dissolution of her said marriage in consequence of adultery alleged by her to have been committed by him.

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At the time of the institution of this suit there was no court in the Province of Quebec, where the defendant was resident, competent to entertain such a suit. The subject of divorce and dissolution of marriage is a subject over which the Province of Quebec has no jurisdiction, that subject being, by the constitution of the Dominion, placed exclusively under the control of the Dominion Parliament. The only court existing in the Dominion competent to entertain a suit for divorce and to dissolve the marriage of persons residing in the Province of Quebec is the court of the Parliament of the Dominion of Canada, having its seat at Ottawa, in the Province of Ontario.

By the law of the State of New York, it was competent for the plaintiff to institute the said suit, instituted by her in the said Supreme Court of the State of New York, although the defendant was then domiciled in the Province of Quebec. No question arises here as to the fact of, or as to the time and place of, the committal by the defendant of the adultery charged to have been committed by him. That was a subject which was inquirable, and was inquired into, in the above suit. The summons and complaint of the plaintiff therein was served personally upon the defendant in the city of Montreal, and he appeared to the suit in the said Supreme Court by an attorney of that court duly appointed by the defendant to appear thereto for him, and such proceedings were thereupon had in the said suit in accordance with the law of the State of New York, that in the month of December, 1880, a decree was made therein whereby the defendant was convicted of having committed the acts of adultery charged against him in the complaint

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of the plaintiff, and for cause of such adultery it was adjudged by a decree made in the said suit in accordance with the law of the State of New York, that the said marriage between the plaintiff and the said defendant should be and the same was thereby absolutely dissolved, and by force of that decree the plaintiff is entitled to sue in the courts of the State of New York as if she were sole and unmarried.

Now, although the ordinary rule is that the domicile of the wife is the place where her husband has his domicile, yet it is an established exception to this rule, in American authority, that for the purpose of instituting a suit for divorce the wife may have a domicile separate from that of her husband.

In the case of *Cheever v. Wilson*(*m*), it was decided by the unanimous judgment of the Supreme Court of the United States that the rule is that the wife may acquire a separate domicile whenever it is necessary or proper that she should do so, that the right springs from the necessity of its exercise, and endures as long as the necessity continues, and that the proceedings for a divorce may be instituted where the wife has her domicile.

In *Harteau v. Harteau*, it was said by the Supreme Court of the State of Massachusetts(*n*), that the law will recognize a wife as having a separate existence and separate interests and separate rights in those cases where the express object of the proceeding is to shew that the relation itself ought to be dissolved or so modified as to establish a separate interest and especially a separate domicile and home, otherwise the parties would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not in that of the wife.

In *Colvin v. Reed*(*o*), it is said:

The unity of the person created by the marriage is a legal fiction to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural

(*m*) 9 Wall. 108.

(*n*) 14 Pick. 181-185.

(*o*) 5 Smith Pa. Rep. 375.

justice, in proceedings which from their nature make them opposite parties.

Mr. Wharton, in his work on private international law (sec. 46) says that the rule that the wife's domicile is that of the husband is now conceded on all sides, does not extend to cases in which the wife claims to act, and, by law to a certain extent and in certain cases is allowed to act adversely to her husband.

And Mr. Bishop, in his invaluable work upon Marriage and Divorce (Vol. II., sec. 125), states the rule as collected from the decided cases thus:

When the law authorizes a suit between a husband and his wife for divorce and makes the jurisdiction over it depend among other things on domicile there is an irresistible implication that if she needs a separate domicile to give effect to her rights or if his case requires her to have one to make his effectual the law has conferred it on her.

In *Deck v. Deck* (*p*), it has been decided in England that under the provisions of the English Statute, 20 and 21 Vict. ch. 85, it was competent for the divorce court there to entertain a petition for divorce at the suit of an Englishwoman married in England to an Englishman who had left her and gone to the State of New York, where he acquired a domicile and had married again there, and upon service of process in the suit upon the husband in the United States to make a decree for the dissolution of the marriage.

A similar point was decided in *Bond v. Bond* (*q*), and in *Niboyet v. Niboyet* (*r*), in the case of an Englishwoman who had married a Frenchman at Gibraltar, it was decided upon the same statute that the court had jurisdiction to entertain a petition for divorce presented by the wife, although the husband appeared under protest and contested the jurisdiction of the court upon the grounds that he had never acquired an English domicile or lost his domicile of origin and, among the exceptions to the general rule that the domi-

(*p*) 2 Sw. & Tr. 90.

(*q*) 2 Sw. & Tr. 93.

(*r*) 4 P. & D. 1.

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cile of the husband is the domicile of the wife, which the above statute creates, Mr. Dicey, in his work on Domicil, states the following:

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1st. The Divorce Court has under exceptional circumstances jurisdiction to dissolve a marriage where the parties are or possibly where one of them is, at the commencement of the proceedings for the divorce resident though not domiciled in England.

2nd. The Divorce Court has jurisdiction to dissolve a marriage between parties not domiciled in England at the time of the proceedings for divorce where the defendant has appeared absolutely and not under protest.

3rd. The Divorce Court has jurisdiction to dissolve an English marriage between English subjects on the petition of a wife who is resident though not domiciled in England.

Mr Justice Story, in his Conflict of Laws (section 36) says:

Of the nature, extent and utility of the recognition of foreign laws respecting the state and condition of persons every nation must judge for itself.

Now, admitting this to be so, I must say it appears to me very clear that if the husband in *Deck v. Deck (rr)*, instead of going to the State of New York, had gone to the Province of Quebec and had married there, the courts of the provinces of this Dominion should not hesitate to recognize the validity of the decree made in that case, so as to entitle the wife to maintain a suit like the present in her own name as a *feme sole*; and if we should recognize such a decree made by the divorce court in England, I can see no principle upon which we should decline to recognize a decree of the Supreme Court of the State of New York made under similar circumstances, for a cause which, by the law of the State of New York, is sufficient to justify a decree of dissolution of marriage.

In *Maghee v. McAlister (s)*, Lord Chancellor Blackburn, in the Irish Court of Chancery, recognized the validity of a decree of dissolution of marriage made by a Scotch court at

(rr) Sw. & Tr. 90.

(s) 3 Ir. Ch. Rep. 604.

the suit of a husband for desertion and non-adherence, in the case of a domiciled Scotchman married in England to an Irishwoman, who, while she and her husband were residing in England, deserted him there, although the cause would have been insufficient to warrant the granting of a decree of divorce by an English Court. And the ground of the decision was that, the husband having been at the time of the marriage a domiciled Scotchman, the marriage, although solemnized in England, was a Scotch marriage, and that, therefore, it was competent for the Scotch Court to pronounce the decree of dissolution, although the wife had not appeared to the suit.

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This judgment is quoted with approbation by the Law Lords in the House of Lords in *Harvey v. Farnie*(*t*), in which case it was decided that the English courts will recognize as valid the decision of a competent christian tribunal dissolving a marriage between a domiciled native in the country where such tribunal has jurisdiction, and an Englishwoman, when the decree of divorce is not impeached by any species of collusion or fraud and this, although the marriage may have been solemnized in England and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

A fortiori, as it appears to me, should the decree of the Supreme Court of the State of New York between the parties to the present suit be, upon the principle of the comity of nations, recognized as valid in the courts of the provinces of this Dominion, for the marriage between the plaintiff and defendant was, in the strictest sense, a New York State marriage. Both parties thereto were natural born citizens of the United States, and domiciled at the time of the marriage in the State of New York, which was also the domicile or origin of the plaintiff, and in which she was resident at the time of her filing her petition for divorce and dissolution of marriage in the Supreme Court of the state, and the defendant, though at the time of the presentation of such

(*t*) 8 App. Cas. 43.

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petition domiciled in the Province of Quebec, was personally served with the process issued out of the said Supreme Court in the said suit and appeared thereto absolutely by an attorney of that court for that purpose duly authorized by the defendant. We may, and in a case of this kind, I think, should refer to the decisions of the courts of the United States and of the several states and to the statute law of the particular state in the tribunals of which the decree of dissolution of marriage was made equally, as we would in a like case in the English Divorce Court refer to the decisions of the English courts, and to the statute law of England affecting the subject, all countries being equally foreign to the country in the tribunals of which the question arises, in the sense in which that term is applied to questions of domicile, and the status of married persons; and so doing we should not, in my judgment, hesitate to recognize the decree in the Supreme Court of the State of New York in the suit instituted by the plaintiff against her husband for adultery to be valid and binding upon the defendant. There is no suggestion of the decree having been obtained by collusion or fraud and the parties to that suit having been natural born citizens of the United States and domiciled in the State of New York at the time of the marriage and married under the law of that state, the marriage must be held to have been a New York State marriage and the parties must be held to have become upon the marriage subject to the law of the State of New York relating to divorce by which law it then was, and continually hitherto has been, provided and enacted by statute that a divorce may be decreed and marriage may be dissolved by the Supreme Court of the state whenever adultery has been committed by any husband or wife in the following case, among others: "where the marriage has been solemnized or taken place within this state," and that a bill of divorce may be exhibited by the wife in her own name as well as by a husband; and, further, that if a married woman at the time of exhibiting a bill against her husband shall reside in this

state, she shall be deemed an inhabitant thereof, although her husband may reside elsewhere. The contention that what this decree purports to effect, namely, dissolution of marriage, is contrary to the public policy of the Province of Quebec, and that, therefore, it should not be recognized cannot prevail, for although the Province of Quebec has no tribunal established within its limits competent to entertain questions of divorce and cannot, by its constitution, establish such a court, yet that is because of the nature of its constitution and because the subject of divorce is placed under the exclusive jurisdiction of the Dominion Parliament, which can establish such a court competent to entertain all cases of divorce arising in all the provinces, and in the meantime, until it does, exercise itself jurisdiction over the subject, as a court, for the same cause as by the law of the State of New York is deemed sufficient there, and in the same manner as the Imperial Parliament did in England prior to the establishment of the Divorce Court there. That cannot be said to be against the public policy of a province of this Dominion which the province, by its constitution, has not, but the Dominion has, power to deal with. Neither can it, with any propriety be said that the province has any interest in refusing or which could justify its courts in refusing to recognize the validity of the decree. The language of Lord Selborne, in *Harvey v. Farnie*(*u*), appears to me to be very appropriate to the present case, to the effect that, so far as the question of recognition depends upon any principle, it must be upon the principle of recognizing the law of the forum in which the decree is made and of the matrimonial domicile when, as in this case, they both concur. I am of opinion, therefore, that the validity of the decree should be recognized in the several courts of the provinces of this Dominion. That upon one side of the line of 45° latitude the plaintiff and defendant should be held to be unmarried persons with all the incidents of their being

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(u) 8 App. Cas. 43.

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sole and unmarried, and that upon the other side of the same line they should be held to be man and wife, is a result so inconvenient, injurious and mischievous, and fraught with such confusion and such serious consequences, that, in my judgment, no tribunal not under a peremptory obligation so to hold should do so. Such a decision would, in my opinion, have the effect of doing great violence to that *comitas inter gentes* which should be assiduously cultivated by all neighbouring nations, especially by nations whose laws are so similar and derived from the same fountain of justice and equity as are those of the State of New York and of Canada, and between whom such constant intercourse and such friendly relations exist as do exist between the United States of America and this Dominion.

But I am of opinion that, for the purpose of the present appeal, it is sufficient to hold that the defendant, having appeared to the suit which, as appears by the evidence, the Supreme Court of the State of New York had jurisdiction to entertain, he should not be permitted in the present suit indirectly to call in question the validity of a decree made in a suit to which he appeared absolutely and not under protest. This is a position which, in my opinion, is not only warranted on principle, but on the authority of decided cases. *Zycklinski v. Zycklinski*(*v*); *Callwell v. Callwell*(*w*); *Reynolds v. Fenton*(*x*), and other cases.

The appeal should, therefore, in my opinion, be allowed with costs and the case remitted to the Superior Court of the Province of Quebec to be proceeded with.

I have thought it due to the able argument presented to us by the learned counsel upon both sides to express my opinion upon the above point which was so fully and with great propriety dwelt upon as the main point in the case, but I concur also in the judgment of my brother Fournier and in the reasoning upon which he has supported it.

(*v*) 2 Sw. & Tr. 420.

(*w*) 3 Sw. & Tr. 259.

(*x*) 3 C.B. 187.

Appeal allowed with costs.

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Solicitors for the respondent: *Kerr & Carter.*

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 30.
 **June 14.

AND

JOHN QUIRK (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-
 WEST TERRITORIES.

*Chattel mortgage—Renewal—Time for filing—Identification of goods
 —Sufficiency of description—Proof of judgment and execution.*

The ordinance of the North-West Territories relating to chattel mortgages (Ordinance of 1881, No. 5) provides by section 9 that "every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the persons making the same after the expiration of one year from the filing thereof, unless a statement, etc., is again filed within thirty days next preceding the expiration of the said term of one year." A chattel mortgage was filed on August 12th, 1886, and registered at 4.10 p.m. of that day. A renewal of said mortgage was registered at 11.49 a.m. on August 12th, 1887.

Held, affirming the decision of the court below that the renewal was filed within one year from the date of the filing of the original mortgage as provided by the ordinance.

Per Patterson, J.—In computing the time mentioned in this section the day of the original filing should be excluded and the mortgagee would have had the whole of the 12th August, 1887, for filing the renewal.

Section 6 of the same ordinance provides that: "All the instruments mentioned in this ordinance whether for the mortgage or sale of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished." The description in a chattel mortgage was as follows: "All and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general mer-

*XVIII. Can. S.C.R. 695.

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

chandise now being in the store of said mortgagors on the north-half of section six, township nineteen, range twenty-eight west of the fourth initial meridian."

Held, affirming the decision of the court below (1 Terr. L.R. 159), that the description was sufficient. *McCall v. Wolff* (13 Can. S.C.R. 130) distinguished. *Hovey v. Whiting* (14 Can. S.C.R. 515) followed.

Per Patterson, J., that although the interpleader issue did not contain an express statement that the judgment and execution on which the goods were seized were against the makers of the chattel mortgage, that fact should be inferred.

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APPEAL from a decision of the Supreme Court of the North-West Territories(*a*), Rouleau, J., dissenting, reversing the judgment at the trial in favour of the defendants and directing judgment to be entered for the plaintiff, in the interpleader issue with costs.

The facts were shortly as follows. The sheriff under an execution at the suit of Thomson, Codville & Co. against Samuel Kirkpatrick and William E. Holmes, seized certain goods and chattels which were claimed by the plaintiff under a chattel mortgage made to him by said Kirkpatrick and Holmes, dated the 12th August, 1886, and registered on the same day at 10 minutes past four o'clock in the afternoon. A renewal of the chattel mortgage was registered on the 12th August, 1887, at 49 minutes past eleven o'clock in the forenoon. The following was the issue directed to be tried:

"Whereas John Quirk affirms, and Thomson, Colville & Co. deny, that at the time of seizure by the sheriff, the good seized, namely, the goods and chattels mentioned in a chattel mortgage made by Samuel Kirkpatrick and William E. Holmes to the claimant herein, dated the 12th day of August, A.D. 1886, were the property of the claimant as against the defendants herein the execution creditors, and it has been ordered by the Honourable Mr. Justice Rouleau that the said question shall be tried in the Supreme Court

(a) 1 Terr. L.R. 159.

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of the North-West Territories, in which said John Quirk shall be plaintiff and the said Thomson, Codville & Co. shall be defendants, therefore let the same be tried accordingly."

At the trial the chattel mortgage and renewal were put in and the defendants admitted their execution and filing and called no evidence, but rested their case upon their objections. The material part of the chattel mortgage read as follows:

"This Indenture made (in duplicate) the 12th day of August, one thousand eight hundred and eighty-six.

"Between William Edward Holmes and Samuel Kirkpatrick of High River in the District of Alberta, general merchants, trading at High River, under the name, style and firm of Holmes and Kirkpatrick, hereinafter called the mortgagors of the first part.

"And John Quirk of said High River, rancher, hereinafter called the mortgagee of the second part.

"Whereas the mortgagee has indorsed four several notes, copies of which are hereto annexed, marked respectively A. B. C. D. for and at the request of the mortgagors, and whereas the said mortgagors have agreed to give these presents to secure the mortgagee against loss or damage on account of such endorsement. Now this indenture witnesseth, that the mortgagors, for and in consideration of the premises and the sum of one dollar of lawful money of Canada, to them in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) hath granted, bargained, sold, assigned and by these presents doth grant, bargain, sell and assign unto the said mortgagee, his executors, administrators and assigns all and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of the said mortgagors on the north half of section six, township nine-

teen, range twenty-eight, west of the fourth initial meridian.

“Also any and all stock purchased by the mortgagors and which may be in their possession upon the said premises during the existence or continuance of this security or any renewal or renewals thereof.”

The issue was tried before Rouleau, J., who gave judgment against the plaintiff with costs.

On appeal to the full court the judgment at the trial was set aside, Rouleau, J., dissenting, and the defendants thereupon appealed to the Supreme Court of Canada.

Christopher Robinson, Q.C., for the appellants. The *onus probandi* was on the respondent who was plaintiff in the issue. Taylor on Evidence (8 Eng. ed.), secs. 364, 5, 6, 7. Best on Evidence (7 ed.), secs. 265, 266. The *onus* was on the respondent.

The issue, pleadings and case do not disclose or admit in any way that Holmes and Kirkpatrick or the plaintiff or anyone on their behalf or on behalf of either of them were in possession of the goods seized, nor do they disclose that the execution was against the plaintiff's mortgagors. The mere production of the chattel mortgage and the alleged renewal did not prove title to the goods seized by the sheriff: *Richards v. Jenkins* (b).

The question on the facts here proved must be whether the claimant has any interest in the goods. It must be necessary for him to shew that he has some interest, for, if he has none, the evidence must be conclusive in favour of the execution creditor. *Grant v. Wilson* (c).

The appellants were not bound to give any evidence of judgment or execution until the respondent (plaintiff) had made out a case: *Holden v. Langley* (d); *Paterson v. Langley* (e); *McWhirter v. Learmouth* (f); *Crappier v. Paterson* (g).

(b) 18 Q.B.D. 451.

(c) 17 U.C.Q.B. 144.

(d) 11 U.C.C.P. 407.

(e) 11 U.C.C.P. 411.

(f) 18 U.C.C.P. 136.

(g) 19 U.C.Q.B. 160.

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The plaintiff's mortgage was not re-filed in time and under sec. 9 of Ordinance 5 of 1881, of the North-West Territories, the mortgage ceased to be valid as against execution creditors.

The mortgage in question was first filed on the 12th of August, A.D., 1886, at 4.10 p.m., the renewal was not filed until the 12th day of August, A.D., 1887, at 11.49 a.m. The mortgage therefore ceased to be valid after the latest moment of the day of the 11th of August, 1887, that being the expiration of the term of one year. *Beatty v. Fowler(h)*; *McMartin v. McDougall(i)*; *Armstrong v. Ausman(j)*; *Stewart v. Brock(k)*; Barron on Bills of Sale, last edition, 433.

Under sec. 6 of the said Ordinance there was not in said mortgage a sufficient and full description of the goods within the meaning of the enactment, and the mortgage was void as against execution creditors. *McCall v. Wolff(l)*; *Nolan v. Donnelly(m)*.

The description of locality of premises is too general to indicate where the said goods are to be found. *Wilson v. Kerr(n)*; *Nolan v. Donnelly(nn)*.

Chrysler, for the respondent. The chattel mortgagees at the trial objected and still object that the defendants, Thomson, Codville & Co., under the form of the interpleader issue in this case are obliged to establish that they had recovered a judgment and issued execution thereon, and that the cases relied upon by the appellants refer to a form of interpleader issue in which the judgment and execution of the creditor is recited in the issue. There is no such recital here. See Chitty, Forms.

The plaintiff contends there was a compliance with the requirements of the Ordinance and that the description is

(h) 10 U.C.Q.B. 382.

(i) 10 U.C.Q.B. 399.

(j) 11 U.C.Q.B. 498.

(k) 19 Can. Law J. 289.

(l) 13 Can. S.C.R. 130.

(m) 4 O.R. 440.

(n) 17 U.C.Q.B. 168.

(nn) 4 O.R. 440.

abundantly clear and the goods described in it may by such description be easily known and distinguished. See *McCall v. Wolff*(o); *Harris v. Commercial Bank of Canada*(p); *Hovey v. Whiting*(q).

As to the objection that the re-filing was not a compliance with the Ordinance it is contended that, if renewal were necessary, this chattel mortgage is proved to have been renewed within one year and the requirements of the section were complied with. The section is in the same terms as the Ontario Act, Revised Statutes of Ontario, ch. 125, sec. 11, and two Ontario cases were cited and relied on by the appellants, viz., *Armstrong v. Ausman*(r); *Stewart v. Brock*(s). In *Armstrong v. Ausman*(r) the objection to the renewal was a different one and the point now in question did not really present itself for decision. *Stewart v. Brock*(s) was a judgment of a County Court judge who followed, out of deference, the dictum expressed in *Armstrong v. Ausman*(r). Except these two cases the point is free from authority and the question is the general one as to the construction of a written document in regard to the computation of time.

The words are very clear and precise—"after the expiration of one year from the filing thereof." The chattel mortgage in question was filed on the 12th of August, 1886, at ten minutes past four o'clock in the afternoon. The renewal was filed on the same day of the following year, the 12th of August, 1887, at forty-nine minutes past eleven in the forenoon. If the day of filing is excluded, as it seems to be by the plain language of the section, the mortgagee would have the whole of the same day in the following year to file the renewal. If portions of a day are to be taken into account the year, from the hour and minute of filing, would not expire until ten minutes past four on the 12th of August, 1887. In either case the renewal was filed

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(o) 13 Can. S.C.R. 130.

(q) 14 Can. S.C.R. 515.

(p) 16 U.C.Q.B. 437.

(r) 11 U.C.Q.B. 498.

(s) Can. Law J. 289.

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in time and the chattel mortgage retained its validity. See also *Lester v. Garland*(t); *Dowling v. Foxall*(u).

In computing time under the 15 & 16 Vict. ch. 5, sec. 2, avoiding letters patent upon failure in payment of stamp duties it was held that the day of the date should be excluded. *Williams v. Nash*(v). Under the statute authorizing goods distrained to be replevied within five days next after the taking, the day of taking was held to be excluded. *Robinson v. Waddington*(w); *Sutherland v. Buchanan*(x). There is abundance of authority that the day is to be construed exclusively wherever anything is to be done in a certain time after a given event or date. *Per Osler, J.*, in *Hanns v. Johnston*(y).

The identity of the goods seized with those described in the chattel mortgage is stated as part of the question on the face of the issue.

STRONG J. was of opinion that the appeal should be dismissed with costs.

FOURNIER J.—The question raised by the interpleader is to know whether at the time of the seizure respondent (Quirk) had title as against the execution creditors Thomson, Codville & Co. The grounds relied on by appellants were insufficiency of description of the articles in the chattel mortgage and that the mortgage was not re-filed in time.

As to the first objection, the description being "all of the goods, chattels, etc., etc., used in the mortgagor's business and being in a certain store" in a certain place. I think it covers all the goods in that store. This description is sufficient as it was already decided by this court in the case of *McCall et al. v. Wolff*(z). This opinion has also been held by several judges, in decisions in the Ontario courts.

(t) 15 Ves. 248.

(w) 13 Q.B. 753.

(u) 1 Ball & B. 193.

(x) 9 Gr. 135.

(v) 28 Beav. 93.

(y) 3 O.R. 100.

(z) 13 Can. S.C.R. 130.

As to the second objection, I think the re-filing of the chattel mortgage was made in time. It was filed the first time on the 12th August, 1886, at 4.10 p.m., and re-filed 12th August, 1887, at 11.49 a.m. It appears then that it was re-filed in compliance with sec. 9 of Ordinance 5 of 1881, declaring as follows:

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Every mortgage filed in pursuance of this Ordinance shall cease to be valid as against the creditors of the persons making the same after the expiration of one year from the filing thereof, unless a statement, etc., is again filed within thirty days next preceding the expiration of the said term of one year.

From the language of the statute it is clear that a complete year from the filing, 12th August, 1886, at 4.10 p.m., would not expire before the 12th August, 1887, at the corresponding hour of 4.10 p.m.; the chattel mortgage having been re-filed on the 12th August, 1887, at 11.49 a.m. was then before the expiration of a year and in time to remain in full force, and consequently the appeal should be dismissed.

TASCHEREAU J.—I am of opinion to dismiss this appeal, with costs. I think the mortgage was re-filed in time and that the description of the goods mortgaged is sufficient. *McCall v. Wolff* (22) does not apply.

GWYNNE J. concurred.

PATTERSON J.—This appeal is from a decision of the Supreme Court of the North-West Territories upon an interpleader issue which issue is stated as follows:

Whereas John Quirk affirms, and Thomson, Codville & Co. deny that, at the time of seizure by the sheriff, the goods seized, namely, the goods and chattels mentioned in a chattel mortgage made by Samuel Kirkpatrick and William E. Holmes, to the claimant herein, dated the 12th day of August, A.D., 1886, were the property of the claimant as against the defendants herein, the execution creditors, and it has been ordered by the Honourable Mr. Justice Rouleau that

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the said question shall be tried in the Supreme Court of the North-West Territories, in which said John Quirk shall be plaintiff and the said Thomson, Codville & Co. shall be defendants, therefore let the same be tried accordingly.

At the trial the chattel mortgage was produced, and the execution of it and the dates of filing and re-filing as marked upon it were admitted.

That constituted the whole evidence.

The defendants relied on objections to the chattel mortgage under the Ordinance of the North-West Territories of 1881, and the plaintiff, while he maintained the validity of his mortgage, contended that the defendants had not shewn themselves entitled to impeach it.

Judgment was given at the trial for the defendants, but was reversed on appeal to the full court.

The objection to the *locus standi* of the defendants I understand to be that the issue does not shew a judgment against the mortgagors sufficiently to dispense with proof of a judgment and execution.

The objection was not much pressed before us, and there is nothing in it.

In drafting the issue we do not find, though we might have expected to find, an express statement that the judgment there mentioned, and the execution on which the goods were seized, were against Kirkpatrick and Holmes, who made the mortgage to the plaintiff, but that fact must have been shewn before the issue was ordered, and it is to be inferred from the statements which the issue contains.

The plaintiff's other answers to the objections relied on by the defendants are better founded.

The mortgage was originally filed on the 12th of August, 1886, at 4.10 p.m. A renewal statement was filed on the 12th of August, 1887, at 11.49 a.m.

The objections were that it was not renewed in time; and that it did not contain a sufficient description of the goods.

The 9th section of the Ordinance enacts that:

Every mortgage or copy thereof filed in pursuance of this Ordinance shall cease to be valid as against the creditors of the persons making the same, and against subsequent purchasers or mortgagees in good faith for valuable consideration, after the expiration of one year from the filing thereof unless, within thirty days next preceding the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof * * is again filed, etc.

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This mortgage was originally filed on the 12th of August, 1886, and the renewal statement was filed on the 12th of August, 1887, at an earlier hour than the original filing.

Was it filed before the expiration of the term of one year?

It is so perfectly undeniable that a year had not elapsed between the one filing and the other, that a common mind, not educated in legal subtleties might be excused for doubting if the question could be seriously asked.

It would be unfortunate if a law passed, as this Ordinance was for the guidance of people in the ordinary transactions of business, could not be safely taken to mean what its language plainly expresses. So to hold would convert the Ordinance into a sort of trap.

I do not think the law is fairly open to the reproach involved in the contention of the defendants.

This mortgage remained valid until one year from the filing had expired, and one year did not expire until 4.10 p.m. on the 12th of August, 1887. Up to that moment it would prevail against executions or subsequent purchasers or mortgagees, assuming, of course, that it still remained in force as between the parties to it. And it continued to be valid in case before the expiration of the year—that is, while the original filing continued to govern—a renewal was filed, so that there was no break on the register. That fully satisfied the object as well as the letter of the Ordinance.

We are not, however, to construe the phraseology of the section with such rigid adherence to the letter as to exclude the duty of ascertaining the intention evinced by the whole Ordinance; and, interpreting it on that principle. I am of

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opinion that the renewal would have been in time if filed any time on the 12th of August, 1887.

We find in the Ordinance two limitations of time. The first section requires the instrument to be registered (or filed) "within fifteen days *from the execution* thereof," and by this ninth section it ceases to be valid "after the expiration of one year *from the filing* thereof," unless the renewal has been filed "within thirty days next preceding the expiration of the said term of one year."

Test the construction of the first section by supposing the direction to be to file *within one day* from the execution of the instrument. That would clearly give the whole of the day following the day on which the instrument was executed. The day of the execution would be excluded. "Within fifteen days" would by the same rule give fifteen clear days after the day of execution. In the same way the phrase "within one year from the filing" means within one year after the day of filing.

The year thus began on the 13th of August, and the whole of the twelfth of the following August was within the year.

There has been for many years in force in Upper Canada and Ontario a statute similar to the Ordinance before us, and which doubtless supplied, either directly or by way of Manitoba (Con. Stat. Man. ch. 49), the model on which the Ordinance was framed. In some cases before the courts of Upper Canada, which were cited on the argument of this appeal, dicta are found to the effect that the year must be taken to begin at the first moment of the day of the execution of the deed or at the hour of the day marked on the deed as that at which it was filed. It does not seem to have become necessary to decide the point in any of those cases, and one may venture to doubt that, on the closer examination of the statute which such a decision would have required, the time would have been held to run before the actual time of the filing. Besides this, it is to be noticed

that while the law originated in Upper Canada in 1848^(zz), it was not until 1857 that the time for the original filing, which in that province is five days from the execution of the instrument, was introduced into the statute. (20 Vict. ch. 3.) The decisions referred to were earlier than 1857, and the judges whose dicta are quoted had not the legislative indication of the sense in which the term "from the filing" was used, which, since 1857, has been found in the limitation of five days "from the execution."

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Mr. Chrysler, who gave the court the assistance of a learned and able argument for the respondent, referred to a number of English decisions on the mode of computing time under various statutory limitations. I do not think it necessary to notice them in detail, or to say more regarding them than that they comprise precedents strongly supporting the construction which I have founded on the Ordinance itself, and which extends the year to the last moment of the 12th of August, 1887.

The court below was therefore right in holding that the renewal was not too late.

The court was also right, in my opinion, in deciding against the objection to the description of the goods contained in the chattel mortgage.

All and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of the said mortgagors on the north half of the section six, township nineteen, range twenty-eight, west of the fourth initial meridian.

The objection is made under this sixth section of the Ordinance, which reads thus:

All the instruments mentioned in this Ordinance whether for the mortgage or sale of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished.

If the description is not sufficient and full within this

(zz) 12 Vict. ch. 74.

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provision it would be impossible to convey a stock-in-trade so as to satisfy the statute. Actual possession would have to be taken and continued, and then the case would be outside of the statute.

The clause differs from the cognate sections in the Ontario Act, R.S.O. 1887, ch. 125, sec. 27, and in the Manitoba Act, Con. Stat. Man. ch. 49, sec. 5, by omitting the word "thereby." Those Acts read "that the same may be *thereby* readily and easily known and distinguished."

The foundation is thus removed on which it was sometimes argued that the goods must be easily recognizable and distinguishable with no other aid than the written description.

That argument, to which the language of the clause gave some force, was never acceded to. Many Upper Canada cases in which the point arose are commented on by Mr. Barron in his treatise on Bills of Sale, at pp. 482, *et seq.*, and by my brother Gwynne in *Hovey v. Whiting(a)*.

Under the principle of those decisions and of *McCall v. Wolff(b)*, and *Hovey v. Whiting(a)* in this court, the decision before us would satisfy the requirements of the Ontario and Manitoba Acts. It is *a fortiori* good under this Ordinance. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Lougheed & McCarthy.*

Solicitors for the respondent: *Smith & West.*

(a) 14 Can. S.C.R. 515.

(b) 13 Can. S.C.R. 130.

*SAMUEL MAY & COMPANY (PLAIN- } APPELLANTS;
TIFFS)..... }

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**Feb. 25.

AND

DUNCAN C. McDOUGALL AND LEON- } RESPONDENTS.
ARD C. ARCHIBALD (DEFENDANTS) }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract of sale—Particular chattel—Representation.

The plaintiffs were manufacturers of billiard tables at Toronto, and the defendants resided at Antigonish, Nova Scotia. The cause of action arose with respect to a contract entered into between them for the exchange of billiard tables. The defendants having previously purchased through an agent at a sale at auction held at Halifax, a billiard table of a size too large for them, which the defendants never had personally seen, opened negotiations with the plaintiffs by letter for an exchange. To this plaintiffs replied giving their terms, which the defendants by post card refused to accept. Subsequently the plaintiffs reopened negotiations and asked defendants to give as near a description of their table as they could, to which M. acting for both defendants, replied: "I may just say I never saw our table yet, but am informed it is a very nice one, etc. The gentleman who purchased the table for us writes thus: 'I am told that the table is a great bargain, cost £200 in England, etc.' The table is 6 x 12, and for particulars we would refer you to Jerry F. Kenny, Esquire, or F. D. Clarke, auctioneer, Halifax. To this plaintiffs replied accepting the offer, adding: "We trust that the English table is fully as represented." The tables were sent to their respective destinations. On receipt of the defendants' table, the plaintiffs wrote refusing to accept it on the ground that the table received was an old, out-of-date, American table, and claiming that they had been defrauded in the matter by the defendants. The latter replied, saying, "I complied with the conditions of our bargain. I referred you

* Incorrectly reported, XVIII Can. S.C.R. 700.

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

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at the time to Mr. Kenny and the auctioneer, and gave you the information I had about the table which you took in exchange for the one sent me. I acted in good faith." The trial judge found in favour of the plaintiffs, but his judgment was reversed by the full court, and the action dismissed, McDonald, C.J., dissenting. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the court below and restoring the judgment at the trial, that McD. agreed to deliver to M. & Co. an English built table made by Thurston as described in his letter and having failed to deliver such a table he was liable to pay the full price of the one obtained from M. & Co.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial in favour of the plaintiffs.

The facts of the case are sufficiently set out in the head note and the following judgments in the courts below and in this court.

JAMES J., at the trial (unreported).—The plaintiffs are manufacturers of billiard tables at Toronto. The defendants reside at Antigonish, N.S. The defendants having purchased by their agents, at auction, a billiard table, which did not suit their purpose, on 20th September, 1886, by letter, proposed to exchange the article for one of the plaintiff's manufacture. After some negotiations, the exchange was effected by correspondence, and the articles mutually transmitted. The defendants' table was represented by them to be "a full-sized English billiard table 6 x 12 feet," then "in Halifax, packed, ready for shipment." On the arrival of the table at Toronto it was examined by plaintiffs. It was discovered by them that it was of American construction, and of a different size and pattern from an English table in several respects, and especially in size. Instead of being 6 x 12 it was only 6 x 11 feet 8 inches, and of little or no value to plaintiffs, and thereupon they rejected it, and brought this action for the value of their own table, shipped to defendants. The plaintiffs had no opportunity of inspecting it before they received it, but took it solely on the written representation of the defendants. The principle of *caveat emptor* does not apply as against the plaintiffs, as in this case the purchaser (the plaintiffs) received not an article inferior in quality to the representation, but a different article. The plaintiff had no opportunity of seeing it before the bargain was made, and he was guided only by the defendants' written statement. It was different in size, construction and origin from an English table. I think the defendants' explicit and positive statement that it was a "full-sized English

table 6 x 12 feet," was tantamount under the circumstances to a warrant, and therefore I find a judgment for the plaintiffs. 1890

There is no ground for imputing a fraudulent intention to the defendants who made their statement in total ignorance that the table was not as represented by them. MAY & Co.
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I do not know, from the evidence and the arguments adduced to me, whether a simple judgment for plaintiff will meet the full justice of the case. If not, I will endeavor to rectify it on application. At present my judgment is simply a judgment for plaintiffs.

The only case to which I need refer is *Nichol v. Godts(a)*, in which the sale was of "foreign refined rape oil, warranted only equal to sample," and the action was brought for the refusal by the defendant to accept oil which corresponded to the sample, but which turned out not to be foreign refined rape oil. It was held that he was entitled to be discharged from the contract inasmuch as the nature of the article delivered was different from that which he had agreed to buy. See also *Azémar v. Casella(aa)*.

On the appeal to the Supreme Court of Nova Scotia, the following judgments were pronounced (unreported):

RITCHIE J., (pronouncing the judgment of the majority of the court)—The plaintiff who was a maker of billiard tables at Toronto agreed to furnish a new one to defendants in exchange for a second-hand billiard table, which defendants had just previously purchased and the sum of fifty dollars, the defendants to pay the freight on both tables between this province and Toronto. The tables were exchanged and the payment made as agreed upon by defendants to the plaintiff, but the plaintiff on examination of the table sent him repudiated the agreement on the ground that the table was not as represented, he returned the money to defendants and claimed to be paid the full value of the new table he had sent defendants. This defendants refused to pay, alleging that the agreement had been fully performed on their part. The plaintiff then brought this action to recover the price of his table as goods sold and delivered, and for the freight paid by him on the table sent to Toronto, or in the alternative, damages for breach of an agreement in not delivering to him a full sized English billiard table which they had agreed to do, or in the alternative to have the agreement entered into between them for the exchange of the tables declared null and void, and to recover from the defendant the price of the billiard table supplied by him to them. The contract was made by letters and telegrams. According to my view the negotiations were not broken off by defendants' letter of the 29th September, but the whole correspondence must be read together in order to ascertain the real

(a) 10 Ex. 191.

(aa) L.R. 2 C.P. 431 and 677.

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agreement between the parties. In order to enable the plaintiff to recover in this action he must bring it within the class of which *Azemar v. Casella* (b) is a representative, and it must appear that the billiard table did not answer the description of the one sold, and was not merely deficient in quality. For if it was a sale of a specific article, and the quality only was deficient, the cases of *Model v. Steel* (c) and *Heyworth v. Hutchinson* (d) apply and the plaintiff cannot refuse to take the table sent him.

If we turn to the correspondence we find that in the first letter from defendant McDougall to plaintiff he says: "Mr. Archibald and I bought at the sale of Sir Edward Kenny's country residence a full sized English billiard table with cues, etc. I am told that it cost £200 in England, and is very little worse for wear (the maker's name is, I think, Thurston). Can we make an exchange with you for a 4½ x 9 combination billiard, pool, balls, cues, etc. Our table is in Halifax, packed ready for shipment." And afterwards in reply to a letter from plaintiff saying: "Give us as near a description as you can of your table, maker's name is essential." Defendant McDougall writes: "I may just say I have never seen our table yet, but am informed it is a very nice one made by 'Thurston' and very little the worse of wear, being in the private family of Sir Edward Kenny, in his country residence, near Halifax." The gentleman who purchased the table for us, writes thus: "I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear." The table is 6 x 12 and for particulars we would refer you to "Jerry F. Kenny, Esq., or R. D. Clarke, auctioneer, Halifax." As I understand the evidence given on the part of the plaintiff, the term "English" as applied to a billiard table is not confined to a table made in England, but means a table made for playing a game known as "English billiards," and that such tables are made in Canada. The old American table with six pockets is shewn by the evidence to be much smaller (10 x 5), with larger balls and pockets than English tables. The fact that the length of the slate bed was four inches less than 12 feet, does not, I think, materially effect the matter. 6 x 12 was given in round figures as the size table, and not of the bed, and even if the plaintiff considered that to be given as the exact measurement of the bed he must have known when he made the bargain that he was not going to get an English made table as he now claims he ought to get, because he says himself that such a table is always 6 feet 2 in. wide. In my opinion the size given was only approximate and that is the way it should be understood, and this is confirmed by the fact that the plaintiff calls his table a 4½ by 9 table, while it is in evidence that the bed is only eight feet eight inches long. Taking into consideration the whole of the evidence I am of opinion that the table

(b) L.R. 2 C.P. 431 and 677.

(c) 8 M. & W. 858.

(d) L.R. 2 Q.B. 447.

sent to plaintiff answers the general description given, viz: "A full sized English billiard table, 6 x 12," and that the plaintiff received the specific article he agreed to purchase, but no doubt of a quality very inferior to that which he expected to get, and that on the authority of *Heyworth v. Hutchinson (dd)* he cannot reject it, but his only remedy is an action on his warranty, if any exists, and which action he has not brought. The appeal I think must be allowed with costs,

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McDonald C.J.—I am sorry that I cannot concur in the judgment just read. I have a very strong opinion on the subject and I have no hesitation in saying that the plaintiff has been most unmercifully swindled by someone. Some time in 1886 this advertisement appeared in a newspaper published in Halifax: (After reciting the time and place of sale at auction):

"At 2 o'clock, a full size 6 pocket English billiard table by Thurston, with the full complement of billiard and pool balls, cues and marking boards, etc." That would imply an English made table as well as a table for the English game. The table was purchased by an agent of the defendants who came here for that purpose, and he describes it in this way: "I purchased the table as you requested. I had to pay just the amount you limited me, \$125, and 75 cents for the linen cover. I did not get the pool balls as they were sold separately, for I think \$1.50 each. There were 12 of them. I don't think you needed them as they are only for gambling. I got the three billiard balls and marker and 19 cues which is all that is needed for billiards. I am told the table is a great bargain, cost two hundred pounds in England, and is not much the worse for wear. The cues and marker cost about \$40 more."

Defendants became possessors of the table and wrote to the plaintiff, May, of Toronto, in this way:

"Antigonish, N.S., 20th Sept. 1886.

Samuel May & Co., Toronto.

Gentlemen,—Mr. Archibald and I bought at the sale of Sir Edward Kenny's country residence a full sized English billiard table, 6 x 12, with cues, marker and the three balls (ivory), and as it is a little large for our room, would wish to trade if possible for a combination table. I am told it cost two hundred pounds in England and is very little worse of wear. (The maker's name, I think, is Thurston). Can we make an exchange with you for a 4½ x 9 combination, billiard and pool balls, cues, etc., and on what terms? Our table is in Halifax, packed ready for shipment, and will remain there till we hear from you."

That description was carried throughout and on the faith of that and on the guaranty that they were offering to sell an English table in fair condition by an English maker, which had cost two hundred pounds, plaintiffs agreed to take it and I say that they

(*dd*) L.R. 2 Q.B. 447.

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never got the table they agreed for or anything like it. He got instead a badly made American board which never saw England, and had no claim or title to be called an English table.

But I am told that the defendant is to be excused, because when he is charged with fraud he writes in reply to plaintiff's letter of December 27th: "I have nothing to say with respect to your allegation of fraud. I complied with the conditions of our bargain. I referred you at the time to Mr. Kenny and the auctioneer, and gave you the information I had at the time about the table which you took in exchange for the one sent me. I acted in good faith."

Now I do not think Mr. McDougall did comply with the conditions of his bargain, which was to exchange with the plaintiff a table of the character and value above described for one of their own make. Mr. McDougall may have intended to act in good faith, but I cannot see the honesty of an act by which he obtains a valuable article in exchange for a worthless article by means of a gross misrepresentation which the plaintiff had no available means of detecting. One can hardly be surprised at the strong language by which the plaintiff characterizes the transaction.

Henry Q.C., for the appellants. As to failure of consideration owing to the innocent misrepresentation, see *Benjamin on Sales* (3 ed.), p. 377; *Kennedy v. Panama Mail Co.*(e).

As to difference in substances see *Cox v. Prentice*(f); *Asemar v. Casella*(g).

See also *Anson on Contracts*, p. 146; *Pollock on Contracts*, p. 525; *Redgrave v. Hurd*(h).

Harrington Q.C., for respondents.

SIR W. J. RITCHIE C.J.—I have not the slightest doubt in this case and never had since I looked at the record before us. It is clear that the principle on which the case must be determined is not necessarily that it is a question of warranty or representation, but simply whether or not the article delivered to the plaintiffs fairly answered the description of what the defendants agreed to sell.

It appears that these defendants purchased at auction a billiard table which was described as follows:

(e) L.R. 2 Q.B. 580.

(f) 3 M. & S. 344.

(g) L.R. 2 C.P. 431, 677.

(h) 20 Ch. D. 1.

R. D. Clarke

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Is instructed by J. F. Kenny, Esq., to sell at Sherwood (on the Bedford Road, near Four Mile House) on Thursday next, 9th inst., commencing at 10.30 o'clock:

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The Household Furniture, comprising * * *

At 2 o'clock, a full-size, 6 pocket, English billiard table, by Thurston, with the full complement of billiards and pool balls, cues and marking boards, and a full set of sporting pictures, etc.

They then made application to the plaintiffs in Toronto for the purpose of obtaining an American table by exchange. The correspondence opens in this way:

Antigonish, N.S., 20th Sept., 1886.

Samuel May & Co., Toronto.

Gentlemen,—Mr. Archibald and I bought at the sale of Sir Edward Kenny's country residence a full sized English billiard table, 6 x 12, with cues, marker and the three balls (ivory), and as it is a little large for our room, would wish to trade it, if possible, for a combination table. I am told it cost £200 in England, and is very little worse of wear; (the maker's name is, I think, Thurston). Can we make an exchange with you for a 4½ x 9 combination billiard and pool balls, cues, etc., and on what terms. Our table is in Halifax, packed ready for shipment, and will remain there till we hear from you. Yours truly,

D. C. McDOUGALL.

The plaintiffs answered thus:

Toronto, Sept. 24th, 1886.

D. C. McDougall, Esq., Antigonish, N.S.

Dear Sir,—Your favour of 20th inst. to hand. Contents noted. We have sent you with this mail our illustrated catalogue and price list, which contains full particulars regarding our various styles of tables, outfits, prices and terms.

You will see from our list (catalogue), page 4, that we sell a 6 x 12 English table, with a complete outfit for English billiards, at \$350.00, less 10 per cent. for cash, or \$315.00 net, which is far from £200, while we claim our tables fully up to the standard of the best makers of English imported tables.

After fixing up the old English table you propose to trade, which may involve a good deal of expense, for new cushions, cloth, varnish, outfit, etc., we cannot get more than \$250.00 and \$275.00 for it. If we pay the freight on it from Halifax, we cannot offer you more than \$125.00 or \$150.00 at the outside for the table, if it is in the condition you represent.

1890 MAY & Co. v. McDOUGALL. Ritchie C.J.	If we do this, we expect to get for a 4½ x 9 Eclipse Combination Table, with complete outfit for carom pool and pin pool. \$350.00 (See page 3, No. 31 catalogue.) Less paying for English table. 150.00
	\$200.00
	Less 10 per cent. for cash. 20.00
	\$180.00

To save time and correspondence on this matter, we have herewith at once made you the very best possible offer we can make, and if satisfactory, we expect to hear from you by return of mail.

Yours truly,

Samuel May & Co.

And the defendants then write again as follows:

Antigonish, N.S., 29th Sept., 1886.

Samuel May & Co., Billiard Manufacturers, Toronto, Ont.

I am in receipt of your favour of 24th inst., with stated enclosures. We would not think of entertaining such an exchange.

Yours truly,

D. C. McDougall, Agent.

The matter was then apparently at an end, when the plaintiffs re-opened negotiations by the following letter:

Toronto, Oct. 2nd, 1886.

D. C. McDougall, Esq., Agent Halifax Banking Co., Antigonish, N.S.

Dear Sir,—Your laconic reply to our letter of 24th inst. to hand.

We would drop the matter if it was not for an inquiry which we have just received from a private party in the far North-West who would like to purchase a good second-hand English table. We would therefore kindly ask you to make us your offer for the proposed exchange, and if we can possibly do it we will accept it.

Give us as near a description as you can of your table, maker's name is essential, but as you have nothing with it but the billiard outfit (no life and pyramid balls and boards) you should not make your price too high, or a deal will be impossible.

Awaiting your kind reply, we remain.

Yours truly,

SAMUEL MAY & Co.

Here the defendants are asked for a full description of the table and told that the maker's name is essential. Mr.

McDougall then writes offering fifty dollars, and in this letter he says:

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I may just say I never saw our table yet, but am informed it is a very nice one, made by 'Thurston,' and very little the worse of wear, being in the private family of Sir Edward Kenny in his country residence near Halifax. The gentleman who purchased the table for us writes thus:—'I got the three billiard balls and marker and nineteen cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear.' The table is 6 x 12 and for particulars we would refer you to Jerry E. Kenny, Esq., or F. D. Clarke, auctioneer, Halifax.

Yours truly,

D. C. McDOUGALL.

Here again the defendants, having heard that the maker's name is indispensable, give the name of "Thurston" as such maker. The plaintiff then wrote as follows:

Toronto, Oct. 22nd, 1886.

D. C. McDougall, Esq., Agt. Halifax Banking Co., Antigonish, N.S.

Dear Sir,—Your favour of 12th inst. to hand. Contents noted. Although your offer is such that it will hardly leave us anything as a profit, we will accept the same.

After making arrangements for payment of the freight, the letter proceeds:

We trust that the English table is fully as represented; and if you are satisfied, you may ship it at once, with billiard balls, markers, 19 cues, cloth, and what else there may be. In the mean time we will get up a 4½ x 9 Eclipse Combination Table in best style, and with outfits for pool, carom and pin pool games. Awaiting your early reply, we remain, dear sir,

Yours truly,

SAMUEL MAY & Co.

I am satisfied that this can be read in no other way, notwithstanding the ingenious argument of Mr. Harrington, than this, "If you are satisfied that the table is an English built table 6 x 12, etc." The defendants answer this letter as follows:

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Samuel May & Co.

Antigonish, N.S., Oct. 26, 1886.

Letter received. Will accept terms if you include two eighteen-ounce ebonized cues and ship table within ten days. Answer.

D. C. McDougall.

To which plaintiffs agreed.

We have seen then what the description was that defendants gave of their table; now let us see what the evidence is as to what was sent to the plaintiffs. And I do not understand that this evidence was in any way contradicted, but was rather corroborated by the evidence for the defence. We must remember that the plaintiffs had never seen the table, nor were they ever in a position to see it, and they were constrained to rely on the representation of the defendants respecting it, which, I think, formed a condition precedent to its acceptance by the plaintiffs. The evidence is as follows:

Samuel May describes the table as follows:

Answer.—It consisted of an old-fashioned American made frame of pine, veneered with rosewood, and six American made legs of chestnut wood, veneered with rosewood. The frame is numbered 3,191. The legs are without levellers. English tables have eight legs with a screw leveller in each leg. The bed of this table is slate, which is also American made; the dimensions of slate 6 feet wide by 11 feet 8 inches in length. The slate is in four slabs, one inch thick, and finished on one side only. The bed of an English table measures 6 feet 2 inches in width by 12 feet long, and the slates are finished on both sides to a uniform thickness. American makers don't do this. The cushion rails which came with the above bed and rails are English made, and are made of walnut veneered with rosewood, and were evidently originally made for some other table, being numbered 3,659. The rubber on those rails is hard and worthless for billiard purposes. The table is a six pocket table. I could find no name on the frame or bed or any place where a name had been. There is the mark of a name plate on the cushion rail. The plate is not there. It is not an English billiard table. It is an American made table, but I do not know who manufactured it. The table is worth what the slate is worth, that is all. Slate is worth thirty cents a foot here. That is a good price for it. I would not give more than twenty-five dollars for the whole table."

John Ristow, who stated that he had worked as foreman in the billard business for twenty years thus describes it: 1890
MAY & Co.

Answer.—The frame-work is American make. It is a six leg table. The slate is American. It is not the regular size of an English table. All English tables have eight legs. This only has six. This table has no screw levellers. English tables have. The legs of an English table are in one. In American tables they are in sections. The nuts on an English table are round, and are put in the slate from below. This table has square nuts, put in from the top. The frame of the table is pine, veneered with rosewood. The legs chestnut veneered with rosewood. The size of the bed is six feet by eleven feet eight inches. The English bed is six feet two by twelve feet. The cushions are English made. The rubber is useless. I do not know the maker's name. There is no name on it. The name plate is lost. It has dropped out. I cannot tell where it was manufactured. I can hardly tell the value of the table. Fifty dollars is what they generally pay for an old table. That is to say, old tables of our own make. This table is only worth what the slate which is in it is worth. I cannot say what this is worth. About fifteen dollars or something like that. It is pretty hard to say. v.
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That contradicts every word said in reference to this table. They differ in every particular. The table had none of the features of an English built table. The evidence is that it was originally built in America and that new cushions were put on it in Halifax. There were English cushions and it was when they were put on that the plate with Thurston's name was also put on. But there was no evidence that the table was made by Thurston, and the plaintiffs had expressly stated that the maker's name was essential.

Under these circumstances, when the plaintiffs had said to the defendants, "We trust that the representations made are true," and when on the arrival of the table at Toronto it is found that they are entirely untrue, how can it be said that the defendants have substantially delivered what they agreed to deliver? I think it was understood by the parties that this was a table made in England; that it was made by Thurston; and that it had been purchased in England for £200. That was the kind of table the plaintiffs expected to get.

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It cannot be said that anything like fraud attached to this defendant for not satisfying himself by personal examination of the truth of the representations; his conduct is open to objection only because, when he discovered that the table failed in every particular to satisfy the representation he attempted to adhere to the bargain and to force his objectionable table on the plaintiffs, though they should suffer a great loss thereby.

FOURNIER J.—I agree in the view of the learned Chief Justice and for the reason he has given I am in favour of allowing the appeal with costs.

TASCHEREAU J.—I concur.

GWYNNE J., also concurred.

PATTERSON J.—I agree that the appeal should be allowed. There is, no doubt, a good deal of difficulty in cases involving the question which seems to be involved here as to whether a sale is of a specific chattel, or of one answering a particular description or required for a particular kind of work. I have had occasion more than once to look into this whole subject. The case of *Church v. Abell(i)*, which came to this court, was a case respecting a mill wheel, and one of the questions raised was whether it was a specific chattel or one answering a particular purpose.

In this case there are some peculiar features. I have not been able to satisfy myself that this is a case to be treated on the same grounds as the purchase of a chattel usually is. The difference here is in the nature of the bargain. The origin of the negotiation was the desire of the defendants to purchase a billiard table and they proposed to the makers to pay for it in a particular way, a part of the payment to be by handing over the table they had. In this aspect the transaction might not be regarded in the same way as that

(i) 1 Can. S.C.R. 442.

of the purchase of a particular article for a particular purpose.

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The negotiations between these parties was, as pointed out by Mr. Henry in his argument at no time at an end. The offer made by the plaintiffs, asking \$180 cash, was distinctly refused and that, at the time, would seem to have put an end to the negotiations. But it does not exclude the correspondence up to that time, for when the matter was revived, the correspondence was revived with it.

The negotiations were re-opened by the plaintiffs who wrote to say that they had an opportunity to dispose of an English table having had inquiries about one from the North-West, probably from an Englishman who had settled there and wished to procure a table such as he had been accustomed to play on.

In answer to that the plaintiffs got the description of the table, which has been spoken of so much, offering merely \$50, where \$180 was asked before, and saying something to which I think more force has been given than it is entitled to. The writer says: "We have never seen the table at all, etc." If that is true it scarcely puts the parties on the same footing as in dealing with something of which neither of them knew anything, for so far as Mr. McDougall is concerned the table was purchased by his agent at auction and he had seen it by his agent. How accurately the agent examined it we cannot tell, but he acted for the defendants and saw what was purchased. The reference in that letter where the writer says "We would refer you to Jerry E. Kenny, Esq., or F. D. Clarke, auctioneer, Halifax," I do not take to be an offer of examination so as to bring it within the principle of *caveat emptor*. The table was boxed up in Halifax ready to be shipped. The plaintiffs say, "We trust it is as represented," but the evidence shews it was not an English table at all. An English table may be a table for playing English billiards, but it is clear that that was not what these parties were talking about, for the original price of the table was mentioned in English currency. I have no

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MAY & Co. doubt that the description given was of a table made in
v. England; the plaintiffs certainly understood it so.
McDOUGALL. I think the case is one in which the purchase of this
Patterson J. table from the plaintiffs was to be paid for by the delivery
 of a certain thing which has not been delivered, and the
 plaintiffs are entitled to recover the price of the table sold.
 I think the judgment originally rendered by Mr. Justice
 James was correct.

Appeal allowed with costs.

Solicitors for the appellants: *Henry, Ritchie, Weston &
Henry.*

Solicitor for the respondents: *Angus McGillivray.*

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<p>*MUTUAL RELIEF SOCIETY OF NOVA SCOTIA (DEFENDANTS).....</p>	}	APPELLANTS;	<p style="text-align: center;">1888 **Nov. 23, 24.</p> <hr style="width: 50%; margin: auto;"/> <p style="text-align: center;">1889 **March 18.</p> <hr style="width: 50%; margin: auto;"/>
AND			
<p>HELEN O. G. WEBSTER, AND HELEN O. G. WEBSTER AND HENRY WEB- STER, EXECUTRIX AND EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOHN R. R. WEBSTER, DECEASED, PLAINTIFFS).....</p>	}	RESPONDENTS.	

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Life insurance—Warranty—Misstatement and concealment in appli-
cation—Pleading—Questions at issue—Findings of fact—Amend-
ment—Practice—Successful party moving against findings.*

The action was to recover indemnity payable under a bond issued by the defendants to W. The defence alleged that deceased warranted that he was confined to his house by sickness five years before the application, when in fact he had been confined to the house by a severe attack of apoplexy within four years of the application. All the issues were found by the trial judge in favour of the plaintiffs except that as to the date of the attack of apoplexy, and, on the ground that there was misrepresentation as to this fact, he gave judgment for the defendants. On appeal to the full court this judgment was set aside and judgment directed to be entered for the plaintiffs. On appeal to the Supreme Court of Canada,

Held, Gwynne and Patterson JJ., dissenting, affirming the judgment appealed from, (20 N.S. Rep, 347), that there was no statement made by the deceased, although so found at the trial, that the attack of apoplexy occurred five years before the application, nor was that issue raised by the pleadings.

Per Strong, J., that upon the evidence, the merits of the case were not such as to warrant the Supreme Court in allowing a new defence by way of amendment to be set up at this stage.

*XVI. Can. S.C.R. 718.

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

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Held, per Patterson J., that the defendants' pleading must be treated as asserting that the deceased untruly represented that he had not been confined to his house within five years, and to hold otherwise would be opposed to the spirit of the Judicature Act and would be exceeding the strictness which obtained in the days of special demurrers.

Per Patterson J., the judgment at the trial being in their favour, the defendants could not have moved against it on the ground that the other issues ought to have been found in their favour.

APPEAL from a decision of the Supreme Court of Nova Scotia(a), which reversed the judgment at the trial in favour of the defendants, and directed judgment to be entered for the plaintiffs.

The plaintiff, Helen O. G. Webster, was the widow of John L. R. Webster, late of Yarmouth, physician, deceased, and the defendants were a mutual insurance society doing business in Canada. The application for insurance signed by the deceased contained the following questions and answers:

"Q. Has the party had, or been afflicted since childhood with any of the following complaints: Apoplexy, bronchitis, coughs, disease of heart, disease of kidney, disease of liver, disease of lungs, fits or convulsions, insanity, palpitation, paralysis, piles, rupture, spinal disease, spitting or raising blood, or any serious disease. Give full particulars of any sickness you may have had since childhood? A. No disease except a slight attack of apoplexy.

"Q. When were you confined to the house by sickness? A. Five years ago.

"Q. Has the party ever been seriously ill? If so, when, with what? A. Apoplexy.

"Q. Is the said party now in good health? A. Yes.

"Q. State name and residence of medical attendant? A. James Garish, M.D."

And contained the following special warranty:

(a) 20 N.S. Rep. 347.

"It is hereby declared and warranted that the above are in all respects fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned, that this application and warranty are a part of the consideration for, and shall form a part of the contract for indemnity; and that if there be, in any of the answers herein made, any untruth, evasion or concealment of facts, then any bond granted upon this application shall be null and void."

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The only reference to the application contained in the policy of insurance, or bond of membership as it was called, was the following:

"This bond of membership witnesseth that the Mutual Relief Society of Nova Scotia, in consideration of statements made in the application herefor, and the payment, etc., etc., do agree to pay to Helen O. G. Webster, etc."

The material part of the statement of defence was the following:

"1. It was an express condition of the said Bond of Membership, and the bond was issued to the said John L. R. Webster upon the express warranty that the said bond should be null and void if any of the answers made in the application for the same should be untrue, evasive, or if the applicant should conceal any facts, and the defendant company says that the said John L. R. Webster in his application (which was declared to be part of the consideration for and a part of the contract of indemnity) did make untrue and evasive answers, and did conceal facts in his said application, to wit:

"a. The fact of the day of his birth.

"b. That he had not, nor been afflicted with no disease except a slight attack of apoplexy.

"c. That he was confined to house for sickness five years before said application:—when in truth and fact—

"a. He was not born on the day mentioned in the said application.

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"b. That he had been afflicted with a severe attack of apoplexy and not a slight attack.

"c. That he was not in good health to his own knowledge at the time his application was made.

"d. That he had been confined to the house by a severe attack of apoplexy within four years of said application, and for more than once during said period with profuse bleeding at the nose."

Upon this defence the plaintiffs joined issue.

The action was tried before James, J., without a jury. At the trial Dr. Benjamin F. Campbell, of Boston, deposed as follows:

"8. Q. Were you acquainted with the late Dr. John L. R. Webster, late of Yarmouth, N.S.? A. Yes, I met him once, I think it will be three years next October, at the house of Mr. John Geddes in East Boston. I was invited to meet him there at that time by the Geddes family.

"Q. What occurred? Were you consulted by the late John L. R. Webster professionally? A. During our conversation he went into particulars regarding his sickness, which he had two or three years previously, and asked my opinion regarding it.

"Q. What was the nature of the sickness to which he referred? A. I inferred from his statement of the case that he had had a slight attack of cerebral hemorrhage, commonly called apoplexy.

"Q. Did he go into the case thoroughly? A. Quite minutely.

"Q. As a result of your examination and consultation with the doctor and his wife what did you decide was the nature of his attack, whether slight or severe, giving your reasons for so stating? A. Slight. My reason is that there was a total absence of symptoms that would have been present at that time provided that he had suffered from a severe attack.

"Q. Was Dr. Webster in good health at the time and could you then have told that he had ever suffered from an

apoplectic attack had he not informed you of the fact? Was there anything in his physical or mental condition which would indicate that he had ever had an attack of apoplexy? A. During our conversation I did not observe anything in his condition that would indicate that he had had an attack. I depended on the history of the case, that they gave me.

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“Q. From your knowledge of the case and from your experience generally, would you consider that the doctor in making an application for insurance on his life would be fully justified and correct in making the statement that the attack of apoplexy which he had was a slight and not a severe one? A. I would say that he was.

“Q. In a slight attack of apoplexy similar to that which you considered the doctor had, would the risk to the company be materially increased by the attack having occurred only four years prior instead of five? A. I would say as a rule the greater the interval the better the risk, but one year would not make a great deal of difference.

“Q. In case a person, during his life is accustomed to having attacks of bleeding at the nose, would you consider an attack of that nature after an apoplectic attack a dangerous symptom? A. Not so dangerous as if he had not been in the habit of having such attacks, but it is generally considered a very grave symptom.”

George E. Day, M.D.: “I was acquainted with John Lindsay Ross Webster for seventeen years, but not intimately.

“On the 23rd of February, 1885, he applied to me as Medical Examiner of the defendant company.

“I did not solicit him to become insured. He made the appointment with me on the 22nd to meet me on the next day.”

“Q. Would the difference between five years and four years in the happening of the attack of apoplexy be material with respect to your recommending the risk? A. I think it would, because the longer the lapse of time after an

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attack the less the danger there would be of a recurrence of the same. During that examination he did not refer to any bleeding at the nose. I would not consider a person afflicted with severe and frequent bleeding at the nose in good health. A profuse bleeding at the nose occurring after an attack of apoplexy would indicate that the person was not in good health; and an "atheromatous" condition of the blood vessels which renders them brittle and liable to break and produce death.

"All the answers in the application were reduced by me to writing exactly as he gave them.

"I carried the application to the office of the company and gave it to Mr. T. B. Crosby, the treasurer of the defendant company, after it was completed.

"Q. Afterwards did you receive any instructions from Mr. Crosby? A. I did.

"Q. In consequence of receiving those instructions did you see Dr. Webster? A. I did about the 1st of May, 1885. I found Dr. Webster in his own office and told him there was a good deal of dissatisfaction both with him and with myself in regard to his policy in the defendant company. He asked me why. I told him several of the directors thought he was not a good risk and they blamed me for recommending him and blamed him for making the application. He said he did not see why they should, for what was done was done in good faith. He then asked me what I thought he'd better do; and I told him I thought he had better surrender the policy; and, of course, the money he had paid would be refunded. He replied that he did not wish to do anything wrong and he would be specially sorry to have me blamed. Said he would consider the matter and let me know. I never saw him but once after that.

"At the time I took Dr. Webster's examination I was acting as agent of the company as well as medical examiner. Every member of the company was authorized to act as an agent. Previous to taking the doctor's examination before referred to I had heard that he had had an attack of

paralysis. I did not see him, however, when he was ill. During my examination I did not see anything that would indicate that he had had an attack of apoplexy; from my examination I would not have thought he had had such an attack if the doctor had not told me so."

John D. Harris M.D.: "I am a practising physician, have been practising over twenty years; am a graduate of Bellevue College, New York. I was acquainted with the late Dr. J. L. R. Webster about 19 years previous to his death and up to the time of his decease. Was quite intimately acquainted with him, was in the habit of having professional consultations with him; we frequently consulted each other. I remember the fact of his having had an attack of apoplexy. I saw him the second day after the attack and several times subsequently while he was confined to the house.

"Q. What was the nature of that attack with respect to its severity or otherwise? A. It was rather a mild attack. I saw Dr. Webster frequently after he got out again after the attack. Had professional consultations with him after that; not quite so frequently as previous to the attack. I can remember of four now since the attack, but I had frequently seen him."

The following judgment was delivered at the trial (unreported):

JAMES J.—I am now to prepare a verdict and judgment on the various issues raised by the annexed pleadings.

First. I find there was no intentional concealment on the part of the deceased in making his application for insurance on his life.

Secondly. There was an error of four days in stating the date of his birth, which was on the 19th instead of the 23rd February, 1835. Unless this was a warranty, a point which it is not necessary for me to decide, it is an immaterial statement, as it would not increase or decrease the number of his years (in either case he would have been 50 years of age, as the premiums are calculated by the number of years, not by the number of days). Considering this a statement substantially correct and immaterial, I find this issue in favour of the plaintiff.

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Thirdly. I find that he had not then and had not been afflicted with any disease except the attack of apoplexy which he revealed in his answer to question 11, and I find that that attack of apoplexy was a slight and not a severe attack. I think that the great weight of evidence is in favour of my finding on these two points, which is in favour of the plaintiff.

Fourthly. He was not in "perfect health" at the time, but he was in "good health," that is, he was in as good health as was consistent with the fact of his having had an attack of apoplexy, even a slight attack.

I cannot help remarking that the officers of the company were very incautious in admitting to insurance a person who had an attack of apoplexy within a few years. It is clear on the evidence that he was not a fairly insurable life, even if the apoplexy had occurred 7 or 10 years previously, and I think that the fact should weigh materially with the defendant association in relation to the course they should pursue on the verdict, which I am compelled to find in their favour. I make this observation as tending to an amicable arrangement, which I hope will be effected.

I observe also that he revealed in his answer to Q. 13, the fact of a hereditary tendency to apoplexy, as he states that his mother's father died of that disease; they insured him deliberately, knowing that his was not an insurable life.

Fifthly. I do not find that the nose bleeding before and after the apoplexy was a "disease," as it was proved to my satisfaction that he was subject to it from his childhood, there is no evidence of its having occasioned him any inconvenience except on one occasion when it was, although profuse and alarming as nose bleeding very frequently is, very easily stopped. I find the issue on this point in favour of the plaintiffs.

Sixthly. The attack of apoplexy occurred four years before the application and not five years as stated by him.

I cannot consider this an immaterial misstatement. It is clear from all the evidence of the several medical gentlemen that the greater the length of time elapsing after such an attack the less probability there is of another attack. I find this point in favour of the defendants.

I find on this ground, and on this only, a verdict on the whole case for the defendants.

A. JAMES.

Nov. 20th, 1886.

NOTE:—There are no contradictions in the evidence. It is mostly that of very highly intelligent medical gentlemen who come to different conclusions on very different points, but whose testimony is very largely identical. Seven physicians were examined at length.

On appeal to the Supreme Court of Nova Scotia, the judgment at the trial was reversed, 'he judgment of the court being delivered by Weatherbe J., the material part thereof being the following:

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WEATHERBE J.—All the findings are in favour of the plaintiffs in this case except one. That one finding is that an attack of apoplexy, which deceased had, occurred four years before his application and not five, as stated by deceased in his application. This is found to be a material misstatement. Upon this ground alone the verdict for defendant is based.

Upon examining the issues raised by the pleadings, I find there is no such issue raised as that upon which the above finding in favour of defendant is made.

The defendants set up in their defence that deceased made untrue and evasive answers, and concealed facts in his application, to wit: * * (c) That he was confined to his house by sickness five years before said application, when, in truth and fact, * * (d). He had been confined to the house by a severe attack of apoplexy within four years of said application. * * * Issue is joined upon this part of the case. Here is the whole of the pleading touching the finding of the judge who tried the cause.

The application itself is in evidence in which, to the question, "When were you confined to the house by sickness?" There is this answer: "Five years ago."

Not only was the issue in question not raised by the pleadings, but there was no statement made by deceased as is found on the trial, that the attack of apoplexy referred to occurred five years before the application.

The inquiry is nowhere made in the application, directly or indirectly, when the attack of apoplexy referred to occurred. Nor has the applicant anywhere in his answers attempted, either directly or indirectly, to answer that question. * * *

Bingay Q.C., and *Warden*, for the appellants. Concealment and untrue representation of material facts voids the policy. *Clark v. Manufacturers' Ins. Co.(a)*; *Friesmuth v. Agawam Mut. Fire Ins. Co.(b)*.

And this irrespective of the question of materiality. *Foot v. Aetna Life Ins. Co.(c)*; *Jeffries v. Economical Life Ins. Co.(d)*; *Aetna Life Insurance Co. v. France(e)*.

(a) 2 Wood & M. 472.

(c) 61 N.Y. 571.

(b) 10 Cush. 587.

(d) 22 Wall. 47.

(e) 91 U.S. 510.

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If the judgment of the full court be correct either as to the issues or the alleged variance, an amendment of the pleadings should have been made, or a new trial ordered whether asked for or not and an amendment, if necessary, should be made by this court to meet the exigencies of the case for the purpose of determining the real question in controversy between the parties as disclosed by the pleadings, evidence or proceedings. Supreme and Exchequer Courts Act, sec. 63.

The case is distinguished from *Confederation Life Association v. Miller (f)* in that the warranty here is absolute and not according to the best of his knowledge and belief.

Harrington Q.C., and *Gormully* appeared for the respondents.

SIR W. J. RITCHIE C.J.—I am of opinion the appeal should be dismissed with costs.

STRONG J.—I agree with the judgment of the court below as delivered by Mr. Justice Weatherbe (reported in 20 N.S. Reports, p. 347), so far as it determines that there was no breach of the condition of the bond, which was the only defence set up.

As regards the merits of the case upon the evidence they are not such as to warrant us in allowing a new defence by way of amendment to be set up at this stage, for I also agree with the court below that the evidence does not warrant the conclusion that there was in the application, having regard to surrounding circumstances of which the appellants' officers and agents had notice, any untruth, evasion or concealment of material facts.

The appeal should be dismissed with costs.

TASCHEREAU J.—This appears to me to be a very simple case.

(f) 14 Can. S.C.R. 330.

All the findings but one were in favour of the plaintiffs at the trial before Mr. Justice James without a jury. The finding against them is that an attack of apoplexy which the deceased had, occurred four years before the application and not five as stated in the answers to the application. But there is no such issue raised by the defendants as remarked by the Supreme Court of Nova Scotia. This alone disposes of this appeal. I should dismiss it.

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GWYNNE J.—It must, I think, be admitted that the medical adviser of the company who recommended the acceptance of the risk in question acted with great indiscretion, but the question before us is not as to the indiscretion of the medical adviser of the company, but whether any of the answers of the deceased in his application for the insurance to the questions therein do or do not constitute a breach of warranty contained in the bond of membership which constitutes the policy of insurance in the present case, and upon this point I am unable to come to the conclusion that his answers to the 11th and 12th of such questions do not in view of the evidence constitute a breach of warranty avoiding the contract.

The 11th question is:

Has the party had, or been affected since childhood with any of the following complaints (here follow several enumerated complaints which are) apoplexy, paralysis, or any serious disease? Give full particulars of any sickness you may have had since childhood. When were you confined to the house by sickness?

To the whole of this the applicant answered:

No disease except a slight attack of apoplexy five years ago.

The 12th question is:

Has the party ever been seriously ill, if so, when, with what? Is the said party now in good health?

To the first part of this question the applicant answered "apoplexy." To the second "yes."

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Now the whole substance of the warranty which is contained in these answers is: that the applicant has never since childhood had any serious disease, nor any one of the enumerated diseases except apoplexy, a slight attack only of which he had five years preceding the day upon which he was making his application, namely, the 23rd February, 1885. The learned judge who tried the case came to the conclusion that the attack of apoplexy which the evidence shewed the deceased to have had, just four years and not five years preceding his making his application for insurance, was only a slight one. I confess that the evidence does not lead my mind to the same conclusion; for it was attended with partial paralysis, and his gait was affected thereby and his memory impaired to that extent that neither ever became perfectly restored, and as to his state of health at the time of his making the application for insurance, all I think that can be said in its favour is that it was perhaps as good as it could be after an attack of apoplexy, but that it was impaired by that attack, from which, as in my opinion, the weight of the medical evidence is, the deceased never wholly recovered; and that in February, 1885, when he made his application for insurance his health was so affected thereby that he was not a fit subject for insurance; a fact of which as a medical man himself, which the deceased was, he cannot, I think, be assumed to have been ignorant. We cannot lose sight of the fact also that the applicant after having had the attack of apoplexy had two attacks of bleeding at the nose at intervals, the second of which was very serious. Now, although bleeding at the nose may arise from other causes still, as the evidence shews, it is a frequent attendant upon apoplexy and indicative of apoplectic tendencies, and after an attack of apoplexy it is a bad symptom. In one of those attacks the hemorrhage appears to have been excessive, in so much that the doctor who attended the applicant for it being the same doctor who had attended him for the apoplexy pronounced it to be a bad symptom, and this medical man having been applied to by

the deceased to examine him for the purpose of effecting the insurance declined to do so. Moreover it appears that the deceased himself about six months before his death, and, consequently, a short time before his making application for this insurance, in a conversation with a friend of his, a Dr. Harris, whom he was in the habit of meeting in consultation, himself stated that this second attack of hemorrhage had been quite a severe attack.

Then it appears that he had the attack of apoplexy just four years and not five years preceding his making application for this insurance. If the question now was whether or not this difference as to the time when he had the attack was material, I should be obliged, upon the evidence, to say that in my opinion it was, but the question is not as to its materiality, but whether the variance as to the time when the applicant had the attack of apoplexy constitutes a breach of a warranty, and in answer to this question I am obliged to say that in my opinion it was.

Upon the whole I find it impossible to say that the applicant's answers to the above 11th and 12th questions appear to me to be in all respects fair and true. On the contrary, as the evidence strikes my mind, I am forced to the conclusion that, in view of the circumstances above referred to and of the state of health of the applicant, which as a medical man he ought, and I think must have, known was not good in the sense in which he must have known the question to be put, there was in his answers to these 11th and 12th questions untruth, evasion and concealment of facts so as to avoid the policy of insurance. I am therefore of opinion that the appeal should be allowed and the action in the court below dismissed with costs.

PATTERSON J.—The contract of insurance on which this action is brought is called a bond of membership. The operative portion of it is in these words:

This BOND OF MEMBERSHIP witnesseth that the Mutual Relief Society of Nova Scotia, in consideration of statements made

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in the application herefor, and the payment of nine dollars, the receipt whereof is hereby acknowledged, and the further payment of annual dues of four dollars and fifty cents on or before the 23rd day of February of each year, and a further sum in accordance with the rate in column number two of the table indorsed hereon as often as required to replenish the death indemnity fund during the continuance of this contract (said sum not to exceed, however, ten payments each year).

Do agree to pay to Helen O. G. Webster, the wife of the member, her executors, administrators or assigns, sixty days after due notice and proof of death of John L. R. Webster, one full assessment contributed to the indemnity fund all the members of the society at the date of the death of the said member: Provided, however, such payment shall not exceed the sum of five thousand dollars.

Then follow some conditions relating to specified causes of death and to non-payment of dues, which do not affect the questions in the action.

The bond bears date the 23rd of February, 1885.

It is set out in the statement of claim, with an allegation of the death and of the proofs of death.

The statement of defence is so laudably concise that I shall not attempt to abbreviate it.

The defendant company says that:

1. It was an express condition of the said bond of membership and the bond was issued to the said John L. R. Webster upon the express warranty that the said bond should be null and void if any of the answers made in the application for the same should be untrue, evasive or if the applicant should conceal any facts, and the defendant company says that the said John L. R. Webster in his application (which was declared to be part of the consideration for and a part of the contract of indemnity) did make untrue and evasive answers, and did conceal facts in his said application to wit:

- a. The fact of the day of his birth.
- b. That he had not, nor been afflicted with no disease except a slight attack of apoplexy.
- c. That he was at the time of the said application in good health.
- d. That he was confined to house by sickness five years before said application; when the truth and fact—
 - a. He was not born on the day mentioned in the said application.
 - b. That he had been afflicted with a severe attack of apoplexy and not a slight attack.

c. That he was not in good health to his own knowledge at the time of his application made.

d. That he had been confined to the house by a severe attack of apoplexy within four years of said application, and for more than once during said period with profuse bleeding at the nose.

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The application, which bears the same date as the bond, states that the applicant was a physician; that he was born on the 23rd of February, 1835; that his age was 50 on the day of the application; and then questions 11 and 12 are answered thus:

1. Has the party had, or been afflicted since childhood, with any of the following complaints? Apoplexy, bronchitis, coughs, disease of heart, disease of kidneys, disease of liver, disease of lungs, fits or convulsions, insanity, palpitation, paralysis, piles, rupture, spinal disease, spitting or raising blood, or any serious disease? Give full particulars of any sickness you may have had since childhood?

No disease except a slight attack of apoplexy.

When were you confined to the house by sickness?

Five years ago.

12. Has the party ever been seriously ill? If so, when; with what?

Apoplexy.

Is the said party now in good health?

Yes.

After the questions on the applicant paper there is this memorandum:

It is hereby declared and warranted that the above are in all respects fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application and warranty are a part of the consideration for, and shall form a part of the contract of indemnity; and that if there be, in any of the answers herein made, any *untruth, evasion or concealment* of facts, then any bond granted upon this application shall be null and void.

In January, 1881, the deceased had an attack of apoplexy. Dr. Farish attended him for it for seven weeks and then left him, not because he had fully recovered but because he thought further attendance unnecessary, the patient being himself a doctor. Several doctors were examined,

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the contest concerning the attack of apoplexy being whether it was a severe or a slight attack, turning on a criticism of the word "slight," which the applicant had used, as contrasted with the term "severe;" but whether that was a fair criticism having regard to the applicant's explanation given by the next answer, in which the illness was stated to have been *serious*, may well be questioned.

The deceased died of apoplexy on the seventh of June, 1885, less than four months after he effected this insurance. Evidence was given to shew that he had never fully regained his strength after the illness of 1881; traces of the attack remaining in his speech and gait; and it was proved that two years before the application he had had profuse bleeding at the nose, for which Dr. Farish had attended him.

The evidence touching the age of the deceased is the plaintiff's statement in the proofs of loss, of February 19th, 1835, as the date of his birth, taken from a paper called a "family record," which was produced at the trial, but got mislaid. It is thus described in the printed case:

It is a half sheet of foolscap paper containing entries or memoranda on one page only, and has no heading or signature.

These entries or memoranda purport to give the date of marriage of Dr. John L. R. Webster's parents, the date of his own birth, the dates of births of his brothers and sisters and the dates of death of some of them. The date of his own marriage, and the dates of birth of his children. There are some alterations, interlineations and erasures on the paper.

The memorandum or entry referring to his own birth, and in which there is no alteration, interlineation or erasure, is as follows: J. L. R. W., born Feb'y 19th, 1835.

The whole paper is in the handwriting of John L. R. Webster, now deceased.

The case was tried before Mr. Justice James who found in favour of the plaintiff on all the questions raised by the defence except the one which related to the date of the apoplectic attack, the answer in the application paper being understood to be that that attack was as long as five years

before the application; and he gave judgment dismissing action.

The plaintiff moved against that judgment, and the court reversed it and gave judgment for the plaintiff, dealing only, in the opinion delivered, with the one question of the five years, and treating the others as, for the purposes of that motion, finally disposed of by the trial judge.

From that judgment the defendants appeal. They contend that the judgment given at the trial was right and the action properly dismissed, and while they maintain that the trial judge was correct in the view he took of the five years' point, they insist also that he ought to have found in their favour on all or some of the other alleged misstatements, and that therefore the action should have been dismissed even if the five years' question were properly dealt with by the court *in banc*. To this contention it is answered in the first place that the defendants, not having moved against the findings of the trial judge, are precluded from now questioning them.

This answer overlooks, in my opinion, the true nature of the proceeding.

The issue for trial was whether, under the terms of the contract the bond was ever an operative instrument. It was null and void *ab initio* if any one of the allegations of the defence was sustained. The defence advanced four reasons for holding the bond inoperative. The learned judge held that it was inoperative for one of those reasons, but not for the others. The defendants could not have moved against the judgment. The action was dismissed. They would not have been heard to complain as the foundation of a motion that while the judgment was in their favour the judge ought to have found more than one reason for his conclusion to dismiss the action. But when the judgment was attacked they had a right to insist that it was the proper judgment to render upon the whole evidence.

The rules of the Judicature Act authorizing a notice in place of a cross-appeal do not apply.

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We must, therefore, regard all the allegations of the defence as open for consideration if necessary to be insisted on.

The decision at the trial proceeded upon the finding that the deceased had represented by his answers that his attack of apoplexy was five years before he made his application, whereas it was only four years, and, further, that (if the materiality of the answer were important) it was shewn by the medical evidence to be material because the longer the time after such an attack the less was the danger of another similar attack.

The court considered that the issue on which the trial judge had pronounced was not raised by the pleadings, and that there was no statement made by the deceased to the effect that the attack of apoplexy occurred five years before the application.

The allegation of the pleading is that he stated that he was confined to his house by sickness five years before the application and it is averred that in truth and in fact he had been confined by a severe attack of apoplexy within four years.

The answer of the deceased, as pleaded, may not have asserted in so many words that the *last time* he was confined was five years ago, but, if that was not what it meant, it was not negatived by the pleader's averment that the deceased was confined within four years, and the plaintiffs should have taken exception to the pleading instead of joining issue on it.

We must treat the pleading as asserting that the deceased untruly represented that he had not been confined to his house within five years. To do otherwise, particularly after the battle at the trial had been fought on that understanding of the issue, would not be the spirit of the Judicature Act, but would be exceeding the strictness of the bygone days of special demurrers when after pleading over, and *a fortiori* after verdict, such an objection would not have been entertained.

Then as to the proof. It will be observed that the issue is not strictly whether the attack of apoplexy had occurred five years before the application. It is whether the deceased had within that period been confined to the house by sickness. The proof, it is true, as well as the importance of the statement, turns on the apoplectic attack, and the pleader has specified that illness as the occasion of confinement to the house within four years and limits his proof by that pleading. But it is not unimportant to note the exact form of the issue because, in the judgment in discussion, it is said, and said truly, that there was no statement made by the deceased that the attack of apoplexy occurred five years before the application. The result of the answers to the three consecutive questions:

Give particulars of any sickness you may have had since childhood?
 When were you confined to the house by sickness?
 Has the party ever been seriously ill?

may be that the confinement five years ago was by reason of the apoplexy, but there is no statement of that in so many words. It is equally true, as mentioned in the judgment, that the inquiry is nowhere made in the application when the attack of apoplexy occurred, and, the questions being general, one would not look for specific inquiries about matters that are not heard of until after the answers are given. But the application paper must, in this as in other respects to which I may yet advert, be looked at reasonably and as understood and intended to embody information given in good faith by the one party to be acted upon by the other. The answers were manifestly intended to convey, and would naturally be understood to convey, that the applicant had not been confined to the house by sickness within five years before the application. That was an untrue answer. It was contended for the plaintiff before us that the allegation of the defence being that the deceased had been confined within four years and the proof falling short of demonstrating that the attack for which Dr. Farish was called in on the 2nd of January, 1881, and for

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which he attended the patient 49 days, or say until the 19th of February, when he discontinued his visits, because the patient was himself a doctor, actually kept the deceased indoors at any time after the 23rd of February, which was just four years before the application, it ought to be held that the defence was not proved. That cannot be truly called a reasonable contention. The facts to which I have just alluded would support and, taken in connection with the other evidence, may be said to compel the inference of fact that it was well within the four years before the deceased was able to leave the house, but that is not essential. The question was the truth of the answer as to five years. Was that substantially true, as it might have been if the time fell some days or weeks short of the full time? Under the old system of pleading, the traverse being of the five years, the averment would have been that he had been confined within five years, to wit, within four years, and proof of the substantial inaccuracy of the answer would have sustained the plea without regard to the time laid under the videlicet. The present pleading cannot be construed more strictly.

Now if it had happened that in place of the old illness being apoplexy it had been a broken arm or something from which the recovery had been perfect and which had no possible relation to the cause of the death, the answer would, as I apprehend, have avoided the bond. In other words we have not to inquire into its materiality. The insurers ask for information on which they may base what inquiries they please before accepting the risk, and the contract is upon the express terms that, if the answers are untrue, their liability shall not attach. The agreement in this case is not distinguishable from that in *Anderson v. Fitzgerald*(g). The corresponding part of the contract in that case may be taken, as stated by Parke, B., at p. 495:

At the end of the list of questions the assured subscribed a declaration to the effect that the particulars should

form the basis of the contract between the assured and the company and that, if there should be any fraudulent concealment or untrue allegation contained therein or any circumstances material to the insurance should not have been fully communicated to the company, all the money paid on account of the insurance should be forfeited and the policy should be void.

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The association of the words "fraudulent concealment or untrue allegation" afforded more room for construing the document as meaning that the untrue allegation must be tainted with fraud than can be found in the words "untruth, evasion or concealment of facts," which are used in the contract before us.

There is nothing that can be laid hold of, such as existed in cases like *Fowkes v. Manchester & London Assurance & Loan Assn.*(h) to modify the *primâ facie* signification of the word "untruth." "The question is," said Blackburn, J., in *Fowkes' Case*(h) :

What is the meaning of the word "untrue"? *Primâ facie* it means "inaccurate," not necessarily implying anything wilfully false.

In *Cazenove v. British Equitable Ins. Co.*(j) the subject is very fully illustrated as it is in numerous other cases many of which were cited on the argument.

The circumstance that the attack of apoplexy occasioned the confinement of the deceased to the house at a later date than five years before the application forms the only direct bearing of that illness upon the issue. The discussion which occupied much of the time at the trial and on the arguments, as to the greater probability of a recurrence of the malady after an interval of only four years than after the lapse of five, does not become important unless the materiality of the answer and its materiality in relation to that particular malady has to be decided. In my opinion we have not to consider the subject in that aspect. If it were otherwise, I should not consider the finding of Mr. Justice James open to objection, nor do I understand a different view to

(h) 3 B. & S. 917.

(j) 6 Jur. N.S. 826.

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have prevailed in the full court, the decision proceeding upon the mere technical objections.

Upon these grounds I think the judgment for the defendants should be restored.

This being so it is not necessary to examine closely the other questions dealt with by Mr. Justice James. I have not failed to give attention to them, and I may say generally that I see no reason to differ from him in his conclusions.

The principle which makes the truth or untruth of the answers under a contract like the one before us the matter to be inquired into, irrespective of the motives of the applicant, does not require or justify so narrow and literal a reading of the answers as to give them an effect which cannot have been intended by the parties. The questions must be read in the light of their apparent purpose, and if a question is ambiguous it must be understood in the way that will best sustain the answer. These principles will be found applied and illustrated in the judgment of the Judicial Committee of the Privy Council in *Connecticut Mutual Life Ins. Co. v. Moore(k)*. One cannot read the questions in this case without observing that, like some of those observed upon in *Moore's Case(k)*, their literal meaning must be qualified in some way. For example, in one of those where it is asked if the applicant has had or been afflicted since childhood, with any one of a list of complaints, including cough and spitting or raising of blood, it is obvious that those words are not to be understood in their largest sense. *Moore's Case(k)* is direct authority for this. So when the age of the applicant and the date of his birth are asked, the duplicate question asking only the same information in two forms, the inquiry must be for the purposes of keeping within the company's rules as to insurable age, and to govern the rate of premium. For those purposes no note is taken of the fraction of a year and whether, in this case, the applicant was born on the 19th of February

(k) 6 App. Cas. 644.

or the 23rd, he truly represented himself as a man of 50. The answer was not, in my view of the question, an untruth within the meaning of the contract.

I am satisfied that we should allow the appeal and with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Sandford H. Pelton.*

Solicitor for the respondents: *James Went Bingay.*

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ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lessor and lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Construction of deed—Specific performance.

A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or continue the lease for a further term of like duration. After the term expired, the lessees remained in possession for some years when a new indenture was executed which recited the provisions of the original lease and, after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and, after demand of further rent and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option.

Held, affirming the judgment of the court below (28 N.B. Rep. 1), Ritchie C.J., and Taschereau J., dissenting, that the lessees were not entitled to a decree for specific performance.

*XVIII. Can. S.C.R. 702.

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

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Held, per Gwynne J., that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.

Per Gwynne J. (Patterson J., hesitante) that assuming the renewal clause was incorporated in the second indenture, the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors.

Per Gwynne and Patterson JJ., that the option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and, if the second indenture was subject to renewal, the clause had no effect, as there were no buildings erected during the second term.

Per Gwynne J. The renewal clause was inoperative under the statute of frauds, which makes leases for three years and upwards, not in writing, have the effect of estates at will only and, consequently, there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per Ritchie C.J., and Taschereau J., that the occupation by the lessees after the term expired must be held to have been under the lease and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided.

APPEAL from a decision of the Supreme Court of New Brunswick(a), reversing the judgment of the judge in equity in favour of plaintiffs.

The suit in this case was brought to compel specific performance by the defendants of an agreement contained in a lease made, in 1885, between the predecessors in title of the plaintiffs, as lessors, and the defendants, as lessess, which lease contained a covenant providing that, at its expiration, the improvements on the demised premises should be appraised and the landlords should then either pay the amount appraised or renew the lease for a further term of fourteen years. At the expiration of the lease, in 1869, the defendants remained in possession for some years, paying rent as reserved by the lease, and, in 1877, a renewal lease was executed for a term of fourteen years from 1869. On the ex-

(a) 28 N.B. Rep. 1.

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piration of this renewed lease the defendants remained in possession of the premises, paying rent as usual, for a year, and then notified the plaintiffs that they abandoned the premises and sent back the key. The plaintiffs refused to accept the key and demanded the rent as it accrued and also tendered a renewal lease for execution to the defendants who refused to execute it or to pay the rent. The plaintiffs then brought a suit for specific performance. The judge in equity held that there did exist an agreement which the defendants could enforce against the plaintiffs, and that, if there was such an agreement binding on the plaintiffs, it must be binding on the defendants also; the more so as the principal part of the acts done from which such an agreement could be inferred were done by the defendants themselves. All the plaintiffs had done was to accept the rent. The defendants not only occupied the premises after the expiration of the term, knowing that the plaintiffs had not exercised their option of paying for improvements, and, consequently, were bound to renew the lease but also paid the rent accordingly. This, he considered evidence that they were willing to accept the lease of the premises that the plaintiffs were bound to give. If they did not intend to do so they were wrongdoers, a position which they had no right to assert.

This decision was reversed by the full court^(a), where it was held that, as no valuation of the buildings had been made at the expiration of the term, the fact of the lessees remaining in possession and paying a year's rent only created a tenancy from year to year, and no agreement on their part to accept a renewal of the term could be implied therefrom. The plaintiff then appealed to the Supreme Court of Canada.

Gilbert, Q.C., and Sturdee, for the appellants. The Supreme Court of New Brunswick held in *Irvin v. Simonds* ^(aa) that if the lessee of a renewable lease holds over after

(a) 28 N.B. Rep. 1.

(aa) 11 N.B. Rep. 190.

its expiration and pays rent, which is accepted by the lessor, the tenancy under the lease continues. That case has always been followed in New Brunswick. See also *Kimball v. Cross*(b); *Kramer v. Cook*(c); *McDonell v. Boulton*(d); *Nudell v. Williams*(e); *Despard v. Walbridge*(f); *Walsh v. Lonsdale*(g); *Wylson v. Dunn*(h).

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The plaintiffs have been guilty of no laches. *Archbold v. Scully*(j); Fry on Specific Performance, p. 477.

Jack, for the respondents. The courts will always refuse to construe a lease as perpetually renewable unless such right of renewal is clearly expressed. Woodfall, Landlord & Tenant (11 ed.) 329; *Baynham v. Guy's Hospital*(m); *Tritton v. Foote*(n).

The plaintiffs are precluded by laches from bringing this suit. *Huxham v. Llewellyn*(p).

The defendants had a right to remain in possession until paid for their improvements. *Nudell v. Williams*(q).

SIR W. J. RITCHIE C.J.—The facts upon which the decision of this case depend are stated in the case and facts submitted to the court, as follows:

On the twenty-fourth day of July, A.D., 1855, one Edward Sears, by indenture executed by him and the respondents, leased certain premises in the city of Saint John, New Brunswick, to the respondents, for fourteen years from the first day of May then last past, at the rental of one hundred pounds, or four hundred dollars, payable by even and equal half-yearly payments on the first days of November and May in each year during the term. This indenture contained a covenant upon the proper construction of which in connection with the attendant circumstances, the deter-

(b) 136 Mass. 300.

(c) 7 Gray 550.

(d) 17 U.C.Q.B. 14.

(e) 15 U.C.C.P. 348.

(f) 15 N.Y. 374.

(g) 21 Ch. D. 9.

(h) 34 Ch. D. 569.

(j) 9 H.L. Cas. 360, 383.

(m) 3 Ves. 295.

(n) 2 Bro. C.C. 636.

(p) 28 L.T. (N.S.) 577.

(q) 15 U.C.C.P. 348.

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mination of this appeal depends, and which is set out in the printed case as follows:

And it was thereby mutually agreed, covenanted and understood by and between the parties to these presents that in case the said mayor, aldermen and commonalty of the city of Saint John, their successors or assigns, should erect and put up any buildings or improvements upon the said demised premises within and during the said term, the same shall be valued and appraised by two indifferent persons, one to be chosen by and of the part of the said the mayor, aldermen and commonalty on the city of Saint John, their successors or assigns, the other by and on the part of the said Edward Sears, his heirs and assigns, and which two persons, in case of disagreement, should choose a third, the appraisement or determination of any two of whom should be final and conclusive, and it should be at the option and election of the said Edward Sears, his heirs and assigns, to pay or cause to be paid to the said the mayor, aldermen and commonalty of the city of Saint John, their successors or assigns, such appraised value of such buildings or improvements, to the extent of five hundred pounds or to extend and continue the lease and demise of the said lot and premises with the said right of way unto the said the mayor, aldermen and commonalty of the city of Saint John, their successors or assigns, for a further term of fourteen years, at the same yearly rent, payable in like manner and under the like covenants, conditions and agreements as are expressed and contained in these presents, and so as often as such case should happen at the end or expiration of any lease or demise of the said premises, for any further term or terms, there should be a like valuation, and the like option as therein before mentioned.

The respondents entered into and continued in possession of the demised premises and paid the rent as the same matured, until the first day of May, A.D. 1877, and also, during the term granted by the said indenture, erected a building on the demised premises.

On the first day of October, A.D. 1877, the assigns of the reversion in the premises, by indenture executed by them and the respondents, renewed and continued the demise of the premises for fourteen years from the first day of May, A.D. 1869,

at the same yearly rent, payable in the same manner, and under the like covenants, conditions and agreements as are expressed and contained in the said recited indenture of lease.

The renewed lease expired on the 30th April, 1883, and the defendants continued in possession and paid rent for more than a year after that. On January 23th, 1884, the defendants sent a notice under their corporate seal and addressed to the lessors, as follows:

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Gentlemen, you are hereby notified that the mayor, aldermen and commonalty of the city of Saint John will deliver up to you on the first day of May next your lot of land and premises mentioned and described in the lease thereof made to the said mayor, etc., by Robert Sears and others, dated on or about the first day of October, A.D., 1877, as follows: (describing the lot).

On April 30th, 1884, the plaintiff, John Sears, received from the defendants the following letter under their corporate seal, addressed to the lessors:

Gentlemen,—The mayor, etc., of the city of Saint John, having, pursuant to their notice to you, dated the 28th January last, gone out of possession of the lot * * * formerly held by them under lease dated the first day of October, 1877, which lease has expired, enclosed you will find the key of the building on the lot sent to you on delivering up to you the possession of the lot and the buildings and improvements thereon.

On May 3rd, 1884, the plaintiff's solicitor wrote to the defendants the following letter, addressed to the common clerk of the city:

Dear Sir,—I am instructed by Mr. John Sears to acknowledge the receipt by him yesterday of your communication of the 30th ult., addressed to Robert Sears, John Sears and George Edward Sears, and to return to the corporation of Saint John the key which you enclosed.

The Messrs. Sears refuse to accept possession of the premises referred to in your letter, and under the terms of the lease will look to the lessees for payment of the rent as it matures.

On the same day the common clerk replied to this letter, stating that the return of the key was not accepted, but that it would remain at the common clerk's office at the risk of the landlords.

No rent was paid by the defendants after the first of May, 1884, and the next rent fell due on the first of Novem-

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ber, and payment was demanded from the defendants, which was refused.

In January, 1885, the plaintiffs tendered to the defendants for execution a renewal of the said lease, which the defendants refused to execute.

In May, 1885, the defendants instituted the present suit for specific performance.

As at present advised, I think that, when the lessees continued to remain in possession and paid rent after the expiration of the term in the lease, they thereby elected to continue in possession under the terms of the lease, which provided for a continuance, and, when the lessors by receiving the rent acquiesced in their so doing, it was an election on their part not to pay for improvements and both parties became bound by the terms of the lease, the landlords to continue the lease in the terms of the old one, and the tenants to continue their occupation on the same terms.

This, in my opinion, was the natural and legal result of the continuing in possession and of the payment and receipt of rent, rather than the assumption that the lessees remained in possession wrongfully on sufferance. In other words, that the lessees continued lawfully in possession in accordance with the terms of the lease, rather than unlawfully, adverse to the lessors, and subject to the creation by mere implication of a new tenancy of an entirely different character. This was not a new contract or a new demise. The tenants continued in possession under the old contract and the old demise by virtue of the terms of the lease, and they were to all intents and purposes continuing tenants, and therefore there was no necessity for anything passing between the landlords and the lessees as to the terms on which the occupation was to continue. Both parties knew full well the terms in the lease. When the tenants continued in possession and paid rent and the landlords accepted it, it must be assumed to have been subject to the terms under the lease, the contract being one and the same by which both parties held. In the absence of anything to

shew a different understanding, the inference is, to my mind, irresistible that the parties intended the occupation to continue under and upon the terms of the lease, and the very fact of the tenants remaining in possession and not asking for payment for improvements shews that the tenants wished the continuance of the lease, they merely acting on the lease as the parties had done when the first term expired, and when the lessees continued in possession and paid rent and such rent was accepted and the parties continued to occupy after the expiration of the first lease, which was on the 30th day of April, A.D. 1869. And on the first day of October, 1877, a new lease was executed for a further term of fourteen years, commencing from the expiration of the old lease.

If the defendants continued in possession, paid their rent, and the same was received by the landlords, in my opinion the rights of the parties thereby became fixed and established, and after which neither parties by their own act could alter or interfere with, without the assent of the other. If the defendants now called on the plaintiffs to pay for the improvements, what would the plaintiffs' answer be but that they had elected to continue in possession and paid their rent, and it was acquiesced in and received by the landlords, and the tenancy is still continuing on the terms of the lease; therefore you have no improvements for which we are now entitled to pay.

The plaintiffs, in the sixth paragraph of their bill, state that the said building, erected on said lands and premises, was damaged by fire on the twentieth day of June, in the year of Our Lord one thousand eight hundred and seventy-seven, and thereafter the said building was repaired by said defendants, and the said defendants, after the expiration of the said indenture of lease in the said fourth section in part set out, and without any valuation of said building having been made, continued in possession of the said lands and premises, and paid the rent thereby reserved for the same to the said Robert Sears, John Sears, George Edward

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Sears and Edward Sears, junior, up to and until the first day of May, in the year of Our Lord one thousand eight hundred and eighty-four.

And the defendants answered: We admit that the several allegations contained in the sixth paragraph of the said bill are true, but we allege in addition thereto that the building so repaired as alleged in the said sixth paragraph was built and was so repaired by us at our own cost during the continuance of our tenancy under the indentures of lease mentioned in the said bill or one of them, and that the said building so repaired was standing and being on the said demised premises on the first day of May in the year of our Lord one thousand eight hundred and eighty-four, and is now standing and being on the said premises, and then was and now is of the value of one thousand dollars and upwards.

The claim to be paid for the improvements which were put on the premises under the first lease and partially destroyed by fire and repaired by the defendants during the second lease, has never been released or abandoned by the defendants and the covenant to pay, should plaintiffs refuse to continue the lease, still exists in full effect and force.

Under these circumstances, I think the appeal should be allowed.

An objection was taken that specific performance could not be adjudged in this case. I can see no objection to the defendants being compelled to execute the lease tendered to them in January, 1885, but if there are any technical difficulties in the way of decreeing specific performance, then, as the plaintiffs have, in my opinion, a clear present right under R.S.N.B. ch. 49, sec. 33, no suit in the said court shall be open to the objection that a merely declaratory decree or order is sought thereby, and it shall be lawful for the judge to make a binding declaration of right without granting consequential relief, and therefore a declaratory decree of the plaintiffs' right, which is prayed for by par.

22 of the bill, would, I presume, answer all the purposes of the decree for specific performance.

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STRONG J., was of the opinion that the appeal should be dismissed.

TASCHEREAU J., concurred with the Chief Justice and thought the appeal should be allowed.

GWYNNE J.—In my opinion this appeal should be dismissed with costs and the judgment of the Supreme Court of New Brunswick maintained.

One Edward Sears, by an indenture of lease dated the 4th day of July, 1855, demised a piece of land situate in the city of Saint John, in the indenture of lease mentioned unto the mayor, aldermen and commonalty of the said city: To have and to hold to them, their successors and assigns

from the first day of May then last for the term of fourteen years thence next ensuing, yielding and paying therefor yearly and every year during the said term unto the said Edward Sears, his heirs or assigns the yearly rent or sum of one hundred pounds lawful money of the Province of New Brunswick, by even equal half-yearly payments on the first days of November and May in each and every year.

And the said indenture was expressed to be executed

upon the express condition that if the said yearly rent thereinbefore reserved and made payable, or any part thereof, should be in arrear or unpaid by the space of thirty days next after any or either of the days in any year during the continuance of that demise whereon the same ought to be paid as aforesaid, it should and might be lawful to and for the said Edward Sears, his heirs and assigns into and upon the said lot and premises or any part thereof in the name of the whole to re-enter and the same to have again re-possess and enjoy as in his and their former estate, as if these presents had not been made and the said mayor, aldermen and commonalty of the city of St. John thereout and therefrom to expel, put out and remove, the said indenture or anything therein contained to the contrary notwithstanding.

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The indenture then contained a grant of a right of way therein described and a covenant by the lessees to pay the rent by the lease reserved at the days and times therein appointed for that purpose. The indenture then contained the clause following:

It is hereby mutually agreed, covenanted and understood by and between the parties to these presents that in case the said mayor, aldermen and commonalty of the city of Saint John should erect and put up any buildings or improvements upon the said demised premises within and during the said term, the same shall be valued and appraised by two indifferent persons, one to be chosen by and on the part of the said mayor, aldermen and commonalty, their successors or assigns, the other by and on the part of the said Edward Sears, his heirs and assigns, which two persons, in case of disagreement, should choose a third, the appraisal or determination of any two of whom should be final and conclusive, and it should be at the option and election of the said Edward Sears, his heirs or assigns to pay or cause to be paid to the said the mayor, aldermen and commonalty, such appraised value of such buildings or improvements to the extent of five hundred pounds or to extend and continue the lease unto the said mayor, aldermen and commonalty for a further term of fourteen years at the same yearly rent payable in like manner and under the like covenants, conditions and agreements as in the said indenture are expressed and so as often as such case should happen at the end or expiration of any lease or demise of the said premises for any further term or terms there should be a like valuation and the like option as hereinbefore mentioned.

Now this was an indenture of lease for a term of 14 years certain. The term created thereby must, and did, terminate on the 1st May, 1869. The lease contained, it is true, a covenant by the lessor that in the event of certain contingencies happening, he, his heirs or assigns, would execute another lease for a further term of 14 years to be computed from the expiration of the first term; but unless the specified contingencies should happen, no obligation was imposed upon the lessor to give such further lease, and until such further lease should be executed the relation of landlord and tenant between the parties for such new term of 14 years could not be created, for by the law of New Brunswick, Consolidated Statutes, ch. 67, sec. 7:

All leases, estates or other interests in lands not put in writing and signed by the parties or their agents thereunto lawfully authorized by writing shall have the force of leases or estates at will only except leases not exceeding the term of three years.

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As the above covenant of the lessor was inserted wholly and solely for the benefit of the lessees they could waive the benefit of it. In fact, they alone could be the actors in any proceeding for the enforcement of it. The lessor never could compel the lessees against their will to accept a new lease and so to become tenants of the lessor, his heirs or assigns for a further period of 14 years, for they entered into no contract whatever in writing or otherwise to accept such a lease at the mere will of the lessor, his heirs or assigns. Now, the contingencies, the occurring of which imposed an obligation upon the lessor, his heirs and assigns, under his covenant, as to the execution of a new lease for a further term of 14 years were:

1st. That within and during the first term the lessees had erected and put up some buildings and improvements which remained upon the demised premises at the expiration of the term; and inasmuch as the covenant was for the benefit of the lessees, which benefit they might waive;

2ndly. That the lessees should claim to be paid the value of the buildings and improvements so made and remaining on the demised premises.

It was only upon these events occurring that the provision contained in the lease as to the valuation of such improvements and the payment thereof, or the execution of a new lease for a further period of 14 years by the lessor, his heirs or assigns came into operation. If no buildings and improvements had been erected during the term; or if none such remained upon the premises at the expiration of the term; or if any being there, the lessees either because of the smallness of their value, or for any other reason, claimed no payment whatever in respect of them, there would be no valuation under the provision as to valuation in the lease, and the lessor, his heirs

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or assigns, would be under no obligation whatever arising under his covenant, either to pay anything to the lessees or in lieu of payment to execute a new lease.

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What in fact occurred was this. The lessees did during the term erect certain buildings which were upon the demised premises at the expiration of the term on the 1st May, 1869, but there is no evidence that the lessees made any claim to be paid for such buildings. All that occurred, so far as appears, and therefore all that for the purposes of the present case must be taken to have occurred, was, that without anything having been said by the lessor or the lessees as to valuation of the buildings or as to payment therefor, or as to a new lease for a term of 14 years, the lessees simply continued in possession after the expiration of the term and paid the old rent until the 1st of October, 1877. Upon the third of October, 1874, while the lessees were thus in possession, the lessor executed an indenture whereby he granted bargained and sold the demised premises, together with other lands, to Robert Sears, John Sears, George Edward Sears and William Macara Sears, upon certain trusts in the said indenture declared and amongst others, upon trust to demise from year to year or for any term or number of years, with or without a clause of renewal or provision for payment for improvements all or any part of the real and leasehold estate thereby conveyed. The grantees under this deed continued to receive from the present defendants until the first of October, A.D. 1877, without anything being said as to the nature of the defendants' tenure, rent at the same rate as the defendants had previously paid.

Now, under these circumstances,—What was the relation existing between the defendants and the owners in fee for the time being of the premises in question from the expiration on the 1st of May, 1869, of the term created by the indenture of lease of the 4th of July, 1855, until the 1st of October, 1877? And the answer must be, as it appears to

me, upon principle and the authority of *Hyatt v. Griffiths* (s), that the defendants were tenants from year to year subject only to such covenants in the expired lease as were applicable to or might be incident to a tenancy from year to year; but this is a question now of little importance, for Robert Sears, John Sears, George Edward Sears and William Macara Sears, the grantees of the indenture of the 3rd of October, 1874, and the defendants mutually agreed as to the terms upon which the defendants should continue in possession of the premises in question, which terms were embodied in an indenture bearing date the said 1st October, 1877, whereby, after reciting the indenture of lease of the 4th of July, 1855, and the indenture of the 3rd of October, 1874, and the provision therein contained that it should be lawful for the trustees thereunder to demise from year to year or for any term or number of years, with or without clause of renewal or provision for payment of improvements all or any part of the real or leasehold estate thereby conveyed; and after reciting further that the said Robert Sears, John Sears, George Edward Sears and William Macara Sears, parties to the said indenture, now in rental of the first part had agreed to extend and continue the lease and demise of the said lot and premises comprised in the said indenture of lease (of the 4th July, 1855) with the said right of way unto the defendants, for a further term of fourteen years computed from the expiration of the said first term, and that the defendants had agreed to accept such lease, the said indenture witnessed that the said parties thereto of the first part did demise and lease unto the defendants all and singular the lands and premises comprised in the said rented indenture of lease: To have and to hold the same unto the defendants for the term of fourteen years from the 1st day of May, 1869, thence next ensuing, and fully to be complete and ended at the same yearly rent payable in like manner and under the like covenants, conditions and agreements as are expressed and con-

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tained in the said recited indenture of lease and the said defendants did thereby accept the said extension of lease at the rent upon the terms and conditions aforesaid, and did covenant with the parties to the said indenture now in recital of the first part that the defendants should and would yearly and every year during the continuance of the said extended term of fourteen years well and truly pay the said yearly rent thereby reserved.

Now, it is obvious that it was quite competent for the defendants and the parties of the first part to the above recited indenture to agree upon any terms and conditions they should think fit to be inserted in the new lease. It was quite competent for the defendants to waive all claim for payment of the value of any buildings or improvements they might erect or make, if they should erect or make any within and during the second term. It may be that they had no intention whatever to erect or make any such, and therefore that they had no object in having a clause inserted in the second lease, similar to that which was in the first, providing for payment for improvements. They had not, under the terms of the original lease, any right to demand and insist upon the insertion in any subsequent lease which might be executed, of a provision for payment at the expiration of a second or subsequent term for improvements which had been made within and during the first term. If a clause similar to that in the original lease providing for payment for improvements or in lieu thereof for a new lease should be inserted in any second or subsequent lease under the provision in that behalf contained in the original lease, it would only make provision in respect of improvements to be made within and during the term by such second or subsequent lease granted, and not for a valuation at the expiration of a second, third or fourth term of 14 years of improvements which had been made during the first term by the original lease granted. Payment on a valuation at the expiration of each term, for buildings and improvements erected and made within and during such term, or in

lieu thereof, that the lessor would grant a new lease for a further term of 14 years with a like provision therein contained, if the lessees should require it, for payment on a valuation at the expiration of the new term for such improvements as should, if any should, be made within and during such new term, was the only obligation that the lessor had entered into under the terms of the original lease. It was, therefore, quite competent for the parties to the indenture of the 1st of October, 1877, to leave altogether out of that indenture of lease any provision as to valuation and payment for improvements at the expiration of the term by that indenture granted, whether there should or should not be any improvements made by the lessees on the demised premises within and during such term, and this is precisely what they have done. The parties of the first part to that indenture have given, and the defendants, the parties of the second part thereto, have accepted, a lease terminating absolutely at the expiration of 14 years from the 1st of May, 1869, without any provision therein contained for any valuation for improvements or for an extended term. The covenants, conditions and agreements contained in the original lease and which are imported into the new lease by the reddendum clause therein, are those relating to the payment of the rent reserved, that is to say, those only to which the defendants are subjected as to payment of rent by their covenant and in default to eviction by the reddendum clause in the original lease and which was as follows:

Yielding and paying therefor yearly and every year during the said term unto the said (the lessors) the yearly rent or sum of, etc., etc., on the first day of November and May in each year, the first payment to be made on the first day of November then next. Provided always and these presents are upon this express condition, that if the said yearly rent or sum hereinbefore reserved and made payable or any part thereof shall be in arrear and unpaid by the space of thirty days next over or after any or either of the days in any year during the continuance of this devise whereon the same ought to be paid as aforesaid, it shall and may be lawful for the said (the lessors) into and upon the said demised premises or any part thereof

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in the name of the whole to re-enter and the same to have again, re-possess and enjoy as in their first and former estate as if these presents had not been made and the said (lessees) therefrom and there-out to expel and put out, this indenture or anything herein contained to the contrary notwithstanding.

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The defendants, by acceptance of this lease, voluntarily divested themselves of all right or claim for payment of any improvements, if any, they should make during the term, and the right of the lessors to enter upon the demised premises upon the expiration of the term of 14 years thereby granted became absolute and unconditional, so that any overholding of possession by the lessees after the expiration of such term would be without right, and they might therefore be evicted by the lessors, without either a notice to quit or demand of possession. This seems to me to be the true purport, tenor and effect of the second lease; but assuming the covenant for further renewal to be imported into this lease, still the defendants never asserted any interest in or under such a covenant as being contained in it. They did not at any time since the expiration of the second term pretend to have or assert any claim to have any right to compensation for improvements as a valuation or to have a new lease granted to them for a further term of 14 years. Up to the day upon which they paid rent for the half year next ensuing the expiration of the term by the lease granted, they were merely overholding tenants having possession at the mere sufferance of the plaintiffs and not even claiming to have possession under any other terms. Now, payment of a half year's rent could not have the effect of converting a tenancy at sufferance into a tenancy for a term of 14 years, which latter term could only be created by an express demise or by an agreement in writing executed by the defendants expressly agreeing to become the tenants of the plaintiffs for such a term, and possession thereunder, nor could such a payment have the effect of creating an obligation upon the defendants to accept a lease from the plaintiffs for a further period of 14 years capable of being specifically enforced; for such an obligation could only be

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created by an agreement in writing to that effect signed by the defendants. The payment by the defendants and the acceptance by the plaintiffs, of a half year's rent after the expiration of the term had under the circumstances the effect only of constituting the defendants tenants of the plaintiffs by the year at the old rent; and that tenancy was determined by the notice of the 28th of January, 1884, given for that purpose by the defendants under their common seal and by their abandonment of possession and surrender of the premises executed under their common seal on the 30th April, 1884, and their sending therewith the key of the building erected by the defendants upon the premises during the first term, to the plaintiffs. The fact of the plaintiffs having sent the key to the common clerk of the defendants, who declined to accept it on behalf of the defendants, as indeed he could not do otherwise, or to suffer it to remain in his office otherwise than for and at the risk of the plaintiffs, cannot affect the right of the defendants to treat the tenancy as absolutely determined by their abandonment and surrender of the premises to the plaintiffs in the manner above stated; and as the defendants have not entered into any agreement binding them to accept a lease from the plaintiffs for a further term of 14 years, they cannot be compelled to accept such a lease.

In fact, the plaintiffs' contention rests wholly upon the fallacy that (as they contend) the lease of July, 1855, contains an agreement of the defendants binding upon them to accept from the plaintiffs, their heirs and assigns, perpetual renewal leases for 14 years from time to time so long the plaintiffs, their heirs and assigns, choose to insist upon the defendants doing so. The original lease is open to no such construction, but if it be matter of doubt whether it be or not open to such construction, *Harnett v. Yielding(t)*, which is as sound law now as it was when judgment therein was delivered by Lord Redesdale, is an authority to the effect that courts of equity will not enforce specific perform-

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ance of agreements when from the circumstances it is doubtful whether the party meant to contract to the extent that he is sought to be charged. In the present case there is, in my opinion, no foundation whatever for the contention that the defendants ever entered into any such agreement, either in the original lease or in that of the 1st October, 1877, which is the one to which alone since its execution there is any occasion to refer. In view of the actual facts of the case, the authorities cited and relied upon by the learned counsel for the plaintiffs have in reality no application whatever, as a short reference to them will shew.

In *Kimball v. Cross* (u), there was a lease executed for term of one year for a rent named "with the privilege of continuing for five years at an increased rent," also named. The tenant, after the expiration of the first year continued in possession and paid rent for the first six months of the second year at the increased rate, and it was held that thereby the tenant had entered upon the second term mentioned in the lease, and that the terms of the lease were apt to create a present demise for the five years at the option of the tenant. *Kramer v. Cook* (v) is to the same effect, and is cited in *Kimball v. Cross* (u) in support of the judgment in that case. In *Despard v. Walbridge* (w), a tenant whose tenancy was about to expire, was served with a written notice by his landlord that if he, the tenant, should hold over after the expiration of the term, the landlord would consider the premises as taken by the tenant for another year at an increased rent of \$1,500 per annum. The tenant did hold over, and at the expiration of six months of the second year's occupation was sued by the landlord for use and occupation at the stipulated rent of \$1,500 per annum, and it was held that the continuing in occupation by the tenant after the receipt by him of the above notice was evidence to go to a jury of an implied promise to pay the increased rent of \$1,500 per annum.

(u) 136 Mass. 300.

(v) 7 Gray 550.

(w) 15 N.Y. 374.

McDonell v. Boulton (*x*) is an authority simply to the effect that the tenant by the terms of an expired lease was entitled, if he desired it, to continue in possession for a further fixed term at a stipulated rent, and that as he continued in possession after the expiration of the first term, and claimed the benefit of the further term, he could not be ejected by the landlord.

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Nudell v. Williams (*y*) is an authority to the like effect, namely, that where a tenant remains in possession of demised premises after the expiration of a term granted by an expired lease claiming the benefit of a covenant therein by the landlord to pay for improvements, or in default that the tenant shall continue in possession for a fixed term, at a stipulated rent, the landlord cannot treat the tenant as a trespasser and eject him during the period within which as stipulated in the lease the value of the improvements should be ascertained by arbitration.

These two cases proceeded upon the fact that the tenants expressly claimed the right to hold possession under the terms of the expired lease and to have an extended term unless paid for improvements as provided in the lease, and that therefore the landlords could not treat them as trespassers; for in *Dewson v. St. Clair* (*z*) the Court of Queen's Bench for Upper Canada, the same court as decided *McDonell v. Boulton* (*x*), had already held that where a defendant who had held possession of premises demised to him for 5 years by a lease which contained a covenant of the lessor to grant a renewal for other five years, to commence at the expiration of the first term at a named rent, held possession after the expiration of the first term without asking for a renewal lease and without saying anything in assertion of a claim for such a lease under the lessor's covenant, he could be treated by his landlord as a trespasser and could be and was ejected without any notice to quit or demand of possession.

(*x*) 17 U.C.Q.B. 14.

(*y*) 15 U.C.C.P. 348.

(*z*) 14 U.C.Q.B. 97.

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Walsh v. Lonsdale(a) is simply an authority to the effect that since the Judicature Act a person in possession of premises claiming under a written agreement for a lease is now subject to the same remedies at law and therefore to distress for non-payment of rent in pursuance of the terms of the written agreement equally as before the Judicature Act he would have been subject if the lease had been executed.

In *Irvin v. Simonds*(b), the action was instituted by the assignee of the lessee to compel the lessor's devisee specifically to perform a covenant which the lessor had entered into in the lease similar to the lessor's covenant in the present case for a renewal of the lease for an extended term. The assignee of the lease was clearly entitled to the fulfilment of the lessor's covenant, either by payment for improvements, or the grant of a renewal lease, and at the expiration of the term granted by the expired lease he claimed the benefit of the lessor's covenant and continued in possession, paying rent and claiming such benefit. The lessor having died devising the property to the defendant, negotiations were entered into by the plaintiff with the defendant for the renewal lease, and one was actually prepared for execution by the defendants, who, however, afterwards refused to execute it, and executed a lease of the premises to a third person; thereupon the plaintiff filed his bill for specific performance of the lessor's covenant to renew and for cancellation of the lease executed to the third person; the defendant contended, among other things, that the covenant could be satisfied by payment for improvements, but the court held that the lessor in his lifetime and his devisee since his death, having received rent from the plaintiff, the latter was entitled to specific performance of the lessor's covenant to renew, and decreed accordingly. That case can be no authority for the plaintiffs in the present case, who insist upon forcing a lease upon the defendants, who have made no claim therefor, and who have never entered into

(a) 21 Ch. D. 9.

(b) 11 N.B. Rep. 190.

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any agreement with the plaintiffs to accept the lease sought to be forced upon them, or which can be made the foundation of a decree for specific performance.

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

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PATTERSON J.—I have not been able to see sufficient reason for dissenting from the judgment of the court below. The questions have been carefully discussed in able judgments delivered in that court. I agree with the views on which those judgments proceed, and, for the most part, with those expressed in that just delivered by my brother Gwynne.

The covenant in the original lease of 1855 is so framed as to leave room for difference of opinion upon its proper construction. For my own part I incline to the view that the intention was that the buildings to be valued at the end of any term should be those only which were erected during that term. The words "within and during the said term," words which were probably unnecessary as far as the first term was concerned, because no other buildings could possibly be the subject of valuation at the end of that term, but in a renewal lease made with "like covenants," the words "within and during the said term" would refer to the new term. The parties may well have considered that the payment for the buildings erected during any term, which could not be more, and might be less than £500, would be sufficiently compensated for by a further term of fourteen years at the original rent of \$100 a year plus the right to be paid the value of buildings put on the place during the new term. It is only on this understanding of the covenant that any provision is found for payment for buildings erected after the first term.

I do not regard the repair, during the second term, of the building erected during the first term, as equivalent to the erection of a building during the second term, but the repairs might come within the term "improvements," if the

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tenants were not bound to repair damage by fire, and they were not so bound, as far as appears. I do not know that these questions were mooted in the court below, and I believe they were not raised on the argument here. They do not properly arise, because the rights of the parties depend on the second lease, which was executed in 1877, demising the premises for a term of fourteen years from the first of May, 1869. That demise is stated in the instrument itself, as set out in the pleadings, to have been

under the like covenants, conditions and agreements as are expressed and contained in the said recited indenture of lease.

That is to say, in the original lease of 1855. Now, if this second lease had contained an independent covenant such as, on my understanding of the original document, would have been proper, in place of this, by reference, importing the original covenant itself, it would have provided for valuation of the buildings and improvements erected and made during the second term only. But the covenant imported from the original lease relates to the building erected during the first term, and that is therefore the building that was to be valued, and which the lessor had the option to pay for or to grant a new term at the end of the second term, which was the first of May, 1883.

The question is thus that which was debated in the court below and before us, namely, the right of the lessor who took no steps to have the building appraised, the tenants being similarly remiss in that particular, to insist against the tenants who held over and paid one half year's rent up to the first of November, 1883, which rent was accepted by the lessor, that the tenants were in for another term of fourteen years notwithstanding that he made them no new lease, and notwithstanding that nothing passed between them on the subject of payment for the building or renewal of the term.

The fact of the tenants retaining possession from the first of November, 1883, to the first of May, 1884, and then paying another half year's rent cannot under the circum-

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stances have any significance, when that payment was made the parties were at arm's length.

The terms under which a tenant holds over are to be decided as a question of fact rather than of law. *Oakley v. Monck*(c). This is so whether the contest is respecting a common law tenancy from year to year or the assertion of some agreement enforceable in equity. *Walsh v. Lonsdale*(d).

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The fact here asserted by the plaintiffs and denied by the defendants is that the defendants held over under an agreement that the plaintiffs should grant and that the defendants should accept a lease for a renewed term of fourteen years on the terms of the original lease. This asserted agreement is based entirely on implication. The plaintiffs did not have the building valued and did not intimate to the defendants that they waived such valuation because they elected to renew rather than pay; and they do not now shew as a fact that they had so decided. They say that it should be inferred from their allowing the defendants to hold over, and from their six months afterwards accepting rent at the former rate.

The defendants took no steps to have the building valued. They were not bound to accept a renewal lease even if offered to them. At least so I think, though it is possible to argue that, under the mutual covenant, the future relation between the parties was to depend on the option given to the lessor who might compel the tenants to hold the premises for all time at £100 a year.

The plaintiffs' case requires it to be held that the defendants should have inferred and did in fact infer, from the inaction of the plaintiffs that the plaintiffs had decided not to pay for the building, but to grant a new term, and that the defendants agreed to accept the new term.

The considerations most strongly relied on to lead to the conclusion are that the defendants held over and paid rent. The argument is that they must have held under the asserted agreement, or else as wrongdoers, and that they can-

(c) 3 H. & C. 706; L.R. 1 Ex. 159. (d) 21 Ch. D. 9.

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not be allowed to take the latter alternative. I am very far from being convinced by this argument. I do not recognize the necessity for admitting the premises nor do I see that the conclusion necessarily follows. I shall not enter upon a discussion, which would not advance the inquiry, as to whether the defendants were in, after the end of their term, as tenants at will or at sufferance, or even as wrongdoers, though the charge of holding tortiously does not seem more applicable here than in any one of the numberless cases in which, after the termination of a tenancy for years, a tenancy from year to year has been held to have been created by holding over and paying rent. The mere fact of holding over, followed by the payment of rent, does not, in my judgment, imply more in this case than in the ordinary class of cases. The weak point of the plaintiffs' argument is the absence of any agreement to which the holding over can be referred.

If they had decided, and so informed the defendants, that they would renew the term rather than pay anything, there might be force in the contention that the holding over was an acceptance of the offered terms. The case would have been within the class of which *Roberts v. Hayward*(e) is an example. But the plaintiffs ask us to go further in their favour than they are entitled to ask. An offer to renew at the original rent has to be implied before the acceptance comes in question, and it is going a long way to ask the court to make the double implication.

I am of opinion that, independently of the questions raised touching the application of the statute of frauds, the court below properly held against the alleged agreement, and that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitor for appellants: *H. L. Sturdee.*

Solicitor for respondents: *I. Allen Jack.*

*THE HONOURABLE JAMES GIBB
ROSS (PLAINTIFF).....

AND

NAPOLEON ARTHUR HURTEAU AND
ALCEME HURTEAU (DEFENDANTS)...

AND

JOHN HOSKIN, ADMINISTRATOR OF THE
ESTATE OF THE HONOURABLE JAMES
GIBB ROSS (PLAINTIFF).....

AND

NAPOLEON ARTHUR HURTEAU AND
ALCEME HURTEAU (DEFENDANTS)..

APPELLANTS;

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Sale of goods—Delivery—Lien of unpaid vendor—Stoppage in trans-
itu—Goods not separated from larger bulk—Estoppel.*

H. had a large quantity of lumber in the yards of E. & Co., and sold a portion thereof to L. through an agent on six months' credit. L. gave his promissory note for the purchase money. Defendants' agent gave L. a delivery order on E. & Co., which the latter accepted. L. then pledged the lumber to R., as security for a large advance, and gave the latter a delivery order on E. & Co. which the latter accepted. Before all the lumber had been delivered, L. made default in paying his note to H. and the latter at once forbade E. & Co. making further delivery to L. or R. E. & Co. then brought an action against R. and H. in which they prayed that the latter be required to interplead regarding their respective claims to the lumber and be restrained from bringing any action against E. & Co. respecting the same. An order was made in chambers directing that an issue be tried to determine whether R. or H. was entitled to the lumber in the

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*XVIII, Can. S.C.R. 713.

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

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yards of E. & Co. At the trial the issue was found in favour of H., the court holding that until delivery was made there was no completed sale to L, sufficient to pass the title as against the vendor's lien. This judgment was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, Strong and Gwynne J.J., dissenting, that the judgment below should be affirmed and the appeal dismissed with costs.

Held, per Patterson J., that the acceptance of E. & Co. had not the effect of making them bailees for L, or R, by attornment in respect of the property in question, and that the rights of H. were the same as those on an unpaid vendor to stop goods *in transitu*.

Held, per Gwynne J., that H. was estopped by his conduct in the transaction from asserting title to the lumber which E. & Co. had, on the faith of the authority derived from H., undertaken to hold for R.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial of the Honourable Mr. Justice Ferguson in favour of the defendants.

The facts of the case were shortly these. Hurteau & Frère, of Montreal, purchased from Edwards & Co., manufacturers of lumber at Rockland, Ontario, a quantity of lumber in their mill-yard which, after the purchase, was left in the possession of Edwards & Co., subject to the orders of Hurteau & Frère. The latter employed one Lemay, a lumber broker, in Montreal, to make sales of this lumber, and after some negotiations Lemay sold a portion of the lumber to one Little, and an agreement shewing the sale was executed by both Little and Lemay and, on the same day, ratified by a letter from Hurteau & Frère addressed to Edwards & Co. On the same day Lemay wrote to Edwards & Co. notifying them of the sale to Little and enclosing a delivery order which directed Edwards & Co. to deliver the lumber in question to Little. This order was accepted by Edwards & Co. by their indorsement written on the back thereof. Subsequently Little, as security for an advance from Ross & Co. of Quebec, procured Edwards & Co. to sign an indorsement on the back of the delivery order originally given by Lemay to him as follows: "Will hold within deals

subject to order on Messrs. Ross & Co.,'' and, on the strength of this acceptance, Ross & Co. made their advances.

Subsequently, Little having made default in paying Hurteau & Frère for the lumber, Edwards & Co. were forbidden by Hurteau & Frère to carry out the delivery order in favour of Little.

Ferguson, J., before whom the issue was tried, gave judgment upon the conclusion of the argument as follows :

The question to be determined here is clear. Counsel have agreed the main question to be decided is as to whether or not the sale from Hurteau to Little was completed, whether that was a completed and effectual sale so as to pass the title to Little as against his vendor. Now I am very clearly of opinion it was not such a sale and that this question must be decided in favour of the defendants. As to the contention regarding the law, that the intention of the parties must govern, I do not find that the evidence shews intention or existence of intention so as to take this case out of the authorities setting forth the general rule and cited by the defendants. I cannot say that the exception from the general rule, in this respect contended for, has been made out; nor do I think estoppel contended for has been made out. The main case relied upon in support of the contention of the plaintiff was that of *Whitehouse v. Frost (a)*. * * *

On appeal to the Court of Appeal this judgment was affirmed, Hagarty, C.J.O., holding that :

So long as Edwards, in whose custody the lumber was mixed with a much larger quantity, had not acted on the order by separating and delivering the required quantity from the larger bulk, or even gone the length of (without actual delivery to the purchaser), separating it and placing it apart from the rest, I can see nothing to prevent Hurteau from asserting his lien as an unpaid vendor.

And Burton, J.A., said :

The lumber sold was so far ascertained that the parties had agreed that it should be taken from a specified larger stock, but the rule is well settled that until the parties are agreed on the specific lumber the contract can be no more than a contract to supply lumber answering the particular description. * * The parties did not intend to transfer the property in one portion more than in another and the law which only gives effect to their intention does not transfer the property in any particular portion.

(a) 12 East 613.

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The particular property might on the application of Little have been set apart or identified as the lumber on which the contract was to operate and, for which purpose, perhaps, Edwards would have represented the respondents, and, having thus been made specific and the presumption in such a case being that the property was intended to pass, it would pass unless there was something to shew that it was not intended.

Here the property never became specific, and, the credit having expired, the respondents might properly refuse to part with it until the full payment of the price.

But Little subsequently pledged the property to Ross and he, perhaps deceived by the acceptance of the previous order and assuming apparently that the property had become specific, took a further order from Little on Edwards and received from him what, for the purpose of this case, may be treated as a warehouse receipt.

The question is as to the effect of that instrument. It is said that this, coupled with the payment made by Ross, operates as a complete transfer of the property to Ross and defeats the respondents' lien.

But, if there was no property of Little's on which the warehouse receipt could operate, how does this advance the plaintiffs' contention? It may or may not operate as an estoppel upon Edwards; but how can that affect the original owners who have never given anything but a delivery order which has not been fully acted upon? Ross has, no doubt, been a sufferer, but the respondents have done nothing to bring about his loss.

Osler and MacLennan, J.J.A., concurred.

Pepler, Q.C., and *Nesbitt*, for the appellant. By the delivery order of Lemay, defendants' agent, to Little, ratified by the defendants and accepted by Edwards & Co., the bailees, the property in and *quasi* possession of the lumber in question absolutely ceased to be in the defendants.

The lumber was in the possession of Edwards & Co. as agents for the vendor and, upon the acceptance by them of the delivery order from the defendants' agent, their possession of the property became the possession of the purchaser. Blackburn's *Contracts of Sale* (2 ed.), p. 25; Benjamin on *Sales* (4 ed.), p. 161.

In like manner and for the same reason, by the delivery order of Little and the subsequent attornment of the bailees to the plaintiff, confirmed by their part delivery of the lum-

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ber, the property and possession passed from Little to the plaintiff.

The defendant having expressly ratified the document of title delivered by them to Little and, afterwards, transferred by Little to the plaintiff, are estopped from setting up any claims to the lumber in question to the prejudice of the plaintiff. *Pickard v. Sears* (b); *Carr v. London & N. W. Ry. Co.* (c).

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Christopher Robinson, Q.C., and *Percy Galt*, for the respondents. The lumber in question was never separated from the larger quantity purchased by Hurteau & Frère from Edwards & Co. but all remained piled together in the yard and Edwards & Co. never acted upon the order or separated the portion that was sold from the larger quantity and the property in the lumber never passed from Hurteau to Little.

The defendants admit that, if the lumber sold to Little had been set apart from the balance of the lumber in the yard so that it might be identified and nothing remained to be done before delivery, the property would have passed under the terms of the agreement and their lien for the purchase money would have gone upon Edward & Co., under their instructions, accepting the delivery order in favour of Little; but the question that arises in this case is not one of lien, but of ownership. The cases which go to shew that, where the property in goods has passed, the vendor will lose his lien for the purchase money where the goods are in the hands of a third party and such third party agrees to hold for the purchaser have no application whatever to the case in hand, as Hurteau & Frère were never divested of the property in the goods. The evidence shews that, before delivery, the following acts in respect of the lumber would be necessary: 1. Separation; 2. Re-measurement; 3. Re-culling; 4. Removal for delivery on the barges.

The law is well settled that in the case of a contract for

(b) 6 A. & E. 469.

(c) L.R. 10 C.P. 307.

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the sale of goods so long as anything remains to be done the property does not pass.

Under these circumstances and in view of the authorities, it cannot be successfully contended that the property has passed. We rely also upon the fact that the trial judge found that there was no evidence of intention that the property should pass. In view of the fact that Hurteau & Frère were entirely ignorant of the transaction between Little, Edwards and Ross, it cannot be held that they are estopped by anything that took place between these parties.

SIR W. J. RITCHIE C.J.—We are not concerned in this case to inquire as to what the right of Ross or any other party may be against Edwards & Co., the sole question for our consideration is: Did the property pass out of Hurteau by virtue of the contract of sale of the 12th January, 1888, made by Lemay, agent of Hurteau, to Little? The agreement is as follows:

Agreement between Wm. Little, Esq., and E. H. Lemay:

Wm. Little, of the city of Montreal, buys, and E. H. Lemay, of the same place, sells, the following lumber, now lying at W. C. Edwards & Co.'s yard in Rockland, Ont:

1,000,000 feet 3-inch mill cull deals, 12-13, and about 10 per cent. 8 to 11 feet at (\$7) seven dollars per M.B.M., f.o.b., Rockland, Ont.; the same being a fair average in width of the 3,718 feet lot.

493,590 feet 3-inch mill cull deals, 14-16, at \$7.50, f.o.b., Rockland, Ont.

Terms.—Six months' note from 1st December, 1887, with three months' interest at 7 per cent. added to invoice; to deliver to teams any of the above lot in case Wm. Little so desires before opening of navigation.

January 12th, 1888, Hurteau writes to Edwards:

Montreal, 12th Jan., 1888.

Messrs. W. C. Edwards & Co., Rockland, Ont.

Gentlemen,—You will please rectify Mr. Lemay's order for one million feet 3 mill culls, 8-13 feet, and 493,590 feet 3 in. mill culls, 14-16 feet, sold to Mr. William Little, f.o.b., of barges, with option to draw them from the piles if he wants some during winter.

Yours truly,

(Sgd.) N. HURTEAU & FRÈRE.

January 18th, Lemay gives this order on Edwards:

Montreal, Jan. 18th, 1888.

Messrs. W. C. Edwards & Co., Rockland, Ont.

Gents,—Please deliver to Wm. Little, Esq., or order, the following lumber in your yard to my order, viz., 1,000,000 feet B. M. 3-inch M. cull deals, 8-13, 493,590 feet B.M. 3-inch M. cull deals, 14-16, and oblige.

Yours truly,

(Sgd.) E. H. LEMAY.

Accepted, W. C. Edwards & Co., Jan. 20th, 1888.

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Hurteau had taken Little's note at six months for the lumber.

There is no rail to Rockland and the lumber is generally taken from the wharf in barges, but occasionally at much increased expense across the river to the C.P.R. road.

Just before the note matured Little asked Hurteau to renew. He refused. Little said he could not pay, and Hurteau said he must keep his lumber, and then Little informed him of his dealing with plaintiff Ross, of Quebec.

It appeared that on the 28th of February, 1888, Little applied to Ross for advances and gave to him the following agreement:

Quebec, February 28th, 1888.

Mr. William Little proposes to draw on Ross & Co. to the extent of \$7,500 to be paid within four months of this date and, as collateral security for the said advance, pledges Edwards & Co., Rockland, Ont., warehouse receipt for 1,493,590 feet cull pine deals; it being agreed and understood that the whole advance, with a commission of 2½ per cent., and any interest thereon at the rate of 7 per cent. per annum, be paid as above stated, otherwise Ross & Co. shall have full power to sell the deals or any portion of them at the best price they can get, and credit Mr. Little with any surplus there may be or collect from him any loss.

(Sgd.) WILLIAM LITTLE.

Mr. Little will send fire policy insured in the Guardian Company.

It seems to me in this case we have nothing to do with the transactions of Little, Ross and Edwards, but to inquire whether under the above agreement between Lemay, representing Hurteau and Little and the order of Lemay recti-

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fied, meaning as the evidence shewed ratified by Hurteau, the property in these deals passed out of Hurteau and became the absolute property of Little. I think it very clear under the authorities, the property did not so pass.

The evidence very clearly shews that Hurteau had a large quantity of deals, over 4,000,000 feet in Edwards' yard which it was Edwards' was to ship in barges for Hurteau if so directed. It would seem clear to fill Little's order, the quantity of the two kinds of deals required would necessarily have to be portioned out and separated, because mixed with a much larger quantity belonging to Hurteau. Nothing was done towards separating the portion agreed to be sold from the larger quantity.

I can discover no evidence of any intention to pass the property. I am not prepared to dispute the proposition that property may be charged, though acts necessary to put the goods in a deliverable state remained to be done, but in such a case, I think the intention that the property should pass before delivery should be clearly established so as to interfere with the right of an unpaid vendor.

No particular or individual deal or deals on this large quantity ceased to belong to Hurteau and become the property of Little. In addition to which I think the contract on its face shews that the parties did not contemplate the property passing. The terms of the agreement we have seen:

Six months' note from 1st December, 1887, with three months' interest at 7 per cent. added to invoice; to deliver to teams any of the above lot in case Wm. Little so desires before opening of navigation.

And in Hurteau's ratification he says so many feet sold to Mr. Wm. Little f.o.b. barges with option to draw them from the piles if he wants some during winter.

If the property had passed from Hurteau to Little, why this permission to deliver to teams any of the above lot in case Wm. Little so desires before opening of navigation, or why an option given to Little to draw them from piles if he

wants some during winter? This would seem to me to shew very conclusively it was not intended that the whole quantity should pass. In regard to this question Mr. Hurteau stated that at the time the agreement was entered into with Little, namely, on the 12th January, he expressly provided that the six months' note given for the purchase money should bear date the 1st December, in order that it might mature before the lumber could be removed from the yard, and upon being asked whether it could not have been removed by the 1st June, he stated that, although navigation on the Ottawa opened before the 1st June, still, owing to the small wharf accommodation at Rockland, he did not anticipate that any great quantity of the deals could be removed before the note would come due.

In regard to the provision contained in the agreement, giving the purchaser the right to remove some deals from the piles during winter, Hurteau stated that he consented to such provision because he knew that no great quantity could be removed, as the deals could only be shipped by rail in winter, and would have to be hauled across the river, as there was no railway at Rockland on the Ontario side, and the expense in connection with shipping the deals in winter time would effectually prevent their removal.

It may also be mentioned that Hurteau kept the deals insured, as he stated he considered they were his property until paid for.

So long as the property remained unseparated or undelivered during the winter it seems to me Hurteau's right as an unpaid vendor continued.

We had a case before us some time ago where the same question arose: *Temple v. Close (d)*, 16 Feb., 1881, where a brick maker sold by sample 50,000 bricks out of a kiln containing 100,000 to plaintiff who paid the contract price and hauled away about 16,000, this court held, reversing the judgment of the court below, that the sale was one by sample, that the bricks sold were not specifically sold and there was no evidence from which it could be inferred that

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(d) Cass. Dig. 765, Cout. Dig. 1274.

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it was the intention of the parties the property in the brick should pass before delivery.

I think the property never passed out of Hurteau, and this appeal should therefore be dismissed.

STRONG J., was of opinion that the appeal should be allowed.

FOURNIER J., was of opinion that the appeal should be dismissed.

GWYNNE J.—In the month of December, 1887, Messrs. Hurteau & Brother, dealers in lumber, residing in Montreal, purchased from Messrs. Edwards & Co., manufacturers of lumber, at Rockland, Ontario, all the shipping cull deals then in their mill yard, which after the purchase were left in the possession of Messrs. Edwards & Co. subject to the orders of Messrs. Hurteau. In the month of January, 1888, Messrs. Hurteau employed Mr. Lemay, a lumber broker in Montreal, to make sales of this lumber for them. On the 12th January, 1888, a negotiation which had been proceeding between Mr. Lemay and a Mr. Little for the sale by the former to the latter of a quantity of lumber was reduced into the form of a written agreement in the following terms:

Montreal, 12th January.

Agreement between William Little, Esquire, and E. H. Lemay:

William Little, of the city of Montreal, buys, and E. H. Lemay, of the same place, sells, the following lumber now lying at W. C. Edwards & Co.'s yard in Rockland, Ont.:

1,000,000 feet 3-inch mill cull deals, 12-13, and about 10 per cent. 8 to 11 feet, at \$7.00, seven dollars, per M.B.M., f.o.b., Rockland, Ont., the same being a fair average in width of the 3,717,718 feet lot; 493,590 feet 3-inch mill cull deals, 14-16 feet, at \$7.50, f.o.b., Rockland, Ont.

Terms, six months' note from 1st December, 1887, with three months' interest at 7 per cent. added to invoice, to deliver to teams any of the above lot in case Wm. Little so desires before opening of navigation.

This agreement having been first shewn to and approved

by Hurteau & Brothers was duly concluded by Lemay and Little.

For the purpose of ratifying that sale Messrs. Hurteau & Brother on the same 12th January addressed the following letter to Messrs. Edwards & Co.:

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Montreal, 12th Jan., 1888.

Messrs. Edwards & Co.

Gentlemen,—You will please ratify Mr. Lemay's order for one million feet 3-inch mill culls, 8-13 feet, and 493,590 feet 3-inch mill culls, 14-16, sold to Mr. William Little, f.o.b. of barges, with option to draw them from the piles if he wants some during winter.

(Sdg.) N. HURTEAU & FRÈRE.

Upon the same 12th of January Mr. Lemay addressed the following letter to Messrs. Edwards & Co., Rockland:

Montreal, January 12th, 1888.

Gentlemen,—I have this day sold to William Little, Esq., the following lumber now in your yard to my order, 1,000,000 feet 3-inch M.C. deals, 8-13; 493,590 feet 3-inch M.C. deals, 14-16. I have given him an order on you for the delivery of same, which you will please accept, and in shipping this lumber to him you will do me a favour by seeing that he is treated as well as myself. Your reply will oblige.

Yours truly,

E. H. LEMAY.

The within order is the one I mention as having been given to Little.

(Sgd.) E. H. LEMAY.

Please accept the within order and return to me at once, as I wish to get the note on delivery of same.

(Sgd.) E. H. LEMAY.

The following order was the one which was enclosed in the above letter for the acceptance of Messrs. Edwards & Co.:

Montreal, January 18th, 1888.

Messrs. W. C. Edwards & Co., Rockland, Ont.

Gentlemen,—Please deliver to Wm. Little, Esq., or order, the following lumber now in your yard, to my order, viz.:

1,000,000 feet B.M. 3-inch M. cull deals, 8-13.

493,590 feet B.M. 3-inch M. cull deals, 14-16.

And oblige yours truly,

(Sgd.) E. H. LEMAY.

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Messrs. Edwards & Co., having already received Messrs. Hurteau & Brother's letter affirming the sale by Lemay to Little and directing them to ratify Lemay's order for the lumber sold to Little wrote across the order: "Accepted, W. C. Edwards & Co., January 20th, 1888," and returned the order so accepted to Lemay, who thereupon obtained Little's note for the price of the lumber and delivered the order with Edwards & Co.'s acceptance upon it to Little.

In the month of February, 1888, Little applied to Messrs. Ross & Co., of Quebec, for an advance of \$7,500 upon security of certain deals which he represented that he had at Messrs. Edwards & Co.'s yard, Rockland. Messrs. Ross & Co. consented to make the advance if Little should give them an order for the lumber and that Edwards & Co. would undertake to hold for and on behalf of Ross & Co. Accordingly, Little wrote on the back of the order which he held, accepted by Edwards & Co., the following:

Please hold the within mentioned quantity of deals subject to the order of Ross & Co., of Quebec.

Quebec, 28th February, 1888.

(Sgd.) Wm. Little.

and procured Edwards & Co. to sign the following undertaking also on Lemay's order, accepted by Edwards & Co., at the foot of Little's direction to hold the deals on behalf of Ross & Co.:

Will hold within deals subject to order of Messrs. Ross & Co., as above authorized. Rockland, March 15th. 1888.

(Sgd.) W. C. Edwards & Co.

Upon taking this undertaking and delivering it to Ross & Co. they upon the faith of it made to Little the advance of \$7,500, and subsequently Edwards & Co. delivered to the order of Messrs. Ross & Co. or to themselves 96,975 feet of the lumber.

Three months afterwards and on the 13th of June, 1888, Little's note to Messrs. Hurteau & Brother not having been paid, they by their solicitor addressed and sent the following letter to Messrs. W. C. Edwards & Co.

Toronto, June 13th, 1888.

Messrs. W. C. Edwards & Co.,

We forbid you to deliver to William C. Little or James Ross & Co., or any person claiming under them, any lumber referred to in order dated January 12th, 1888, signed by E. H. Lemay, we being the owners thereof, and the said Little having become insolvent without having paid for the same, and we also forbid you delivering any lumber belonging to N. Hurteau & Frère that is now in your yard to the said Little or Ross or from separating or interfering with any lumber at any time owned by us and claimed by Little or Ross.

(Sgd.) BEATTY, CHADWICK, BLACKSTOCK & GALT,
Solicitors for N. Hurteau & Frère.

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Now at this time there can, I apprehend, be entertained no doubt that, upon the authority of *Stonard v. Dunkin (e)*; *Gosling v. Birnie (f)*; *Hawes v. Watson (g)*; *Woodley v. Coventry (h)*; *Knights v. Wiffen (i)*, and the doctrine of estoppel as expounded in *Simm v. Anglo-American Telegraph Co. (j)* in an action of trover if brought by Ross & Co., against Edwards & Co. upon their refusal to deliver to Ross & Co. the quantity of lumber described in their undertaking of the 20th March as being held by them for Ross & Co., they would have been estopped from denying Ross & Co.'s title to the lumber whoever might be the persons in whom the legal title was really vested. So long as Edwards & Co. were solvent the claim of Hurteau & Brother with whom Ross & Co. had no connection was a matter of indifference to Ross & Co. Hurteau & Brother quite independently of Ross & Co.'s clear claim against Edwards & Co. might also have a good cause of action against Edwards & Co. in the result of which Ross & Co. were in no way concerned.

However, it appears that Edwards & Co. as if they were indifferent holders of property of which Hurteau & Brother and Ross & Co. respectively claimed to be the owners filed a bill in the Court of Chancery for Ontario setting out the facts as above and calling upon Hurteau & Brother and

(e) 2 Camp. 344.

(f) 7 Bing. 339.

(g) 2 B. & C. 540.

(h) 2 H. & C. 164.

(i) L.R. 5 Q.B. 660.

(j) 5 Q.B.D. 188.

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Ross & Co. to contest between themselves the title to the lumber in Edwards & Co.'s possession, and which they had undertaken to hold for Ross & Co. and obtained an order from that court for sale of the lumber and the depositing in court the proceeds arising from such sale to abide the result of an interpleader issue directed to be tried between Ross & Co. as plaintiffs and Hurteau & Brother as defendants, wherein the question to be tried should be whether the plaintiffs or the defendants in the said issue were entitled to the said lumber so sold under direction of the court or to the proceeds thereof. Why, under the circumstances of the case, Ross & Co. should have been required to be parties to such issue or why they should have assented thereto appears to me, I confess, singular, for even though the issue should be determined against them such determination of it would not, that I can see, in any respect prejudice or affect their claim against Edwards & Co.¹ founded upon their undertaking of the 20th March upon the faith of which Ross & Co. advanced their \$7,500. However, that is the issue which has been tried and the judgment upon which is now in appeal before us and we must deal with it, even though the result should not be conclusive upon the rights of the respective parties as it will not be if the judgment pronounced in the court of Ontario must be maintained; the effect of which upon Ross & Co. would seem to be simply to subject them to the costs of this interpleader issue without affecting their rights as against Edwards & Co.

The question as it seems to me which we have to determine is not, as it appears to have been treated in the Ontario courts, whether the legal title in the lumber specified in the sale to Little ever actually passed out of Hurteau & Brother, but whether in view of the terms of the sale note to Little and of the order in his favour upon Edwards & Co. and of Lemay's (Hurteau's broker) letter to Edwards & Co. enclosing to them that order for their acceptance and of Hurteau & Brother's letter to Edwards & Co. accompanying the order in Little's favour, Hurteau & Brother in an action

against them at the suit of Ross & Co., who claim through Little and Edwards & Co., should or should not be estopped from asserting that the title did not pass to Ross & Co.? Whether in fact Hurteau & Brother have not so conducted themselves as to authorize Edwards & Co. to enter into the obligation which they have entered into with Ross & Co. so as to be estopped from asserting title in themselves in the lumber with which Edwards & Co. have upon the faith of the authority derived from Hurteau & Brother undertaken to hold for and as the property of Ross & Co.?

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The sale note which was expressly approved by Hurteau & Brother shews that what was intended was a sale of lumber to Little. The order to Edwards & Co. consequent upon the sale was an order to deliver the lumber mentioned therein to Little or his order. This order Lemay, as Hurteau's agent, enclosed to Edwards & Co., directing them to accept it and to return it when accepted to Lemay in order that he as Hurteau's broker should upon Hurteau's behalf receive from Little his note for the price of the lumber as agreed upon, and Hurteau & Brother in their letter to Edwards & Co. direct them to ratify Lemay's order in Little's favour. Upon the faith of this acceptance, Little gave his promissory note for the price of the lumber, and received Edwards & Co.'s acceptance of Lemay's order to deliver the lumber in pursuance of a sale which Lemay informed Edwards & Co. by a letter, enclosing the order to them for acceptance that he, Lemay, had made of the lumber to Little. The effect of this transaction was plainly, as it appears to me, to direct Edwards & Co. to accept the order in Little's favour so as to become the bailees of Little of the property mentioned in the order subject to Little's order and to invest them with authority from Hurteau & Brother to do everything which might be necessary to enter into a valid agreement with Little to hold the lumber subject to his order; and it was for this purpose that Edwards & Co. were directed to accept the order so that upon Hurteau & Brother's broker handing the accepted order to Little they

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might receive from him his note for the price. It would have been quite competent for Edwards & Co. upon the order in Little's favour having been so sent to them for acceptance to have separated the quantity sold to Little from the piles of lumber in their yard belonging to Hurteau & Brother, and then to have become in express terms in charge of that lumber for and on behalf of Little, and that in substance is what their acceptance of the order in favour of Little fairly implies to have taken place. So likewise when Edwards & Co. accepted Little's order in favour of Ross & Co. and undertook to hold for Ross & Co. the lumber which they then held as Little's, under what they had reason to believe to be sufficient authority derived from Hurteau & Brother to that effect, they did so upon the faith that their acceptance by Hurteau & Brother's direction of Lemay's order in favour of Little constituted them bailees of the lumber upon behalf of Little by authority of Hurteau & Brother. Now, whether, in the absence of actual separation of the lumber sold to Little from the rest of Hurteau & Brother's lumber, the actual property in the lumber did or did not pass, the effect of the transaction was such as to have authorized, and, indeed, as it appears to me, to have directed Edwards & Co., by acceptance of Lemay's order in favour of Little, to enter into arrangements with Little and his assigns in such a manner as to be binding upon Edwards & Co. just as if the property had actually passed to Little, and they having entered into binding obligations with Ross & Co., who were purchasers for value from Little months before Hurteau & Brother asserted their title to be still continuing, Hurteau & Brother cannot now be permitted to assert such title in themselves against purchasers for value from Little, with whom Edwards & Co. have entered into an obligation to hold the lumber for them, upon the faith of authority to that effect derived from Hurteau & Brother.

This, in my opinion, is the view in which the transaction is to be regarded, and the appeal, therefore, should be al-

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lowed with costs and judgment upon the interpleader issue be ordered to be entered for the plaintiffs therein with costs.

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PATTERSON J.—Edwards & Co. in the statement of claim in their action against both parties to this interpleader issue asked for the issue, and also asked that Ross & Co. should be enjoined against bringing an action against them in respect of the lumber in contest. Ross & Co. do not seem to have filed an answer. Hurteau & Frère did so, assenting to the interpleader issue, and the order for the issue was made without any order for the injunction. The issue is whether Ross & Co. or Hurteau & Frère are entitled to 1,396,615 feet of lumber mentioned in the statement of claim or the proceeds produced by a sale of the lumber under the order of the court.

The lumber is part of a larger lot sold by Edwards & Co. to Hurteau & Frère and remaining in the yard of Edwards & Co. Hurteau & Frère sold 1,493,590 feet out of their larger quantity to Little. Little directed Edwards & Co. to hold it subject to the order of Ross & Co., who had advanced him money. Ross & Co. obtained actual delivery of 96,975 feet of it, and the 1,396,615 feet now in dispute is the remainder of 1,493,590.

I could have wished for more particular information than has been given us on one or two points.

A good deal of the argument turned on the fact that Little's lumber had not been separated from Hurteau's. That fact was, however, rather inferred than directly proved, and as to 493,590 feet there seem to be reasons for inferring the contrary. The whole Hurteau purchase was 4,212,308 feet. We are not given many particulars, in a direct form, as to this lumber, and counsel for Ross & Co. seem to have rather checked inquiry into the particulars at the trial. I find, however, that the sale to Little was of 1,000,000 feet of deals 8 to 13 feet long, and of 493,590 feet 14 to 16 feet long. The 1,000,000 feet lot was, no doubt, an undivided part of a larger quantity of the same

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8 to 13 feet grade, but the lot of 493,590 feet appears to have been all that Hurteau had of the 14 to 16 feet grade and to have been therefore a specific lot. We learn this from Lemay's bought and sold note of 12th January, 1888, when the 1,000,000 feet lot is described as "being a fair average in width of the 3,717,718 feet lot," and the last named lot is obviously what was left of the entire Hurteau purchase after deducting the quantity sold to Little and must have been of the 8 to 13 feet grade. Then the fact that the 14 to 16 feet lot was a specific parcel may be further inferred from the purchase not being in round numbers.

I think, however, that the rights of the parties to the issue must be determined on other grounds than the vesting at law of the property in specific deals.

It is the same question as the rights of the unpaid vendor to stop the goods *in transitu*. That right assumes that the legal property has passed, although the goods have not reached the possession of the vendee. If anything remained to be done in this case, such as the separation of the quantity purchased from the bulk of the vendors' deals, the right of the purchaser to the performance of that act was as absolute as his right would have been to receive possession in case of his purchase had been of specific goods, and the refusal in either case must be justified on the same grounds.

If Edwards & Co. had become bailees for Little or for Ross & Co. by attornment in respect of certain property, there would be no longer room for the question. The *transitus* would be at an end. And, in establishing such attornment, the fact of the property having been all along, or having been made, specific, would no doubt be important, and we should expect to find everything that might throw light upon it, such as the shape in which the Hurteau lumber was in the yard of Edwards & Co., carefully brought out in the evidence. The point that an attornment ought to be held to have taken place was not omitted in the argument before us, but there is really in my apprehension of

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the evidence, no support for it. The attornment relied on is the acceptance of Lemay's order of the 18th of January, 1888, which I shall read.

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Montreal, Jan. 18th, 1888.

Messrs. W. C. Edwards & Co., Rockland, Ont.

Gents,—Please deliver to Wm. Little, Esq., or order, the following lumber in your yard to my order, viz.:

1,000,000 feet B.M. 3-inch M. cull deals, 8-13.

493,590 feet B.M. 3-inch M. cull deals, 14-16.

And oblige yours truly,

(Sgd.) E. H. LEMAY.

Accepted, W. C. Edwards & Co., Jan. 20, 1888.

This document cannot be taken as evidencing any new bargain between Hurteau & Frère and Little. I am saying nothing at present as to its effect by estoppel as between Hurteau & Frère and Ross & Co. The bargain was evidenced by the bought and sold note of the 12th of January, and by the letter ratifying it addressed on the same day by Hurteau & Frère to Edwards & Co. By that bargain the deals were to be delivered free on board of barges at Rockland, which could not be done until navigation opened, with an option to Little to have any he wanted during the winter delivered to teams. The possession until delivery was obviously that of Hurteau & Frère, and I suppose, though I do not lay it down decidedly, that the risk of fire or other casualty was theirs also.

Lemay's order of the 18th of January was intended, or supposed, as it seems to me, to have been given on the 12th and to be the order spoken of in the note addressed on that day by Lemay to Edwards & Co., which I shall also read.

Montreal, January 12th, 1888.

Messrs. W. C. Edwards & Co., Rockland, Ont.

Gents,—I have this day sold to Wm. Little, Esq., the following lumber now at your yard to my order, 1,000,000 feet 3-inch M.C. deals, 8-13; 493,590 feet 3-inch M.C., 14-16.

I have given him an order on you for the delivery of same, which you will please accept and in shipping this lumber to him you will

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do me a favour by seeing that he is treated as well as myself. Your reply will oblige.

Yours truly,

(Signed) E. H. LEMAY.

We are not told that Lemay, who describes the lumber as at his order in the yard of Edwards & Co., was known in connection with it by that firm, and the deposition of N. A. Hurteau does not lead us to suppose that he had authority to do more than make a sale as broker subject to the approval of Hurteau & Frère. Accordingly we find those gentlemen on the same 12th of January addressing the following letter to Edwards & Co., and adding certain terms of the sale, which Lemay had omitted from his notice, viz., "f.o.b. of barges" with option to draw them from the piles, if he wants some during the winter."

Montreal, Jan. 12, 1887.

Messrs. W. C. Edwards & Co., Rockland, Ont.

Gentlemen.—You will please rectify Mr. Lemay's order for one million feet 3-inch mill culls, 8-13 feet, and 493,500 feet 3-inch mill culls, 14-16 feet, sold to Mr. William Little, f.o.b. of barges, with option to draw them from the piles, if he wants some during winter.

Yours truly,

(Sdg.) N. HURTEAU ET FRÈRE.

The word "rectify" is explained to be a slip, perhaps "ratify" being the word intended, but the meaning being that Lemay's order was to be acted on in the matter of delivery.

That order, which bears date the 18th, directed the delivery to be made to Little or his order, but that was to be the same delivery provided for by the bought and sold note and specified in the letter of Hurteau & Frère, viz., f.o.b., etc. That letter alone gave validity to Lemay's order, and that was the delivery which Edwards & Co. undertook by their acceptance to make. Hurteau & Frère were not relieved by the order or acceptance from loading the barges, and until that was done the delivery was not made. Ed-

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wards & Co. merely undertook, as far as Hurteau & Frère and Little were concerned, to carry out with Little or his appointee, the sale made by Hurteau & Frère to Little.

Little's order in favour of Ross & Co. and the undertaking thereon by Edwards & Co. of which Hurteau & Frère knew nothing, carried the matter no farther towards a completed delivery by attornment. The effect was to entitle Ross & Co. to obtain the delivery free on board when the time for shipping arrived, or sooner if they sent teams, but it was not delivery.

It seems to me very clear that the right of Hurteau & Frère, as unpaid vendors, to refuse to deliver to Ross & Co. is established, unless they waived it by making the lumber deliverable to Little's order, or unless they have done or authorized to be done something which estops them from asserting against Ross & Co. their right to stop *in transitu*, or what is the same thing in principle, to refuse to deliver or to revoke their order for delivery.

The analogous nature of these remedies is pointed out in the second edition of Blackburn on Sales at pp. 341 and 342.

The vendor's lien does not appear to be affected by his directing the delivery of the goods to the order of the purchaser.

In *Gunn v. Bolckow, Vaughan & Co.* (k), where a loan had been effected by the deposit of a wharfinger's certificate, which was not a document of title like a bill of lading, and where it was held that the vendor's lien remained good against the pledge of the certificate, Mellish, L.J., used language which might seem to countenance the idea that an order requiring the delivery of goods to order or to bearer would free the goods from the lien as against a transferee. He said:

The vendor having agreed by his contract that he would give the wharfinger's certificate, in order that the purchaser may have evidence that the goods have been actually made, and now are

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(k) 10 Ch. App. 491.

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actually ready to be shipped, cannot help giving the certificate; and how the fact of his giving that certificate, which does not profess to be negotiable, and does not profess to require the delivery of the goods to order or to bearer, or anything of the kind, can affect his lien as vendor, merely because the purchaser chooses to borrow money on the faith of it, I am at a loss to conceive.

Now whatever the Lord Justice had in his mind when he spoke thus of goods being required to be delivered to order or to bearer, he cannot have intended to intimate that, as a general rule, the insertion of those words would give a delivery order the character of an instrument of title or a negotiable instrument. In *Farmeloe v. Bain* (1) the vendor gave to the purchasers undertakings in these words: "We hereby undertake to deliver to your order indorsed hereon," etc., etc. The purchasers sold part of the goods, indorsed one of the documents to their vendees, and became insolvent. The original vendors were held entitled to set up their lien.

In the *Imperial Bank v. The London & St. Katharine Docks Co.* (m) Messrs. Carter sold goods to Dalton, a broker, who purchased for undisclosed principals, and signed a delivery order addressed to the Docks Co. requiring delivery to Dalton's order. Dalton indorsed the order to his principals, who pledged it with the plaintiffs. The purchasers, Dalton's principals, becoming insolvent, and possession not having been obtained under the delivery order, although the order had been deposited with the Docks Co., it was held that the unpaid vendor's lien had not been discharged.

These cases and several others are noticed in Blackburn on Sales in the discussion of the subject of dock warrants and delivery orders. In one of the cases, *Merchant Banking Co. of London v. The Phoenix Bessemer Steel Co.* (n), the goods were held to be free from the vendor's lien, on proof of a custom that by warrants such as the one in that case, which stated the iron to be deliverable to the purchasers or their assigns by indorsement, it was understood that the

(1) 1 C.P.D. 445.

(m) 5 Ch. D. 195.

(n) 5 Ch. D. 205.

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vendor had given up his lien. Jessel M.R., held that the custom had been proved; that a person giving such a warrant must be taken to know the custom, and virtually tells the trade when he issues the warrant that the goods are free from the vendor's lien. His Lordship also stated that, in the particular circumstances of that case, the defendants must have known that the warrants were intended to be used for the special purpose of pledging, and could not, therefore, be heard to set up their lien against the plaintiffs to whom the vendees had pledged the warrants.

We have nothing in the case before us like the custom proved in the case cited, nor have we, as I may state in advance of the discussion of the question of estoppel, anything resembling the circumstances which were considered sufficient to preclude the plaintiff from setting up his lien against the indorsee of the warrants.

The question of estoppel must be dealt with in this as in every other case, in my view of the principles on which the doctrine rests. These may safely be taken from the propositions formulated by Lord Esher in his judgment in *Carr v. London and N.W. Ry. Co.(o)*. Four propositions are enunciated.

1st. If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which he knows to be false, and if the second believes in such state of things, and acts on his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

2ndly. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted on in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

3rdly. If a man, whatever his real meaning may be, so

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conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

4thly. If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first, to shew that the state of facts referred to did not exist.

Familiar as these accurate and comprehensive propositions may be, it is as well to have them distinctly before us, because there is unfortunately a good deal of looseness in the way we find the doctrine of estoppel frequently appealed to and occasionally applied.

The basis of all the propositions is the representation of some fact or state of things different from the real fact, which representation has been believed and acted on. The various modes of making the representation and the circumstances under which it is made are the distinguishing features of the different propositions.

The misleading representation necessary to be established in this case is that the lumber was held by Edwards & Co. for Little free from the vendors' lien.

That representation, if made at all, was contained either in Lemay's order of the 18th of January, with the acceptance of Edwards & Co. written across it, or in the other order and undertaking which were indorsed and which are in these words:

Please hold the within mentioned quantity of deals subject to the order of Ross & Co., Quebec.

(Sgd.) WM. LITTLE.

Quebec, 28th Feb., 1888.

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Will hold within deals subject to order of Messrs. Ross & Co., as above authorized.

(Sgd.) W. C. EDWARDS & Co.

Rockland, March 15, 1888.

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The first answer on the part of Hurteau & Frère is that, whatever representation may be involved in these indorsed documents the documents were not made by them and the representation did not emanate from them. We are not trying any question between Edwards & Co. and Ross & Co.

The order given by Lemay on the 18th of January did not follow the authority he had from Hurteau & Frère, inasmuch as it omitted the qualification, upon which rightly or wrongly they placed some stress of f.o.b., etc. If the absence of those words would make it appear that the goods were free from liability to be taken in assertion of the lien, which probably would not be the case, Hurteau & Frère might justly disavow the order and maintain that they did not by any culpable negligence place Lemay in a position to give the order or lead Edwards & Co. to accept it in its imperfect shape, because they were careful to mention the terms in their letter of the 12th, which accredited the order that Lemay was to give.

But the order does not involve any statement to the prejudice of the vendor's lien. It merely designates or permits Little to designate, the person who is to receive delivery when delivery comes to be made. It seems to me to be in this respect undistinguishable from the undertaking in *Farmeloe v. Bain (p)*, to which I have already adverted, and of which Lord Esher said in that case:

It is admitted that the document in question is not a known document amongst merchants; therefore the court must look at it as they would at any other ordinary written instrument. So looking at it, it obviously contains no representation of any fact, and the plaintiffs had no right to rely upon it as such a representation, and consequently they do not bring themselves within either of the propositions as to estoppel, which I ventured to lay down in *Carr v. London & North-Western Ry. Co. (q)*, and to which I still

(p) 1 C.P.D. 445.

(q) L.R. 10 C.P. 307.

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adhere. It was a mere undertaking or contract between the plaintiffs and their immediate vendees.

It is worth remarking that Ross & Co. are not shewn to have lent their money in reliance upon the lumber being free from the lien. That phase of the matter probably was not considered by them when they made the advance.

It is shewn, however, that they knew that the lumber was not paid for, and that they believed Little, with whom they had large dealings, to be solvent. It is also shewn that when the order of the 18th of January was shewn to them, the bought and sold note of the 12th, which contained the terms f.o.b., etc., was also shewn to them.

I think the appeal fails on all grounds, and ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *O'Connor & Hogg.*

Solicitors for the respondents: *Beatty, Chadwick, Blackstock & Galt.*

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*THE CITY OF SAINT JOHN (DEFEN- } APPELLANT; ¹⁸⁸⁰
 DANT)..... } **Feb. 19, 20.
 **June 10.

AND

GEORGE PATTISON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal corporation—Streets—Power to raise the level—Liability for injury to owners of abutting property.

The city of Saint John, by its charter, had power to alter and repair its streets. Under this charter the corporation frequently altered the level of streets. An Act of the Legislature recited that, owing to irregularities of the ground upon which the city was situated, it had been found expedient to make alterations in the level of streets, that this had rendered it necessary for proprietors of houses to erect steps and stairways to obtain access to their properties, that the corporation had undertaken to authorize this being done but doubts had arisen as to its power so to do. The statute thereupon proceeded to empower the council of the corporation to permit such steps to be placed upon the highway so long as they did not encroach beyond a certain distance. In 1874 the corporation raised the level of Church street supporting the work in front of the plaintiff's house by a wall and placing a fence thereon, cutting off his direct access to the street. The plaintiff claimed first, that the defendants had no statutory authority to do the work complained of, and, secondly, that, in the construction of the work, the defendants had acted arbitrarily and oppressively, even if they had the statutory power to raise the level of the street. At the trial the plaintiff was nonsuited, the court holding that, in raising the level of the street, the corporation had acted within the powers granted by its charter and that there was no evidence to support the contention that the council had acted arbitrarily. On appeal to the full court it was held, the Chief Justice and Duff J., dissenting, that the non-suit should be set aside and a new

*Incorrectly reported, Cass. Dig. 173.

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

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trial had between the parties, the court holding that as a matter of law the defendants had not, under any act of the Legislature, authority to raise the street in the manner in which they did raise it, and that, whatever might be their jurisdiction over the street, the particular mode in which they raised the street in question was in excess of their jurisdiction. On appeal to the Supreme Court of Canada,

Held, Fournier and Henry JJ., dissenting, that the judgment of the full court (18 N.B. Rep. 636) should be set aside, and the non-suit granted at the trial restored.

Held, per Gwynne J., that, by the Act of Incorporation and other Acts of the Legislature, the power of altering and repairing the highway was restricted by no condition save the implied one that the work should be done so as not to constitute a public nuisance; and, if not a public nuisance, the convenience of all private persons, however great the damages suffered, had to yield to the public interest.

Leader v. Moxon (2 W. Bl. 924), discussed.

APPEAL from a decision of¹ the Supreme Court of New Brunswick (a), setting aside a non-suit granted at the trial and ordering a new trial.

The facts of the case are sufficiently set forth in the head note and judgments.

Thompson Q.C., appeared for the appellants.

Weldon Q.C., appeared for the respondent.

The only reasons for judgment delivered were the following:

HENRY J. (dissenting)—After a careful consideration of the circumstances of the case I have reached the conclusion that the appeal should be dismissed. The respondent was non-suited on the trial, but on the argument of a rule *nisi* to set it aside and grant a new trial it was made absolute. From that decision the matter came to this court by appeal.

(a) 18 N.B. Rep. 636.

The respondent was the occupier of a house, tin-shop and premises on a street in the city of St. John, New Brunswick, on a level with the roadway and sidewalk, the latter being about four or five feet in width. The appellants caused the roadway opposite to respondents premises to be raised between three and four feet and erected a fence on the retaining perpendicular wall about three and a half feet in height. Up to the time of that being done the respondent had access to the roadway from his premises and had the benefit of communication by means of carts, carriages and of customers to his shop from the roadway. These were substantial common law rights, the loss of which not only injured his enjoyment of the premises, but tended to injure his business and lessen the value of his property. If, therefore, the appellants were not justified in raising the roadway and erecting the wall and fence as they did, he is entitled to recover. They do not, and could not, claim to have been required by any legislative provision to raise the street in question, nor were they guaranteed by legislation against any failure, although acting *bonâ fide* in the execution of their powers.

The result is that they must bear the consequences of any oppressive or negligent use of them by which wrong is done to another. Without questioning the general power of the appellants to alter, amend or repair the streets within their jurisdiction they are, in my opinion, amenable to legal principles, as to its execution. They have a discretionary power as to what streets shall be altered, amended or repaired, but it must be exercised within proper and reasonable bounds. So far as mere public rights or interests are concerned their decision is conclusive. When private rights are to be invaded the question is essentially different. If, in the opinion of the appellants, public interests called for the raising or cutting down of a street which could only be done by sacrificing the rights and interests of some of those whose property adjoined and by which the damage necessarily done to individuals by far exceeded the public bene-

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fit to be derived such a use of the power might be fairly submitted to a jury as arbitrary, oppressive or even malicious, and in such cases would, as done frequently in England, be decided to be an excess of authority. The case of *Leader v. Moxon*(b) establishes this sound doctrine, and although thought to be questioned by Lord Kenyon in the *Governors of the British Cast Plate Manufactures v. Meredith*(c) is not really so. It has, on the contrary, been approved in several subsequent cases and most emphatically by Gibbs C.J., in *Sutton v. Clarke*(d), where he approved the principles upon which it was decided. He says (referring to *Leader v. Moxon*(b)):

The Commissioners were exercising powers given them by an Act of Parliament, but the court thought they were acting in a most tyrannical and oppressive manner, and that though they had a right to pave, and perhaps to raise, the street, they had acted so arbitrarily that they were answerable. With that judgment this court entirely agrees.

If, then, the appellants having the discretion as to the public rights involved have done that which in respect of the vested rights of the respondent they have no justification, it is a question merely of damages for a jury.

Added to the responsibility as to the exercise of their discretionary power before referred to, the appellants are responsible for the proper and careful use of the means employed and the mode adopted.

Sidewalks and roadways are, as a general rule made on a level with each other, and it is the exception to find them deliberately made otherwise. The appellants in this case adopted a very unusual, exceptional, and, I think, unnecessary course when destroying the relative normal position of the two and by doing so would be justified only by shewing something like a controlling necessity. The respondent had a vested interest in and the right to the continuance of them as they existed in this respect before the change, and

(b) 3 Wilson 461, 2 W. Bl. 924.

(c) 4 T.R. 794.

(d) 6 Taunton 29.

he could only be deprived of them by the exercise of an irresponsible power or by a controlling public necessity. Neither, I think, existed. There may have been a power to raise the street, but if so the sidewalk should have been raised also. Had that been done the respondent's communication with the roadway would not have been destroyed. It is true that doing so would have been an injury so far to him and to all those on the same side of the street, but if that had been done a question might have arisen as to whether that were justifiable or not under the exercise of the discretionary powers of the appellants; but admitting it might be so considered, it only proves that a course was open and practicable which should have been adopted as the usual one. The appellants virtually contend they had that power, but did not exercise it because they considered it better not to do so, but to substitute the course adopted. These are questions proper for a jury to determine through evidence submitted. If the raising of the roadway in the way adopted was the only practical way of making the desired improvement, but that that must result in cutting off many householders from the roadway, then it would be a question to be submitted whether their doing so would not be an arbitrary and oppressive exercise of their powers. If they could have raised the street the height mentioned they should have raised also the sidewalk so that the respondent's right to communication with the roadway should be preserved. It might injure him to that extent, but if the act were justifiable, he should submit. It was, however, alleged by one of the witnesses that the work was done as it was to please the respondent. There was no plea under which such evidence could have been received at the trial without an amendment of the pleading. No amendment was made, but it was agreed that the court should if necessary for raising any point on the evidence allow such amendment as might be deemed necessary for that purpose, but it does not appear that any was at any time since made, but whether or not it makes now no difference. If a point at

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all on the trial it was matter of defence which should have been submitted to and found by the jury and legitimately could form no matter for a non-suit. It would have been a distinct issue on a plea of justification and therefore could not operate to justify a non-suit. Besides the loose expression noticed by the learned presiding judge would not, without something more definite and specific, be at all sufficient to sustain a plea of leave and license,

We must, therefore, decide the issue before us wholly irrespective of the evidence in question. Addison in his treatise on torts, p. 553, says:

If the act done is in itself lawful it can only become unlawful in consequence of the negligent and improper manner in which it is executed.

and he cites *Boulton v. Crouther(e)*, and *Governor, etc., of British Cast Plate Manufacturers v. Meredith(f)*, but on the following page he adds:

But if trustees and commissioners of public works acting within their jurisdiction and exercising powers given them by Act of Parliament and wantonly or oppressively do unnecessary injury to individuals they are personally responsible in damages to the parties injured.

And cites *Leader v. Moxon(b)* before referred to. The ground taken by counsel of the appellants that the *bonâ fide* execution of statutory powers by them is a defence under all circumstances cannot be admitted. As I before stated it can be so held when the mode and manner of the execution are prescribed, and even in that case the *bonâ fide* execution does not excuse negligence for which the party is personally answerable in damages to the party injured.

In this case there is no parliamentary direction as to the execution of the powers and those executing them must be held answerable if, from negligence or acting in excess of them by arbitrary tyrannical, wanton or oppressive action, personal injury is done to an individual.

(e) 2 B. & C. 703.

(f) 4 T.R. 704.

(b) 2 W. Bl. 924.

The court in *Leader v. Moron* (b) held that raising a lane opposite the plaintiff's dwelling, five or six feet by which the passage by her doors and the light of her windows were impeded, although it was necessary to produce an inclined plane, sustained the finding of the jury of damages for the plaintiff on the ground that the proceeding was wanton and oppressive. The doctrine that a body executing statutory powers shall not be at all responsible for damage unnecessarily done to private interests, no matter how arbitrarily, oppressively or negligently, is one no court should uphold.

After the raising of the roadway how was the respondent situated? He could not have a load of any kind taken to or from his house or shop. He could not have any access to the yard or outbuildings to have coal, wood, hay or other necessary things hauled there. His customers could not enter his shop from the roadway. The evidence does not shew if he kept horses or carriages, but if not he had the right to do so at any time he pleased, but is now prevented from taking them to his stable; or if he wished to make sale of the property, shorn as it has been of that and other vested privileges, it would certainly bring a much lower price. Besides, the wall and fence, within four feet of the front of a man's residence would undoubtedly be considered a nuisance by any body, and I have little doubt were such placed in front of the residence of anyone of those who ordered it in this case, he would not have been slow to resent it. The respondent was so placed that by no means in his power could he obtain access to the roadway, and as far as affected his communication by carriages of any kind with the adjoining street, it became useless to him, and for all really practical or beneficial purposes it might as well have been closed at each end of the square. Acts and measures that produce such results, I have no difficulty in characterizing as arbitrary, wanton and oppressive, and for which not the slightest actual necessity has been shewn.

I am therefore of the opinion the appeal should be dismissed, and the judgment below affirmed with costs.

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GWYNNE J.—The question which is presented in this case arises wholly upon the first, second and third counts of the declaration and the second and fourth pleas thereto, for under the fourth which is—for breaking and entering a close of the plaintiff—no evidence what was offered, there being no foundation for the pretension that the soil of any part of the street in which the obstruction complained of was placed was the close, soil or freehold of the plaintiff.

The complaint in the first count is that while the plaintiff was possessed of a messuage, dwelling house, shop and premises in which he lived and carried on the trade of a tinsmith, situate upon the south side of Church street in the city of St. John, in which he was used and accustomed to make divers great gains and profits by the sale and repairing of large quantities of tin and iron-ware and goods to and from divers persons passing and repassing by, through and along the said highway into the said messuage, etc., etc., that the defendants wrongfully and injuriously raised and caused to be raised and built up the said street called Church street, and the soil thereof before and in front of the said messuage and premises by then and there placing great quantities of wood timber, boards, plank, earth, stones, gravel and soil in and upon the said street there, to a much greater height than the said street or the soil thereof was before raised, to wit, to the height of six feet, and so close to and against the said part of the said messuage, etc., etc., that the said messuage, etc., etc., etc., and the doors, entrances and passages thereof and the lights and windows thereof were and still are greatly blocked up and obstructed and the plaintiff hath been hindered and obstructed and prevented from carrying on his said trade in so large and beneficial a manner as he otherwise might and would have done whereby the plaintiff has lost divers great gains and profits, etc. This count, it will be observed, does not allege that the obstruction complained of was of such a degree as to amount to a public nuisance, it alleges merely that the defendants wrongfully obstructed the street or public high-

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way, doing thereby a particular injury to the plaintiff. The second count varies very little in form, and in substance not at all, from the first. In it the complaint is, that whereas there was and still of right ought to be a certain street or highway in the city of St. John called Church street whereon all persons might lawfully go, return, pass and re-pass on foot and with horses, carriages, etc., at all times of the year at their free will and pleasure and the plaintiff was possessed of a certain messuage, dwelling house, shop and premises situate and confronting on the south side of said street and highway in which he carried on the trade of a tinsmith, yet the defendants well knowing the premises, but contriving and wrongfully intending to injure the plaintiff in his said trade and to prevent his customers from passing and re-passing by and along the said street and highway, to wit, on the 1st of July, 1874, and for a long space of time to wit, for the space of six months then next following, obstructed the said street or highway, and during the said time kept the said street or highway obstructed for an unreasonable and unnecessary length of time, and thereby during all the time aforesaid obstructed the said highway and street and hindered and prevented the plaintiff from carrying on his said trade in as large and beneficial a manner as he might otherwise and would have done whereby plaintiff was deprived of divers great gains, etc., etc. The only difference seems to be that perhaps this count is open to the construction that in it the plaintiff rests his right of action upon the act complained of as being a public nuisance, and that the plaintiff has sustained a particular or peculiar injury beyond what is felt by the public at large.

The gist of the third count is precisely similar to that of the second.

In it the plaintiff, after reciting that he was possessed of a certain messuage, etc., etc., etc., situate on a certain street or public highway in the city of St. John known as Church street, in which messuage, etc., etc., etc., the plaintiff resided and carried on the trade of a tinsmith from

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which he was accustomed to make great gains and profits, avers that the defendants, to wit, on the first day of July, 1874, and from thence hitherto wrongfully and injuriously by placing stones, earth, soil, planks, timber and boards on the said street or public highway and by wrongfully, negligently and improperly raising the said street or public highway opposite to and in front of the said messuage, etc., etc., etc., of the plaintiff, hindered and prevented the plaintiff from using the said street or public highway by himself, his family, servants and apprentices, and the plaintiff, from the time of the committing of the said grievances by the defendants and from thence hitherto, has been hindered, incommoded and prevented in the use, occupation and enjoyment of the said street or public highway and of the said messuage, etc., etc., etc., and hath been and is greatly damaged in his said trade.

The use of the word "negligently" in connection with the word "wrongfully" in the statement of the obstruction mentioned in this count neither adds any force to the complaint nor makes any variation in it from what it would be without that word. The frame of the count is not for negligence in doing what the count admits might, but for such negligence, be lawfully done, and attributing the injury complained of to such negligence in doing a lawful act; on the contrary the act which the count complained of is charged to have been done "wrongfully and injuriously," that is to say, unlawfully or without right. The complaint, therefore, that an act was done "wrongfully and injuriously" acquires no additional force by the addition of the epithet "negligently." All these three counts are then counts substantially the same, namely, for an unlawful obstruction on a public highway from which, whether amounting to a public nuisance or not, the plaintiff hath sustained a peculiar injury which entitles him to maintain an action.

Whether the counts or any of them are framed as complaining of an obstruction amounting to a public nuisance

or not is unimportant, for to all these counts the defendants plead as follows:—

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And for a second plea as to the first, second and third counts, the defendants say that under and by virtue of the charter of the city of St. John and under and by virtue of divers acts of the General Assembly of the Province in such case made and provided, the streets of the said city were placed under the power and control of the defendants who had and have full power and authority to raise up and level or cut down the same or otherwise alter and change the levels thereof in such manner and at such time or times as in the judgment of the defendants should seem right and proper, and that before and at the time of committing the several supposed grievances in the first, second and third counts mentioned they, the defendants, had determined that it was necessary and proper to raise and level Church street in those counts mentioned, and thereupon the defendants did in the exercise of their said powers raise and level Church street aforesaid and, in so doing, did necessarily raise the soil and pavement thereof before and in front of the said several messuages, etc., etc., etc., of the plaintiff and did necessarily place and lay divers great quantities of wood, boards, timber, plank, earth, stones, gravel and soil in and upon the said street there, and did raise the level of the said street opposite to the said several messuages, etc., etc., etc., of the plaintiff and did all other acts necessary to raise the level of the said street doing thereby to the said plaintiff no unnecessary damage, as they the defendants might for the cause aforesaid, which are the several wrongs and grievances by the plaintiff in his first, second and third counts alleged and not otherwise.

And for the fourth plea as to the first, second and third counts the defendants say that before and at the time, etc., etc., etc., they, the defendants, were and still are the conservators of the streets of the city of St. John, and they then had and still have the right, power and authority to level and cut down or raise up the said streets or to change and alter the level of the said streets in such manner as to the defendants should seem proper, and for the benefit of the inhabitants of the city of St. John and thereupon and because, in the judgment of the defendants, it was necessary and proper and for the benefit of the inhabitants of the said city that the said street called Church street should be raised and levelled the defendants did raise and level

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the said street as they lawfully might for the cause aforesaid and, in doing so, did no unnecessary damage to the plaintiff, which are the same grievances in the said first, second and third counts mentioned.

The effect of these pleas is to displace the allegation of the *wrongful* character of the act complained of, to confess the causing of the obstruction of the highway complained of and avoid the plaintiff's alleged causes of action by justifying the committing the obstruction in the interest of and for the benefit of the public in virtue of authority vested in the defendants for that purpose by Acts of Parliament affirming and confirming their charter as a city corporation, thus removing the foundation upon which the plaintiff's cause of action in his first, second and third counts is rested, namely, that the obstruction was a wrongful act, by shewing matter which, if true, establishes the act to be lawful and wholly displaces the causes of action.

The plaintiff simply joined issue upon those pleas and went down to trial of the issues so joined. Joinder in issue upon these pleas admitted in effect the fact that the acts admitted in and justified by the pleas were the acts complained of. It raised no question as to the acts complained of being in excess of the jurisdiction of the defendants to raise the street, assuming them to have such jurisdiction; it merely called in question and denied the authority pleaded by the defendants to do the acts admitted in their pleas and which the joinder in issue admitted to be those complained of. It in effect re-affirmed the complaint contained in the first, second and third counts, namely, that the acts admitted by the plea were wrongful, for that the defendants had not the authority to do them in virtue of which they justified. This issue, as appears by the argument before us and much insisted upon, did raise a very material question, which would seem to have really been the question which the parties went down to have determined, namely, whether the power conferred upon the defendants in virtue of which they justified the act complained of, namely,

to make and lay out and to alter, amend and repair and improve all streets, etc., etc., etc.,

gave them power to raise or sink the level of the streets to the extent of several feet? The act complained of in this case being that they had so raised the level of Church street, and whether, assuming the defendants to have the power so to raise or sink the level of streets that power was not, by their charter and the Acts of Parliament upon which they relied, qualified by the condition that they should not exercise it without the consent of the owners of property injured by such public improvement.

The charter which was granted in the year 1785 under the Great Seal of the then Province of New Brunswick, after constituting the inhabitants of the city of St. John to be a body corporate by the name of mayor, aldermen and commonalty of the city of St. John, among other provisions and powers, after declaring them to be conservators of the water of the river, harbour and bay of the said city, and after vesting in them power to build such and so many piers and wharves in the said river as to them shall seem proper, as well for the better securing the said harbour and for the lading and unlading of goods as for the making docks and slips for the purposes aforesaid, proceeds in these words:

And We do further for Us, Our Heirs and Successors give and grant unto the said mayor, aldermen and commonalty and their successors that they and their successors shall from time to time and at all times hereinafter have full power, license and authority not only to establish, appoint, order and direct the making and laying out all other streets, lanes, alleys, highways, watercourses, bridges and slips heretofore made, laid out or used, or hereafter to be made, laid out and used, but also the altering, amending and repairing all such streets, lanes, alleys, highways, watercourses, bridges and slips heretofore made, laid out or used or hereafter to be made, laid out or used in and throughout the said city of St. John and the vicinity thereof throughout the county of St. John hereinafter mentioned and erected and also beyond the limits of the said city, on either side thereof, so always as such piers or wharves so to be erected or streets so to be laid out do not extend to the taking away of any person's right or property without his,

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her or their consent, or by some known laws of the said Province of New Brunswick or by the law of the land.

In the year following the granting of this charter the Legislature of the Province of New Brunswick by an Act, 26 Geo. III. ch. 46, and passed for the purpose of confirming unto the city of St. John its rights and privileges, enacted that:

The mayor, aldermen and commonalty of the city of St. John shall and may forever hereafter remain, continue and be a body corporate and politic in *de facto et nomine* by the name of the mayor, aldermen and commonalty of the city of St. John, and by that name sue and be sued, plead and be impleaded, etc., etc., and that all and singular letters patent, grants, charters and gifts sealed under the Great Seal of this Province heretofore made and granted unto the mayor, aldermen and commonalty of the city of St. John be and are hereby declared to be and shall be good, valid, perfect, authentic and effectual in the law and shall stand and be taken, reputed, deemed and adjudged good, perfect, sure, available, authentic and effectual in the law against the King's Majesty, His Heirs and Successors and all and every person or persons whomsoever according to the tenor and effect of the said letters patent, grants, charters and gifts, and that the same be and are to all intents and purposes hereby ratified and confirmed.

The effect of this Act it cannot be doubted was, by legislative authority, to vest in the body corporate all the powers purported to be vested in it by the charter just as if those powers were specially enumerated in the Act instead of being referred to as contained in the charter which the Act ratified and confirmed.

Acts of the legislature were repeatedly passed varying, amending and extending the powers expressed by the charter to be vested in the corporation or supposed so to be vested, and among such Acts, 9 Geo. IV. ch. 4, intituled "An Act relative to the streets and squares of the city of St. John," whereby after reciting that

In consequence of the irregularities of the ground upon which the city of St. John is laid out it has been found expedient to make various and extensive alterations in the level of the streets which have rendered it necessary, in many instances, for the proprietors of houses fronting on such streets to erect steps or stairways in

order to have access to their respective houses, and it is considered that the general width of the streets of the city will admit the placing of such steps or stairways without any material obstruction to the passage along such streets and the same have been authorized by the corporation of the said city; and whereas doubts have arisen whether such corporation is empowered by charter or by any law now in force to permit the erection of such steps or stairways, and it is expedient that the said corporation should be allowed to exercise such power under certain limitations and restrictions;

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it was enacted that:

It shall and may be lawful for the mayor, etc., etc., or the major part of them in common council convened, to authorize and allow the erecting, placing and maintaining of steps or stairways for the convenient access to the ground floor of houses adjoining any street or streets in such parts of the said city as they may deem proper, and from time to time to make, establish and ordain such by-laws, ordinances, rules and regulations as well for keeping, erecting, placing or maintaining as for the better regulating and arranging with uniformity such steps or stairways, and also for the taking down and removal either in whole or in part of such steps or stairways as are now erected or hereafter may be erected in the said city, provided always that no steps or stairways shall be allowed to extend out upon such streets or any of them more than four feet, or more than a tenth part of the breadth of such streets as are less than 40 feet broad, and provided also that no steps leading to any other than the ground floor or story shall be placed upon any part of the said streets.

This Act was declared to be in force for ten years only, and, having been passed on 5th April, 1828, would have expired in April, 1838, if it had not been continued on the 9th March, 1838, by 1 Vict. ch. 26, until the 1st of April, 1858, this Act was revived and continued by 22 Vict. ch. 41, until the first day of May, 1880.

These Acts clearly shew a repeated legislative recognition that under the terms "altering, amending and repairing," used in the charter, the corporation had power so to alter the levels of the streets as to necessitate for the convenience of householders upon streets so altered, the making steps or stairways to enable them to have communication between the ground floors of their houses and the streets so altered and to remove the inconvenience so occasioned to

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such householders, the corporation was authorized to permit them to erect steps or stairways from the altered level of the streets to the ground floor of their houses, provided that such steps should not extend out in the streets more than four feet into streets of the width of 40 feet, nor more than one-tenth part of the width of all streets of a less width than 40 feet.

It is worthy of notice that this Act makes no reference to the fact whether the altered level of the streets should be raised above or sunk below the level of the ground floors of the adjoining houses and the language equally applies to enable the corporation to authorize steps to be constructed from a raised level down to, as from a sunken level up to, the ground floors of houses provided such steps should not intrude into the public street beyond the prescribed distance, if consistently with the public benefit and the avoidance of public nuisance or inconvenience they should deem it advisable in particular cases not to carry the raised level so close to private houses as wholly to close up and prevent all communication between the ground floor of such houses and the altered streets, thus injuring materially the value of such house property. So far as the public convenience should be concerned it does not seem that this convenience would be more prejudiced if steps should be constructed from the doorways of a continuous row of houses all along a street up to the altered level of the street, if not more than four feet from the houses, than by a row of steps commencing on a sunken level four feet from the houses up to the doorways. The former might be as great a convenience to householders (by giving them the means of making use of their houses or adapting them to the altered level before it should be extended up to the very walls of their houses) so as to give them access from their houses down to a sunken level would be; and the object of the Act seems to have been to enable the corporation, when altering to a very considerable extent the levels of streets. (which the Acts of 9 Geo. IV. ch. 4, 1 Viet. ch. 26, and 22

Vict. ch. 41, had declared to be necessary by reason of the irregularities of the ground upon which the city is laid out) to permit obstructions in streets contiguous to houses abutting on such altered streets to extend into the streets to the distance of one-tenth of the width of such streets, without exposing themselves to any liability therefor to the public as for a public nuisance. Then by 3 Wm. IV. ch. 13, it was recited that:—

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Whereas the mayor, etc., etc., of the city of St. John, by the charter of the said city ratified by an Act of the General Assembly, are authorized and empowered to make, lay out, alter, amend and repair the streets, highways and bridges in and throughout the said city and the vicinity thereof and also beyond the limits of the said city, on either side thereof throughout the county of St. John, * * provided that nothing herein contained shall extend to, alter or abridge the powers of the said mayor, etc., etc., within the limits of the said city according to the provisions of the charter.

By 22 Vict. ch. 37, the legislature has added the word "improving" to the words "making, repairing and altering" used in the charter.

At the trial, the act of which the plaintiff complained was proved to be the raising of the level of Church street on a gradual incline descending westward from a street called Canterbury street, passing in front of the plaintiff's house, which was situate upon the south side of Church street. The height to which Church street was raised at Canterbury street was six feet. Here steps were constructed leading down from the raised level at Canterbury street to a piece, of about four feet in width, left for a foot-path or sidewalk on the southerly limit of Church street, passing the plaintiff's house, to the termination of the alteration in the street. Opposite the corner of plaintiff's house nearest Canterbury street the raised portion was 3 feet 5 inches above the sidewalk; opposite plaintiff's shop door it was 3 feet, falling down to 2 feet 6 inches, opposite the west corner of his house and so inclining down to the original level at the termination of the alteration which was a short distance west of plaintiff's house. Along the southern

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limit of the raised portion was erected, from Canterbury street, a retaining wall graduating in height to the level of the raised portion, and on this retaining wall was placed an open rail fence which, opposite the plaintiff's house, was three feet above the retaining wall. It was proved that this fence was erected for the benefit and protection of the public, and that the street would have been unsafe without it. This was not disputed; no attempt whatever was made to controvert it. Close to plaintiff's door there were steps leading down from the raised level to the sidewalk, so as to leave a continuous sidewalk from Canterbury street of the same width as the old sidewalk, the retaining wall having been built along the edge of the old platform or sidewalk. This was the evidence for the plaintiff. Upon the part of the defendants, who relied upon their charter and the Acts of Parliament confirming and amending it, it was proved that Church street was an old street, established in 1811, That in September, 1874, the common council of the defendant corporation authorized the work complained of by a resolution

that the northerly sidewalk and the roadway of Church street west of Canterbury street be raised to a grade running in one line from the present level of Canterbury street to the present surface of Prince William street, and that the southerly sidewalk be raised, as far as possible at present, and a retaining wall be built on the southern side of the roadway.

It was proved by the city engineer that the work was done under the above resolution; that the raising of the street was absolutely necessary in the interest of the public. This point was not disputed. That the work was done for the *bonâ fide* purpose of carrying out the order of the common council, doing as little damage to plaintiff as possible, and that the work opposite the plaintiff's house was done, as it was, to please the plaintiff. The plaintiff, who had been examined as a witness on his own behalf, was not questioned upon this point, nor was he called in reply to contradict this piece of evidence, so that it remains wholly uncontradicted whatever may be its value. Up to the close

of the defendants' evidence the plaintiff's contention, in the words of his counsel upon these three first counts, was:

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That the defendants had no authority in law to do what they did, that they had a right to repair streets and lay down sidewalks, but that the law must have a reasonable construction, and that the right to amend streets must not be construed to give them a right to interfere with private rights.

At the close of the defendants' case plaintiff's counsel, however, asked leave to amend his pleading by replying by way of new assignment to the defendants' second and fourth pleas as follows:

And the plaintiff as to the defendants' second and fourth pleas further says that he sues not only for the trespass or grievance therein admitted, but also for other trespasses and grievances committed by the defendants in excess of the alleged rights and on other occasions and for other purposes than those referred to in the said pleas.

No further evidence was offered or proposed to be entered into. The learned counsel for the defendants objected to this proposed amendment being allowed, and his objection led to an argument between him and the learned counsel for the plaintiff. I confess I am unable to see why the learned counsel for the defendants so strenuously opposed the new assignment, for I cannot see that "no new evidence being intended to be offered," its being allowed, with a plea of not guilty thereto, would have made any material alteration in the line of defence or have operated to the prejudice of the defendants' defence, for the only question raised by a plea of not guilty to the new assignment in addition to that already raised by the joinder in issue to the pleas, would have been, whether or not the mode in which the evidence shews that the defendants did the act justified by them in their plea was in excess of their jurisdiction; that is to say, assuming the defendants to have had jurisdiction to raise the level of the street across to plaintiff's house and so to have blocked him up altogether, whether or not the stopping short in the exercise of that jurisdiction and the

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raising the street, as it in fact was raised, with the space of four feet left for sidewalk was in excess of their jurisdiction, and consequently an illegal act entitling the plaintiff to recover for the particular injury thereby sustained by him; and this was the point to which the defendants' whole defence was addressed. However, the defendants' counsel objected to the new assignment being allowed, and to terminate the argument raised thereon he made a proposition which was accepted by plaintiff's counsel, and which, as appears by the case submitted to us, was entered upon the notes of the learned judge who tried the case as follows:

Mr. Thompson proposes that the whole matter may be discussed on the pleadings as they now are under the evidence and the rights of the parties may be adjudicated upon on the evidence without any question being raised as to pleadings; and that the court, if it should be necessary for raising any point on the evidence as it now stands, may allow such amendment as it may deem necessary for that purpose and to this the Attorney-General agrees.

Under this agreement the defendants' counsel moved for a non-suit, his contention simply being that the evidence having shewn that the defendants raised the grade of the street in the honest exercise of power in that behalf given to them by the charter and Acts of Assembly, that the defendants were the sole judges of the necessity of raising the street and that their decision could not be reviewed by a jury, and therefore that having acted within the scope of their authority they were not liable to the plaintiff, whatever damage he may have suffered.

The contention of the learned Attorney-General, for the plaintiff, was taken from the case submitted, while weakly contending that the corporation had no power to raise the street at all under the words in the charter and Acts of Assembly "to alter, amend, repair and improve," and that their power, if any, was qualified by the condition of obtaining the consent of the owners of property abutting on the street, rested his main contention (while admitting that

when the legislature authorizes an act to be done, the doing of that act does not constitute a legal injury) upon this, that as he contended the corporation was not authorized to run a wall up the middle of the street or put a fence in the middle of the street (alluding to the retaining wall built four feet from the houses on the southern limit of the street and the open fence erected thereon), that they ought to have raised the street all the way across or not have touched it, and he added that it might be contended that the power of the defendants was exercised in this instance arbitrarily and oppressively. As to the main point insisted upon by the Attorney-General, namely, that the leaving the sidewalk at its former level and not continuing the raised grade across the sidewalk to the houses, that was a point only open upon the assumption that the new assignment was upon the record and yet no order for its being put on was made, and the learned counsel for the defendants in his reply repeated his contention that the defendants had by their character and the Acts of Assembly full power and jurisdiction to raise the street in the manner in which they did raise it and that, this being so, all idea of their having acted arbitrarily and oppressively was out of the question, and he, moreover, relied upon the evidence which had been given by the city engineer, and which had not been contradicted to the effect that the sidewalk had been left at its old level to please the plaintiff. No objection whatever was made to the right of the defendants' counsel to rest, if necessary, upon this portion of the evidence as uncontradicted, under the agreement entered into that the case should be argued upon the evidence taken, nor was any attempt made to contradict that piece of evidence, nor was it suggested that it could be contradicted. The learned judge at the close of the argument expressed himself unable to see any evidence of any wanton or arbitrary conduct upon the part of the defendants, and he referred to the evidence given that the sidewalk was left at its old level to satisfy the plaintiff himself, this being the light in which

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he understood the evidence of the city engineer upon that point. Here again an opportunity was offered to the plaintiff, of which he did not avail himself, to question the effect of that evidence or the construction put upon it by the learned judge, as well as by the defendants' counsel, and no offer was made to displace the effect of that evidence, nor was it suggested that it could be displaced or contradicted. The learned judge then delivered his judgment to the effect that the charter and Acts of Assembly gave the defendants full authority to raise the level of the street, and that in them was vested the sole discretion as to the time and manner of doing it and that, having exercised a *bonâ fide* discretion in the matter and raised it, the damage sustained by the plaintiff was not the subject of an action, that as to the erection of the fence on the wall it was necessary for the protection of the public, and that it was the duty of the defendants to put it there for that purpose and he entered a nonsuit.

This nonsuit was set aside by the judgment of three to two of the learned judges of the Supreme Court of New Brunswick.

One of the learned judges constituting the majority declining to express any opinion whether or not the defendants had power to build the street up directly against the plaintiff's house, held that they had no right to raise the street in the manner they did, leaving the space which was left between the houses and the retaining wall, and as to the evidence of the city engineer that the space between the retaining wall and the plaintiff's premises was left to please the plaintiff, he held that, "however this might be this should have been left to the jury," and he was of opinion, further that, assuming the defendants had a right to interfere with the street, it should have been left to the jury to say whether the defendants had or had not acted arbitrarily in the exercise of their power.

Another of the learned judges held that even if the power of the corporation had been exercised with reason-

able care the erecting a fence in front of the house in the occupation of the plaintiff's family and his tin-shop was not authorized by their charter, and it was a question for the jury; that the fact of erecting the fence and putting up the street within a few feet of the plaintiff's premises preventing all access except by a narrow sidewalk three or four feet wide was, of itself, sufficient evidence for a jury to determine whether it was wantonly or carelessly done, and, as to the evidence of the city engineer that this was done to please or satisfy the plaintiff, the learned judge held that the bringing of the action sufficiently negated that evidence, and that this question should have been left to the jury. The third learned judge concurred with the other two, and the nonsuit was set aside and a new trial ordered.

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I am constrained to say that I cannot concur either in the reasons given by the majority of the court for their judgment or in their conclusion for assuming even the new assignment to be upon the record and an issue joined upon a plea of not guilty thereto, the record, as I have already pointed out, would have raised no question as to whether or not the plaintiff had a cause of action by reason of the defendants having done arbitrarily, wantonly or negligently what they did do, if they acted within their legal authority and jurisdiction. The sole question would have been, whether what they did, in the manner in which they did it, was done in the exercise of their jurisdiction or in excess of it? The learned judges constituting the majority of the court below have expressed the opinion that as matter of law the defendants had no right whatever to raise the street in the manner in which they did raise it. This opinion is based upon their construction of the charter and the Acts of Parliament, upon which alone the defendants have rested their defence, and yet they hold that this question should have been submitted to the jury. What question? Should it be submitted to the jury to say whether or not the defendants had under their charter or any Acts of

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Parliament that authority which the court as matter of law holds they had not? They further say that the mere fact of the defendants having erected the fence on the retaining wall, and having raised the street, in the manner they did raise it, which they hold that the defendants had done without any lawful authority, was in itself sufficient evidence to be left to the jury upon a question which they hold should have been submitted to them, namely, whether that which the court, as matter of law, pronounced to have been unlawfully done was or was not also wantonly and carelessly done? Now it is apparent that, if the court is correct in holding that what the defendants did was not authorized by the charter and Acts of Parliament upon which alone they relied for their justification, nothing would have remained to be decided but the amount of the plaintiff's damages, and it would be altogether beside the issues in the cause and wholly irrelevant to take the opinion of a jury upon a question of wantonness or negligence. Then as to the point depending upon the evidence of the city engineer, namely, that what is now objected to in the manner of raising the street was done to please or satisfy the plaintiff, it is apparent that the plaintiff's bringing this action has not and could not have the force attributed to it of being in contradiction of the evidence of the city engineer upon the point which otherwise was wholly uncontradicted (and was strongly relied upon in the presence of the plaintiff without any attempt made to dispute it or offer made to contradict it) so as to raise a question to be left to the jury to pass their opinion upon the truth of the evidence of the city engineer so relied upon. If the defendants' defence could only be sustained by establishing the request or consent of the plaintiff to the work being done as done, it would be contrary to all precedent to set aside a nonsuit for the purpose of submitting a question to the jury upon a point as to which there was no contradictory evidence given or tendered and which, during the argument at *nisi prius*, the plaintiff heard relied upon as uncontradicted without

ever questioning its correctness or expressing a desire to be permitted to give any evidence in contradiction of it.

To set aside a nonsuit and to grant a new trial under such circumstances would be to decide the question of the correctness or incorrectness of the nonsuit not upon the evidence which was before the judge who tried the case and granted the nonsuit, and to grant a new trial not for any error of the judge in nonsuiting the plaintiff but to enable the latter to produce, if he could, new evidence which neither at the trial nor at any time since has he applied to the court for leave to produce or even asserted that it is in his power to produce. But the majority of the court below have expressed their opinion that, as matter of law, the defendants had not, under their charter or any Act of Parliament, authority and jurisdiction to raise the street in the manner in which they did raise it. That whatever may have been their jurisdiction over the streets by their charter and the Acts of Parliament, the particular mode in which they raised the street was in excess of that jurisdiction; and this is the point which the new assignment was designed to raise.

In determining, therefore, this point we must, correctly speaking, assume the new assignment to be on the record with a plea thereto in denial of it, and this, I think, we may fairly conclude from the judgment of the learned judge who tried the cause, upon his granting the nonsuit, was the view of that learned judge who, I must say, seems to me to have very accurately grasped the material points of the case, and whose judgment involves a decision upon the question of excess tendered by the new assignment, and I think there can be no doubt that, and we may fairly conclude that, he would have made his order allowing the new assignment to be put upon the record and have called upon the defendants to plead thereto, if he had not come to the conclusion that, even against a new assignment, the acts of the defendants were justified by their charter and the Acts of Parliament, and that, therefore, the plaintiff could not recover, and so that it was unnecessary for him to make any

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order for the amendment of the pleadings and that a non-suit might be entered. I was for some time embarrassed by the form of the agreement at *nisi prius*, which provides that

the rights of the parties may be adjudicated upon on the evidence without any question being raised as to pleadings.

If the rights of the parties should be determined upon the evidence alone without any question as to pleadings, I do not well see in what form a decision given in such a case could be brought up before us upon appeal. It would not be a special case, and, if the pleadings were to be disregarded, there would be no record to come up before us. However, after much consideration I have arrived at the conclusion that the above sentence was not intended to effect something not covered by the rest of the agreement, which seems perfect without this sentence, which I am disposed to think was introduced merely to terminate the agreement as to the proposed amendment of the record, and to leave that point to the learned judge under the terms of the rest of the agreement which, without the above sentence, would read thus: "That the whole matter be discussed upon the pleadings as they now are under the evidence, and the court, if it should be necessary for raising any point on the evidence as it now stands, may allow such amendment as it may deem necessary for that purpose." The case was accordingly argued under this agreement, and the learned judge being of opinion that a new assignment would not better the plaintiff's case nonsuited him.

The simple point, then, for our adjudication is: Had or had not the defendants the statutory jurisdiction under which they justified the doing the act complained of, or did they in doing that act exceed their jurisdiction? If what they did was within their jurisdiction, then the principle applies which was enunciated by Littledale J., in *Boulton v. Crowther(g)*, and by Lord Kenyon C.J., in *Governor,*

etc., of British Cast Plate Manufactures v. Meredith(*h*), and has been recognized in many cases and in modern times in the Court of Exchequer (see *Ferrar v. Commissioners of Sewers*(*i*)), and is thus expressed by Blackburn, J., in his judgment before the House of Lords in *Hammersmith and City Ry. Co. v. Brand*(*j*), as a well-established rule. He there says:

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I think it is agreed on all hands that if the Legislature authorizes the doing of an act which, if unauthorized, would be a wrong and a cause of action, no action can be maintained for that act on the plain ground that no court can treat that as a wrong which the Legislature has authorized, and consequently the person who has sustained a loss for the doing of that act is without remedy unless in so far as the Legislature has thought it proper to provide compensation for him. He is in fact in the same position as a person supposed to have suffered wrong from noisy traffic on a new highway is at common law, and subject to the same hardship; he suffers a private loss for the public benefit.

That the defendants have under the several Acts of Parliament which confirm and amend their charter complete legislative power to raise or lower the level of the streets to any extent that the irregularities of the ground may seem to the corporation and its council as representing the public, to require for the benefit and convenience of the public cannot, I think, be doubted. The councils of these municipal corporations are themselves a deliberative law-making assembly, chosen by the people, to do whatever within their jurisdiction may in their judgment be necessary for the public benefit, and the powers conferred upon them must, therefore, have a liberal construction in view of the public rather than of private interests. The power vested in the corporation by the statutes affecting the city of St. John is not limited by any condition as to obtaining the consent of the proprietors of property upon streets proposed to be raised or lowered; that condition, as it seems to me, is confined to the case of the corporation laying out

(*h*) 4 T.R. 794.

(*i*) L.R. 4 Ex. 1.

(*j*) L.R. 4 H.L. 171, at p. 196.

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a new street and taking away from private persons their property for that purpose; the words of the charter, which have been confirmed by statute, are:

So always as such streets so to be laid out do not extend to the taking away any person's right or property.

The power of altering, amending, repairing and improving the streets, which is a power vested in the corporation for the benefit of the public, whose representatives the council of the corporation are, is, in my judgment, restricted by no condition save only the implied condition that what shall be done in the name of the public and ostensibly for their benefit and convenience shall not be done in such a manner as in reality to constitute a public nuisance. If not a public nuisance, the convenience of all private persons, however great their damage may be, must, upon the principle of the decided cases, yield to the public interest. The case of *Leader v. Moxon*(k) was relied upon as adverse to this view, but a careful consideration of it will shew that it is not. There the powers conferred upon the commissioners by the statute were to have certain lanes, named therein, paved and cleared of encroachments, nuisances, obstructions and annoyances, and to rate and assess all the inhabitants of the lanes not exceeding one shilling and six pence in the pound for the purposes aforesaid. The statute also gave power to the commissioners to lay out a new street within certain limits therein mentioned,

so as the same does not obstruct, hinder or prejudice the right or free passage that any person hath to his lands, tenements or hereditaments,

and it was held that the raising of one of the lanes mentioned in the Act to the height of six feet, contiguous to the plaintiff's premises and so in a regular incline from one end of the lane to the other, whereby the doors, windows, and ground floors of the houses abutting on the lane were totally

(k) 2 W.BI. 924.

obstructed, was an act grossly in excess of the commissioners' jurisdiction, and, in fact, in itself a nuisance. That it was impossible to construe an Act passed for paving a street or lane and removing encroachments, nuisances, obstructions and annoyances, as authorizing an annoyance such as this, or that the Act could have intended that the householders should pay a rate of 1s. 6d. in the pound in order to have their houses buried under ground and their windows and doors obstructed, and that an Act which, in the case of the new street which was authorized being laid out, had expressly provided against blocking up ancient lights and passages could never be supposed to empower the commissioners to do these injuries on the old streets and lanes.

If that case could apply to the case before us, it would equally apply to prevent the raising the street up to the plaintiff's house or to the raising or lowering any street so as to prejudice individuals having property on the streets, but the Act 9 Geo. IV. ch. 4 and the Acts in continuance of that Act clearly recognizes such acts as absolutely necessary by reason of the irregularities of the ground, and the argument that the prohibition as to the closing up of lights and passages in the new streets, which the commissioners were authorized to make, shewed that a like wrong could not be permitted in the old streets, can afford no argument that an Act conferring powers to lay out new streets and also to alter, amend, repair and improve old streets may not with perfect propriety and reason be construed to have a condition precedent attached to the case of laying out the new streets and which should apply to that case only, namely, that *for that purpose* no property should be taken from anyone without his consent.

The case of *Sutton v. Clarke* (1), and the observations of Gibbs C.J., there, was also relied upon in support of the contention that even though the raising of the street in the manner in which it was raised was lawful, yet that the plaintiff may maintain an action for it as being arbitrary and

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(1) 6 Taunt. 29.

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oppressive to him. It is to be observed that *Sutton v. Clarke* (l) was a case quite different from the one before us; the frame of the declaration in that cause was for exercising the powers acknowledged to have been vested in them by statute to carry water off from a turnpike road in so careless, negligent and improper a manner as by means of such negligence to have unnecessarily caused injury to the plaintiff, and it was held that, having acted under the advice of a surveyor and having honestly acted according to the best of their judgment and under the advice given, they were not liable. In the case before us the complaint is that the defendants had no legal warrant, authority or jurisdiction to do what they have done; that what they did was in excess of any jurisdiction they had, if they had any to raise the street at all.

As to the observations of Gibbs C.J., upon *Leader v. Moxon*(m), the reports of Taunton, we know, have not the reputation of being very accurate, and the light in which the Chief Justice is reported to have viewed *Leader v. Moxon*(m) is not borne out by the report of that case in 2 Wm. Bl., from which it appears that the defendants in *Leader v. Moxon*(m) had grossly exceeded their jurisdiction and had no legal authority whatever to do what they did; whereas, in Taunton, the Chief Justice is reported to have said, referring to that case:

That the commissioners did not exceed their jurisdiction and were exercising power given them by an Act of Parliament, but the court thought they were acting in a most tyrannical and oppressive manner and that though they had a right to pave and perhaps to raise the street they had acted so arbitrarily that they were answerable.

I cannot so read the judgment in *Leader v. Moxon*(m). The defendants, on the contrary, were held to have grossly exceeded their authority, and the case is no authority for the position, nor has any case been cited in support of the position that an Act which, as to the particular manner in

(l) 6 Taunt. 29.

(m) 2 W. Bl. 924.

which it has been done, is authorized by statute, can be pronounced to be actionable as being oppressive and tyrannical. A particular Act authorized by law can never be pronounced by the law to be tyrannical and oppressive. This is quite different from the case of persons having by statute power to effect a named purpose which may be done effectually in divers ways, adopting a mode under circumstances amounting to negligence, the natural consequence of which was unnecessarily to injure the plaintiff, when the purpose authorized could have been effected in another way without doing any injury to anyone.

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The case before us being then, in my opinion, reduced to this, that the plaintiff cannot maintain this action unless he can establish the particular manner in which what has been done was done, constitutes a public nuisance, we have only to turn to the evidence to see whether any evidence in support of that position was offered, and we find that throughout the whole course of the trial this position was not taken nor was any evidence whatever offered in support of it. As to the fence on the retaining wall constituting a nuisance, if the retaining wall did not, that is out of the question, for, if the raising of the street as raised and the erection of the retaining wall were lawful acts, the erecting of the fence was, as indeed the evidence proved, necessary to perfect the legality of the wall, for without the fence it might well be pronounced to be a public nuisance, but yet not such a one as to give the plaintiff a cause of action, for it would not be the absence of the fence to which his injury could be attributed. The plaintiff's whole contention at the trial, and, indeed, since, was that the defendants had no authority whatever in law to do as they did to the prejudice of the private rights of the plaintiff without his consent; that in fact he was entitled to succeed although the act complained of was not or could not be established to be a public nuisance; that his cause of action arose wholly irrespective of the act being a public nuisance. His argument was, in

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truth, more based upon the decision in *Rose v. Groves*(n), as recognized in *Lyon v. Fishmongers' Co.*(o), than upon any case cited, but *Rose v. Groves*(n) has no application to a case wherein the statutory authority to do the act complained of is pleaded, and the act done is not in excess of that authority. The plaintiff has never rested his right to maintain this action upon the ground that the act complained of is a public nuisance from which he sustains peculiar injury, and as, in my judgment, the case is reduced to this, that he could not at all succeed without establishing the act of which he complains to be such public nuisance, the nonsuit was right and should be affirmed and the appeal should be allowed with costs, and the order for a new trial in the court below be discharged with costs.

*Appeal allowed with costs. Rules nisi
 and absolute discharged with costs as
 to rule nisi.*

Solicitor for the appellants: *S. R. Thompson.*

Solicitor for the respondent: *George E. King.*

(n) 5 Man. & Gr. 613.

(o) 1 App. Cas. 662.

<p>*THE CITY OF HALIFAX (DEFEN- DANT).....}</p>	}	APPELLANT;	<p>1884 **Oct. 31.</p>
AND			
<p>JAMES F. WALKER (PLAINTIFF).....</p>		RESPONDENT.	<p>1885 **Feb. 16.</p>

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Highway—Snow—General and long continued bad repair—Loss of profits thereby to owner of omnibus line.

W. was the proprietor of an omnibus line plying in certain streets of the city of Halifax during the winter of 1881-2, under a license from the city. About the 10th January the snow fell very heavily, and by about the 20th, owing to the snow being thrown from the sidewalks into the street, the roadway became filled with pitch holes, some of which were four feet deep. Other severe snow storms through the winter aggravated the condition of the road. The plaintiff alleged that, by reason of this bad repair of the highway, he had suffered damages to a large amount by the wrecking of his carriages, straining of his horses, breaking of harness, etc., and loss of profits through the diminution in traffic on his 'bus line. Plaintiff complained to the city authorities, asking that men be put to work to level the snow between the sidewalks, but his request was refused. The action was tried before McDonald C.J., and a jury, when a verdict for the plaintiff for \$600 damages was found. The defendants obtained a rule to set aside the verdict and for a new trial, which, after argument, was discharged by the Supreme Court of Nova Scotia (16 N.S. Rep. 371). On appeal to the Supreme Court of Canada,

Held, the Chief Justice and Gwynne J., dissenting, that the judgment of the court below should be affirmed and the appeal dismissed with costs.

Held, per Strong J., that, under the Act incorporating the defendants and subsequent Acts amending the same, not only were the defendants liable to indictment for breach of their public

*Cass. Dig. 175.

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

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duties in respect of the matters complained of, but the plaintiff could also maintain an action as a person especially injured thereby.

Held, per Strong J., that the evidence was amply sufficient to warrant the trial judge in leaving the case to the jury, and, the condition of the street being one which might have been remedied by levelling the hillocks which had been formed, and which caused the damage the respondent complained of, the verdict should be upheld.

Held, per Strong J., that the loss of profits claimed was not too remote, but was quite as much an immediate and natural cause of the injury as was the loss of custom in *Lancashire & Yorkshire Ry. Co. v. Gidlow* (L.R. 7 H.L. 517).

Held, per Henry J., that the city of Halifax was liable for the negligence of the street commissioners although they were appointed by the city council and not by the Court of General Sessions as provided by R.S.N.S. (4 ser.) ch. 49.

APPEAL from a decision of the Supreme Court of Nova Scotia (a), discharging a rule *nisi* to set aside a verdict at the trial in favour of the plaintiff.

The facts of the case are sufficiently set forth in the following evidence on behalf of the plaintiff given at the trial, no evidence having been offered on behalf of the defendants.

James F. Walker, plaintiff, ran a line of omnibuses, and kept a feed store. Ran five 'buses on wheels; had six sleigh 'buses last winter. Ran five of them pretty steadily, all six sometimes. Ran them on Lockman, Barrington, Bell's lane, Water, Granville and George streets, Hollis street, Morris street, Pleasant street, Inglis street, South Park street and Victoria road. These streets are used as highways and thoroughfares in the city. A great amount of traffic of Lockman street to Bell's lane. It is the chief traffic street of the city. The run from North street to the foot of Inglis street was about three miles. Used over twenty horses in the 'bus service; employed 9 or 10 men. Was running the 'buses on runners during the month of January last. The place was in good condition when the winter service began. It began to snow about 10th January last, and the roads began to get bad about the 20th. The snow began to get very deep, especially on Lockman street, from North to Cornwallis streets. They became pitchy, caused by snow being thrown from the sidewalks in hills into the

(a) 16 N.S. Rep. 371.

middle of the street. At most of the storms last winter there was more or less drift. In February the streets became worse. A heavy drifting storm early in January. Snow fell more or less in drifts. It did not drift much in Lockman street, which is narrow, but it became very bad with deep pitches in consequence of the snow being thrown off the sidewalks. Granville and Hollis streets were also very bad and pitchy. One pitch measured was four feet deep. These pitches wreck the carriages and strain the horses, and break the harness, traces, whipple bars, etc. The vehicles were almost shaken to pieces when we quit running them. Had to repair them to keep them running. This was caused by the pitching. Lockman street roadway became so narrow that passing vehicles collided with and tore each other. Operated the sleigh 'buses till 16th March. The proceeds of the 'buses fell off very much. The proceeds of February 1882, \$307.85. February 1881, 584.70. There was one more 'bus running in 1882, and sometimes two. The receipts for the month of March, 1881, were \$640.50. The proceeds of March, 1882, up to 11th of the month, was \$71.55. When work was knocked off, in March, 1882, the pitches were still deep, and it became impossible to draw the 'buses in consequence of the depth and width of these pitches. Some 'buses would stick in the holes and the passengers had to get out, to enable men to get the 'bus out of the hole. The streets began to get very bad after the 20th January. Gave notice to the Board of Works, to W. Johnson in charge of that office, of the condition of the streets. Asked him where the chairman was. He said the chairman was away. Went outside and met Alderman Graham, acting chairman of the Board. Johnson, the clerk, said he was acting chairman. This was 21st January. It was before the 25th. Told Graham that the snow was getting very deep and pitchy, and that 'buses could not pass on Lockman street. Asked if he could not put on some men and level the snow between the sidewalks so as to keep the whole street level. He refused this request. Told him would lose money heavily every day; that the street was going to get worse, and that the city would be held responsible for whatever loss sustained. He replied that it was the best thing plaintiff could do. Resumed the work with wheels about the 10th of April. Was obliged on the 22nd of February to take the 'buses partially off the road. The pitches were so bad. No amount of skill in driving would have prevented these accidents. Instructed F. W. Tremaine, as attorney, and told him to write to the city. Have a license as 'bus driver from the city. This is the license (put in and read by J. McD. 1). Paid for it \$25.00 to clerk of license. This is the time-table handed to the city and fixes the streets on which 'buses run. (J. McD. 2, put in and read). The worst damages occurred on Lockman street and Hollis street. Counted over one hundred bad pitches. These are public streets in the city of Halifax, and have known them to be used as such for 25 years. Have

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known the city make repairs on these streets. These streets could have been made safe for travel by cutting down the pitches and filling in the holes. Plaintiff levelled two or three of the pitches and thereby made the road at these places smooth and level.

Cross-examined.—The principal cause of damage was the depth of the snow, and the pitches and the snow not being level. About half the streets on the whole route were comparatively smooth and passable. Every team that went over these streets, at the times referred to, was subject to the same inconvenience and trouble now complained of. The pitches get heavy with increase of traffic if not kept level, and the evil is increased by pitching the snow off the side-walks on to the road bed.

John McDonald, sworn. Overseer of streets under the Board of Works. The city, to my knowledge, for twenty years has expended money in repair of Hollis street and Lockman street; also the other streets.

Cross-examined.—I worked on these streets for the city last winter, in January and February. Cut snow banks and levelled them. We continued this as long as there was any snow on the ground, and it was dangerous to the public. Cutting down snow and filling up pitches made road passable and better, but teams coming along dug them out again, and we had to keep the men at it all the time. Somewhere about \$1,000.00 was spent in this way last winter on the streets named. I don't remember the particular dates of the work done. Probably a hundred dollars of this amount was spent on Lower Water street, and some portions of that amount spent elsewhere over the city.

Edward O'Brien, sworn.—I am a driver in plaintiff's employ. Have been with him about five years or better. About the middle of January the roads through which I drove were pretty bad, deep snow, heavy pitches, and people pitching snow off the side-walks on to the middle of the street. A hundred or more pitches. Lockman street very bad, also Hollis street from Salter to Morris. For a couple of weeks the roads remained in this condition without repairs. The bad roads lasted till the end of March. I drove constantly during the period I have mentioned. Have got stuck, broke pole and harness. We had many breakages during the latter part of January and early part of February. I destroyed three sleighs last winter; forward bobs broken; broke three poles; drove as slowly and carefully as possible and could not get along. The broken harness was repaired this spring. One or two pitches on Lockman street about three or four feet deep. The roads would be better for a couple of days after pitches levelled. The worst time was from latter part of January till about middle of February. I don't think any repairs were made till February. We carried fewer passengers when the roads were bad. The ladies said they were sick with the pitches. We had to stop to pass a big team in consequence of the

narrowness of the way on Lockman street. The 'buses and horses were injured by getting into these pitches.

Jonathan Adams.—I am an expressman. I was expressing and cabbing last winter on all the streets of Halifax. No work was done by the city to repair the roads for a month after the drifts. It was after January before they began to level at all. If the drifts had been levelled off after the storm there would have been no pitches at all. They pile the snow off the sidewalk, and, it not being levelled off, bumpers are formed.

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The following was stated by the Chief Justice to have been his charge to the jury :

I explained to the jury the nature of the action and the duty imposed upon the defendant corporation to keep the streets and highways of the city in repair and their liability for injuries resulting from the defects in these streets, I instructed them that the state of the particular streets, referred to in the evidence, and as described in that evidence, constituted if proved to their satisfaction, defects of a character similar to that of ditch or cutting in the street caused by water after a heavy rain or freshet, and that, in point of law, the city would be equally liable for defects, obstructions or injury caused by snow allowed to accumulate in excessive quantities and causing the pitches described in the evidence, as for defects, obstructions or injuries caused by rain or other agent. I told them that the defendant would be liable only for injuries caused by a defective obstruction of which they had actual notice, or which had existed long enough or notably enough for notice to be reasonably inferred, and I directed them, if they found that the pitches and obstructions described in the evidence, as caused by the non-removal of accumulated snow from the streets, did exist as testified by the plaintiff's witnesses, that the defendant knew, or reasonably ought to have known, that these defects and obstructions existed and were dangerous to the public passing and repassing along these streets in pursuit of their ordinary business and traffic, and that the plaintiff's horses, carriages and harness were injured and damaged in consequence and by reason of these defects and obstructions in the streets, their verdict should be for the plaintiff.

Gormully, for the appellant. The learned judge's charge is based on the theory that the appellants are liable to be sued by an individual who suffers special damage arising from the non-feasance of the appellants in not keeping the highways within their limits reasonably clear of snow.

At common law, however, parishes and municipal agencies were not liable to actions at the suit of individuals, for

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damages arising from the neglect of a public duty imposed upon them by law for the benefit of the public, and from the performance of which such municipal agencies received no profit or advantage. At common law, for want of repair of a bridge or a highway, the remedy and the only remedy against the municipal body was by presentment or indictment. Their liability for non-removal of snow, it is submitted, is not greater than for want of repair. Angell on Highways, sec. 286; Brooke, Abr. Rit. sur le Cas., pl. 93; *Russell v. Men of Devon*(a); *McKinnon v. Penson*(b); *Gibson v. Mayor of Preston*(c).

This has been the universal rule of decision in the New England States, and all the cases on the subject, both in England and America, will be found collected in a judgment of the Supreme Court of Massachusetts, delivered by Gray, C.J., in 1877. *Hill v. City of Boston*(d).

In order to render the municipal body liable to an action for non-feasance of its duty—causing damage to an individual—the statute which imposes the duty must also give such a remedy. This has been done in Ontario and in a number of the states of the Union.

The measure of the liability of the city of Halifax will, it is submitted, be found in the following statutes of the Province of Nova Scotia. 27 Vict. ch. 84 (city charter, 1864); 35 Vict. ch. 34 (1872).

On the true construction of these statutes the appellants are not liable to an action for non-feasance of their duty, though they may be liable to an indictment.

The case of *Borough of Bathurst v. MacPherson*(dd), on which the court below relied, is plainly distinguishable. In that case the municipality were held liable not for mere non-feasance, but for mis-feasance in creating a nuisance on the highway.

The duty, if any, of repairing and keeping passable the

(a) 2 T.R. 667.

(c) L.R. 5 Q.B. 218.

(b) 9 Ex. 609.

(d) 122 Mass. 344.

(dd) 4 App. Cas. 256.

streets is imposed on the Board of Commissioners created by the 35 Vict. ch. 34, and that on this ground the city is not liable. Assuming the city to be liable, in an action for breach of the duty to keep its streets reasonably safe, convenient and free from obstructions, the question whether they have been guilty of such breach is a question of fact which ought to have been submitted to the jury by the learned Chief Justice.

The verdict is against law, as it gives damages for loss of profits arising from the respondent being prevented from running his 'buses regularly on a certain line of highways. This is not such special damage as the respondent can recover for. *Farrelly v. City of Cincinnati*(e); *Griffin v. Sanbornton*(g); *Brailey v. Inhabitants of Southborough* (h). It is against law also, as it gives the respondent damages for injuries sustained in consequence of voluntarily using the streets after he admits that he knew that they were dangerous for travel.

The verdict being general, it must be inferred that the jury gave a verdict in favour of the respondent on all the counts of the declaration and awarded some damages on each count. If the verdict does not include profits it is so excessive as to be against law.

The appellants contend that, inasmuch as the 'buses were not marked as required by the city ordinances and statutes in that behalf, the respondent was illegally plying his 'buses for hire on these highways, and on this ground is not entitled to recover. The appellants also contend that, the notice of action was not properly given under sec. 276 of the Acts of 1864.

Henry, Q.C., for the respondent. That the state of the streets was one of non-repair is abundantly established by the evidence. That the admitted condition constitutes non-repair in law, the following authorities are cited:—*Reg. v.*

(e) 2 Disn. 516.

(g) 44 N.H. 246.

(h) 6 Cush. 141.

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United Kingdom Electric Tel. Co.(i); *Burns v. City of Toronto(j)*; *Caswell v. St. Marys, etc., Road Co.(k)*; *City of Providence v. Clapp(l)*; *Horton v. Inhabitants of Ipswich(m)*; *Stanton v. City of Springfield(n)*; *Johnson v. City of Lowell(o)*; *Luther v. City of Worcester(p)*; per Gwynne J., in *Ringland v. City of Toronto(q)*; per Martin J., in *Loker v. Inhabitants of Brookline(r)*. It must extend to all kinds of defects, as well as all seasons of the year, and an obstruction caused by snow is as clearly included as one caused by flood or tempest, or any other source of injury. Holes or excavations are non-repair: *Reed v. Inhabitants of Northfield(s)*; *Doherty v. Inhabitants of Waltham(t)*. The appellants were guilty of negligence in allowing the roadway to remain in its proved condition: *Mersey Docks Board, etc., v. Penhallow(u)*; *Boyle v. Town of Dundas(x)*; *Colbeck v. Township of Brantford(z)*; *Donaldson v. City of Boston(a)*. And see the cases collected in Harrison's Municipal Dig., pages 479 to 486, especially page 485.

Where an indictment will lie against a corporation for non-repair, an individual who has sustained special damage has his action: *Borough of Bathurst v. MacPherson(b)*; explaining *Henley v. Mayor of Lyme(c)*; *Hartnall v. Ryde Commissioners(d)*; *White v. Hindley Local Board(e)*; *Burns v. City of Toronto(f)*, per Harrison C.J., at p. 566.

In *City of Providence v. Clapp(g)*, it was held that

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| (i) 3 F. & F. 73, n. p. 76. | (u) 7 H. & N. 329, L.R. 1 H.L. 93. |
| (j) 42 U.C.Q.B. 560. | (x) 27 U.C.C.P. 129. |
| (k) 28 U.C.Q.B. 247. | (z) 21 U.C.Q.B. 276. |
| (l) 17 How. 161. | (a) 16 Gray 508. |
| (m) 12 Cush. (Mass.) 488. | (b) 4 App. Cas. 256. |
| (n) 12 Allen (Mass.) 566. | (c) 5 Bing. 91. |
| (o) 12 Allen (Mass.) 572. | (d) 4 B. & S. 361. |
| (p) 97 Mass. 268. | (e) L.R. 10 Q.B. 219. |
| (q) 23 U.C.C.P. 93. | (f) 42 U.C.Q.B. 560. |
| (r) 13 Pick (Mass.) 343. | (g) 17 How. 161. |
| (s) 13 Pick. 94. | |
| (t) 4 Gray 596. | |

there was no distinction between obstructions on a highway by fall of snow and any other obstruction, and this was held by the Supreme Court of the United States as being a correct exposition of the law.

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The plaintiff owned and operated a line of omnibuses running through the particular streets whose condition was complained of. He was obliged to confine his route to these streets in carrying on his business. His business was materially injured by the state and condition of these streets. Under the following authorities there was sufficient special injury to respondent to sustain this action: *Winterbottom v. Lord Derby* (1); Thomson on Negligence, p. 341.

The only reasons for judgment delivered were the following.

STRONG J.—I am of opinion that this appeal must be dismissed. By section 264 of the Nova Scotia Statute, 27 Vict. ch. 81, it is enacted as follows:

The city council or their committee shall remove all encumbrances upon the streets, prevent encroachments thereon, make alterations thereon as required.

By section 265 of the same statute it is provided that the

city council or their committee shall from time to time cause the streets of the city of Halifax to be cleaned, repaired, raised, sunk, altered or paved as they may deem proper.

Section 281 is as follows:

After the passing of this Act all sums required for street service within the city of Halifax shall be borne by and taken from the general revenues of the city.

Section 283 enacts:

that the moneys required for street purposes within the city of Halifax shall be raised by an equal ratiable assessment on the real and personal estate of the citizens as directed by the Act for that part of the city revenue to be raised by assessment.

(1) L.R. 2 Ex. 316.

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Section 284 is in these words:

After the passing of this Act, the streets of the city of Halifax and the expenditure thereon shall be placed under the control of a committee of three aldermen to be annually appointed by the city council to be called the committee of streets and the superintendents of streets and their assistants, if any, shall be under the direction and control of such committee.

By the Statute of Nova Scotia, 35 Vict. ch. 34:

the making and repairing of the streets and street expenditure, drains and sewers of the city and all duties connected with the necessary draining and watering of the streets of the said city and clearing away the snow and other like duties (are) placed under the management and control of an alderman from each ward of the city, to be called a board of commissioners of city works to be named and elected by the city council of said city.

By sec. 5 of the last mentioned Act the said commissioners, subject to the control of the city council, were, amongst other things, clothed with all powers and were authorized to exercise the same powers and perform all such acts which were heretofore entrusted to and performed and exercised by the committee of streets by any statute or by-law.

It cannot be disputed that by these enactments the duty of repairing the streets is cast upon the city, who are empowered to raise by assessment the funds necessary for the purpose, and it follows that for a breach of this duty an indictment could be maintained. The appellant, however, contends that no action can be maintained for a breach of this statutory obligation towards the public, by a person specially injured in consequence of the neglect of the city.

The first question we have to determine is whether the respondent, assuming that he brings himself within the condition of shewing that he is a person who has received special damage, in consequence of the neglect to repair the streets, is entitled to maintain an action. It appears to me that we must hold that the action will lie.

In England, at common law, the duty of repairing highways was imposed upon the inhabitants of the parishes in

which they were situated and, in like manner, the repair of bridges was cast upon the county, and it was held in both cases that the only remedy for non-repair was by indictment and that no action was maintainable by a person specially injured by the omission to repair. This common law rule was also applied in cases where, by statute, the maintenance of highways and streets was transferred from the parish to particular public officers or public bodies, such as surveyors of highways; *Young v. Davis(o)*; local boards of health: *Gibson v. Mayor of Preston(p)*; or metropolitan vestries: *Parsons v. Vestry of St. Mathew(q)*, it being held in such cases, as a matter of statutory construction, that no greater measure of liability was imposed upon such persons and bodies than parishes had been formerly subjected to. On the other hand, it is a well settled general principle of law that when either a statute or the common law imposes a duty for the benefit of the public upon an individual or a corporation an action will lie for a breach of that duty by a person suffering a direct and particular injury by reason of a neglect to perform the duty.

Authority for this proposition is abundant, but it will suffice to refer to the cases of *The Mayor of Lyme Regis v. Henley(r)*, in the House of Lords; *McKinnon v. Penson(s)*; and to the case of *Borough of Bathurst v. MacPherson(t)*, cited in the judgment of Mr. Justice Thompson and relied on by the respondent in the argument here, and the authorities referred to in the judgment of the Privy Council in that case, which was decided as recently as 1879, and which affirms the general doctrine just stated.

There are, however, exceptions to this general rule which will, I think, be found to be included in one or the other of two classes. It is held in some cases that no action will lie when the public duty is required to be performed by an unincorporated body, a body which is fluctuating and unde-

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(o) 2 H. & C. 197.

(p) L.R. 2 Q.B. 218.

(q) L.R. 3 C.P. 56.

(r) 1 Bing. N.C. 222.

(s) 8 Ex. 319; 9 Ex. 609.

(t) 4 App. Cas. 256.

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terminate like a parish or a county. In such a case the inconvenience, indeed the impossibility of finding a person to be sued and of giving a remedy by action without gross injustice to individuals, is held to be conclusive against the right.

This, as Mr. Justice Thompson in his very able judgment in this case has pointed out, was the real *ratio decidendi* of the case of *Russell v. The Men of Devon(u)*, and has been recognized as such in similar cases which the learned judge has collected and given extracts from, particularly in *McKinnon v. Penon(v)*, where both Pollock C.B., and Alderson C.B., assign this as the true ground of that decision, and also in *Mayor of Lyme Regis v. Henley(vv)*, where in all the courts through which the case passed, including the House of Lords, *Russell v. Men of Devon(u)* is distinguished in the same way; and in *Borough of Bathurst v. MacPherson(vvv)* the Judicial Committee also attribute the decision in *Russell v. Men of Devon(u)* to the same principle; their Lordships say:

The principal objection taken by the learned Chief Justice in New South Wales and by the learned counsel for the appellants here to the maintenance of the action was founded upon the nature of the supposed obligations on a liability to repair public roads, and upon the authority of the case of *Russell v. Men of Devon(u)* and several others *in pari materia*. In these cases the principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such. There are no doubt *dicta* to the effect of the inconvenience that might result, from the multiplicity of actions and increase of litigation, if it were held that every individual aggrieved by the non-repair of a public road might sue either the county or parish or individual members of it; but such inconvenience was never admitted as a reason why an action should not be maintainable.

And upon this explanation of *Russell v. Men of Devon(u)*, the Privy Council determined the principal point in the appeal before them. It is obvious, therefore, that the

(u) 2 T.R. 667.

(v) 8 Ex. 319.

(vv) 1 Bing. N.C. 222.

(vvv) 4 App. Cas. 256.

grounds of exception upon which this last mentioned authority proceeded, understood as the Judicial Committee explain them, have no reference to an action against a municipal corporation like the present appellants.

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The other class of exceptions referred to will be found to consist of cases in which it has been held that, upon the proper legal construction of the statute, imposing the public duty, it sufficiently appears by implication, if not expressly, that it was the intention of the legislature that an individual suffering a special injury by reason of the neglect should not have a remedy by action, thus taking the case out of the operation of the general rule. In some cases it has been held that when the statute gives a penalty to be recovered by the party injured, that sufficiently shews it was intended to take away from him the right to any further indemnity by means of an action. *Atkinson v. Newcastle and Gateshead Waterworks Co.*(w), may be referred to as an example of cases falling within this category. The American case of *Hill v. The City of Boston*(wv) is also attributable to this latter class of exceptions. Though it has been doubted whether it was not carrying the doctrine too far to apply it as was done in that case. The weight of authority, however, in the different states and in the United States courts (*Barnes v. District of Columbia*(x)) is in favour of holding that when a duty to repair roads or streets is cast upon a municipal corporation, an individual to whom direct injury is caused by the neglect of the duty by the municipality may maintain an action, and *Hill v. City of Boston*(wv), and other cases which have followed it, seem to depend upon a state of the law peculiar to Massachusetts and other New England States.

Judge Dillon, in his work on Municipal Corporations, discusses the American authorities very fully and sums up the result as follows:

(w) 2 Ex. D. 441.

(wv) 122 Mass. 344.

(x) 91 U.S. 540.

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The duty or burden must appear upon a fair view of the charter or statutes to be imposed or to rest upon the municipal corporation as such and not upon it as an agency of the state or upon its officers as independent public officers. This power in general appears sufficiently when the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways.

It is impossible to suggest any grounds for bringing this case within the exceptions last referred to. Nothing in the statutes can be pointed to as warranting an inference that it was intended to exempt the corporation of the city of Halifax from the ordinary liability to individuals which the law recognizes in such cases.

The case of *Borough of Bathurst v. MacPherson* (y) is also a direct authority for the proposition that there is no distinction in applying the general rule established by *Mayor of Lyme Regis v. Henley* (z), and the cases which have followed it, between cases of non-feasance or omissions to repair and cases of misfeasance when the injury is caused by some positive act of negligence on the part of the corporation.

Sir Barnes Peacock, speaking for the Privy Council, says (at page 267):

In their Lordships' opinion there is no principle upon which a distinction in this respect between nonfeasance and misfeasance can be supported.

Indeed, the injury for which the action was held maintainable in this last case was the direct result of an omission to repair. The case of *Borough of Bathurst v. MacPherson* (y) is in truth a case so exactly in point on all the questions raised here as to the liability of the appellants to a remedy by action, that, bound by it as we are, I am of opinion that we must regard it by itself, and irrespective of

(y) 4 App. Cas. 256.

(z) 1 Bing. N.C. 222.

other reasons and authorities, as concluding this ground of appeal against the city.

There can be no pretence now for saying that as in some of the English cases this was merely the common law liability shifted to the municipality, and that, therefore, as at common law, no action would have lain, none can be maintained against the city. Here the liability was quite as much an original liability as was that of the municipality of Bathurst in *Borough of Bathurst v. MacPherson*(y), and the opinion of the dissenting judge in the court below on that case, which was held erroneous by the Privy Council, was expressly rested on this point. Then the burden which by these statutes was cast upon the city was coupled with a power of raising money for the purpose by assessment, in a manner entirely unauthorized at common law, which is conclusive to shew that the statute created a new and original obligation and did not merely transfer a previously existing common law liability to the municipality.

It is contended in the appellants' factum that the duty of repairing the streets is imposed upon the Board of Commissioners created by the Statute of 1872. This point was but faintly pressed at the argument and requires but little notice. This Board of Commissioners, it will be observed, from the clauses of the statute already quoted, is in effect a committee of the aldermen, being composed of an alderman from each ward in the city, and is elected by the city council. It is, therefore, a body representing the ratepayers not immediately elected by them, but chosen by the direct representation of the ratepayers. It is also expressly made subject to the control of the council. The commissioners, therefore, are the executive officers of the corporation, and upon the same principle that the acts or omissions of the city council are the acts or omissions of the city, and that the city are responsible for any injury resulting from their neglect of duty, so must they be answerable for the consequences of any neglect of their legal obligations by

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(y) 4 App. Cas. 256.

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the Board of Commissioners. *McSorley v. City of St. John (y)*.

Then it is said that the duty to repair does not include the keeping the streets in good order during the winter season, when the nature of the climate makes this impossible. I see no reason why the streets, which have to be used for traffic whilst the snow is on the ground as well as at other times, should not be kept in a reasonable state of repair in the winter season as well as at other times. The question of what is reasonable repair is one for the jury, and this includes the removal of snow as well as other obstructions.

The city have the power of raising and applying money for this purpose, and the measure of their obligation must be that of their rights in this respect.

In the *City of Providence v. Clapp (z)*, the same question was before the Supreme Court of the United States, though it related to an obstruction of the footway, not of the main street, by ice and snow, and the court held that the question was one entirely for the jury.

The evidence here was amply sufficient to warrant the Chief Justice in leaving the case to the jury, and it was found that the street was in a state which, to some extent at least, might have been remedied by levelling the hillocks which had been formed and which caused the damage the respondent complains of.

The forfeiture of the license is not pleaded as it should have been and the court below were manifestly right in holding that for this reason the point was not open on the record. Further, the by-law does not make the omission to paint the numbers and names of the streets on the vehicles a ground of forfeiture at all. The starting place, route and rates of fare, as Mr. Justice Thompson points out, are referred to in the license itself, as being annexed to it, and it must be presumed that this was the paper which was annexed to the license when produced at the trial.

The Chief Justice's note of his charge is, of course, a

(y) 6 Can. S.C.R. 531.

(z) 17 How. 161.

mere synopsis of what he said, but it sufficiently appears that the question of whether the corporation had done all they reasonably could to remedy the obstructions complained of was left to them, even if we suppose the note printed in the appeal book is a literal copy of the charge instead of a mere abstract of it, as I assume it to be. Then no objection or exception was taken to the charge, and it appears from what Mr. Justice Weatherbe says, in another case lately before this court, *Anchor Ins. Co. v. Keith*(zz), that the practice in Nova Scotia as elsewhere is to require objection of this kind to be taken at the trial. It does not appear that the Chief Justice withdrew from the jury any question which ought to have been left to them, and there was ample evidence to warrant the finding that the appellant had been guilty of negligence in omitting to keep the streets in a proper condition for traffic.

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It was further contended that the evidence of loss of profits by the respondent ought not to have been received—that loss of profits was too remote to be a ground of damage and that the damages were excessive.

I take the rule as to the recovery of damages in respect of loss of profits in actions of tort to be that such damages are recoverable if the loss is a direct result of the injury and if the amount can be ascertained with reasonable certainty (Sedgwick on Damages (7 ed.), vol. I., p. 131; *Lancashire & Yorkshire Ry. Co. v. Gidlow*(a), per Cairns, L.C.), and applying that principle to the facts of the present case, it seems to me that the loss of profits here was quite as much an immediate and natural consequence of the injury as was the loss of custom in the case just cited, for which Lord Chancellor Cairns and Lord Chelmsford held the plaintiff in that case entitled to recover. Further, I think the damages on this head were proved with reasonable certainty, and that the loss in this respect was not too speculative, as it had been held to be in the case of the loss of professional practice and other analogous cases. Here the

(zz) 9 Can. S.C.R. 483.

(a) L.R. 7 H.L. 517.

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respondent had an established and regular business in respect of the line of omnibuses and, the average amount of custom being proven, the loss was a matter of calculation, there being a fair presumption that the business could not, from the condition of the streets, have continued to yield the same profits as it had before it was interfered with by the cause complained of.

Taking into consideration the loss of profits and the injury found to have been occasioned to the vehicles, horses and harness of the respondent, I am of opinion that we ought not to disturb the verdict on the ground of excessive damages.

The result is that the appeal should be dismissed with costs.

HENRY J.—I concur almost entirely in the views as to the issue before us in this case which have been expressed by my learned brother Strong. I think that there was a duty thrown upon the corporation of the city of Halifax to keep the streets in fair and reasonable repair, that they did not perform that duty, that they were notified and were requested to do it and did not do it. The plaintiff in the action sustained very serious damages. His business was interrupted and his loss was comparatively severe.

The Revised Statutes of Nova Scotia (4 ser.), ch. 49, provides as follows:

Sec. 2. The subsequent provisions of this chapter shall extend to the city of Halifax and the commissioners of streets therein, unless where specifically excepted.

Sec. 4. The commissioners shall remove all encumbrances upon the streets, prevent encroachments thereon, make repairs, alterations and improvements therein as required, open and make new streets when authorized, make and repair bridges, and cause to be observed the laws touching the streets and bridges, or the work to be performed thereon; and, especially, shall call out, sue for, levy and receive from the inhabitants liable to perform highway labour the moneys, services, highway work and penalties and composition therefor, due, payable or to be performed by them; and shall prosecute for offences committed against the laws relating to highways, and

sue persons holding moneys appropriated to the repair of the streets, or not paying any penalty appropriated thereto.

Sec. 16. The courts of general sessions are hereby empowered to set off by limits districts within their counties, and from time to time to alter the same, and to declare what number of commissioners of streets shall be appointed for each district in manner following: the grand jury shall recommend double the number being residents in such districts, of whom the sessions shall select one-half, one of whom shall annually retire in the order in which his name stands on the recommendation list handed in by the grand jury; and, upon such retirement, two other residents shall be recommended in like manner, one of whom shall be selected by the sessions to supply the vacancy created by such retirement; and in case of the death, continued absence, or refusal to serve of any such commissioners, a special sessions may fill up such vacancy, subject to the confirmation of the grand jury and the general sessions at their next meeting; and any person appointed under this section who shall neglect his duty, or after notice of such appointment shall refuse or neglect to be sworn into office within fourteen days, shall forfeit and pay a fine of eight dollars.

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This Act is made applicable to the city of Halifax with the exception of certain clauses, and, looking at the Act without being acquainted with the previous legislation or the position of the city in its government, as provided for by other Acts, one would imagine that the appointment of commissioners of streets in the city of Halifax was to be made by the power that is suggested in the Act. Now the Act provides that commissioners of streets in several towns and places should be appointed by the county sessions. I think, inasmuch as there is no county sessions having any jurisdiction in the city of Halifax, if that Act were applied in that respect to the city of Halifax, there would be no commissioners at all, and it is a matter of public notoriety and the evidence in this case shews, that the commissioners managing all matters relating to the streets of Halifax are appointed by the city council. We have the fact that the city council appointed them, and that they were not appointed under the provisions of that Act, but are *de facto* the servants of the city council. The city council adopted the position which it did adopt with all its liabilities and with all its privileges. They undertook under

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another Act of the Legislature of Nova Scotia, to appoint commissioners to manage these matters connected with the streets, and how can they say, is it in their power to say that these commissioners are not their servants? The evidence shews they were appointed. The parties who were managing the streets are the appointees of the city council. Whether the city council was legally authorized to appoint them is not the question here. We have to enquire, Did they appoint them? And if they did and they failed in their duty, I think the party is entitled to recover. He has sustained damages and I think the jury has awarded reasonable damages. The duty of keeping in repair the streets of the city of Halifax is as important to the people in the winter time as in the summer. I have seen in the city of Halifax the streets so cut up and so full of cahots that it was impossible to carry a load through them, and I have known people to be absolutely seasick who travelled in this bus. It was disgraceful to the city to have the streets for months in the state I have myself seen, and which is shewn by the evidence in this case. If the city council are not answerable for that, who can be found who will make things any better, unless the Legislature should be applied to? There is no other means at hand for getting any remedy for such a state of things. I think the law is abundantly plain on the subject to impose the liability upon the city council and upon the city, and I think that in the case of damages that have arisen, where they are shewn to be sufficient, the individual is entitled to bring the action. I am therefore of opinion that the appeal in this case should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *J. N. & T. Ritchie.*

Solicitor for the respondent: *F. J. Tremaine.*

*JOHN McFADDEN (DEFENDANT)... APPELLANT;

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AND

**Feb. 20.

**May 1.

WEALTHY ANN HALL (PLAINTIFF)... RESPONDENT.

AN APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Railway—Negligence—Boarding moving train—Company's regulations—Estoppel.

Plaintiff was the holder of a first-class ticket entitling her to transportation from Sussex to Penobsquis, on the Intercolonial Railway, upon which the defendant was a conductor. The train, consisting of a number of freight cars, with one second and one first-class car, after its arrival at Sussex, was backed up so that the first-class car, which was at the rear end of the train, was at a distance from the station platform. After the conductor had given the signal "all aboard," the train started but was not stopped when the first-class car came alongside the platform. The plaintiff attempted to board the car as it passed the platform, but fell and was injured.

Held, Taschereau and Gwynne JJ., dissenting, that it was the duty of the conductor to have had the first-class car brought up in front of the platform, before starting from the station, to allow passengers to get on board in safety, and that his failure to do so was negligence for which the plaintiff was entitled to recover.

Per Henry J.—Although getting on a train in motion is a violation of the railway regulations, the conductor was estopped from setting this up, as he directed the passenger to get on board, which could only be accomplished by getting on the train while in motion.

Per Henry J.—That a railway company carrying passengers cannot shield itself from the consequences of its negligence by shewing that the person injured obeyed specific instructions of the conductor instead of the general regulations and directions of which he had notice.

*Cass, Dig. 723.

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

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Per Taschereau and Gwynne JJ., dissenting.—The accident occurred by the folly and recklessness of the plaintiff, in attempting to board a moving train, and not through any carelessness of the conductor.

APPEAL from a decision of the Supreme Court of New Brunswick (a) refusing a motion to set aside the judgment at the trial and verdict of the jury in favour of the plaintiff, and for a new trial.

The evidence, questions to and answers of the jury and the judge's charges are fully set out in the judgments of Henry and Gwynne JJ.

Lash, Q.C., appeared for the appellant.

Dr. Tuck, Q.C., appeared for the respondent.

SIR W. J. RITCHIE C.J. (after quoting at length from the evidence).—It is clear the defendant could have backed his train down and brought his first-class car opposite the platform, for he did it after the accident.

If there was nobody to get on, why should he call out "all aboard?"

No doubt when the train arrived at Sussex the first-class car was up to the platform or one end of it. While the defendant was away at his dinner the train was moved or backed down to get water and defendant never apparently looked to see whether the train was up or not when he called "all aboard;" he says himself he did not know it was not. The defendant was evidently in too great a hurry to depart, induced, no doubt, by his being behind time.

I think it was the duty of the conductor to have had his first-class cars up in front of the platform to enable passengers to get into that car from the platform.

Now, when the cars arrived at Sussex, the evidence of the defendant himself is that the east end of the first-class car was at the platform, not the west end; that after remain-

ing there, Chesley, the brakesman says: "3 or 4 minutes," it then backed down to get water, and went on the centre track, but the first-class car never was brought afterwards to the platform till it was started by McFadden.

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I think there is no pretence for saying there was any obligation on the part of passengers to go on board the train during those three or four minutes or until the train had been shifted, taken in its water, and was ready to start, or until invited to do so in accordance with the invariable custom and usage on the Intercolonial Railway by the intimation from the conductor "all aboard."

In any event it was his duty to be careful before starting his train to see that sufficient time and opportunity was afforded passengers to board the car in the inconvenient position in which the car was placed. I think the evidence shews defendant exercised no care in respect thereof and afforded no time sufficient or opportunity to passengers to board the train after inviting them to do so. I think there was ample evidence to justify the jury in coming to the conclusion that, when the conductor called "all aboard," the first-class car was not at the platform; that the jury were fully justified in finding the call "all aboard" was a notice to the passengers to get on the cars; that no part of the first-class cars were run opposite the platform when the conductor called "all aboard"; and that the defendant did not allow sufficient time for the passengers to get into the cars after giving that call.

The jury might have come to the conclusion that the accident would not have happened if the train had not been improperly started too soon, or that the accident would have happened by reason of defendant's conduct in starting off the train, as he did, if the plaintiff had not had a parcel in her hand.

The appeal should be dismissed with costs.

TASCHEREAU J.—I cannot regret that the conclusion at which the majority of the court has come to enables this

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plaintiff to retain her verdict, but I cannot concur in that judgment. By taking a train in motion the plaintiff, in my opinion, did not only contribute to the accident she was the victim of, but was the sole and immediate cause of that accident. She did an illegal act by taking a train in motion, and she cannot complain if she suffers the consequences of that illegal act.

STRONG J., concurred with the Chief Justice.

HENRY J.—This is an action brought by the respondent to recover from the appellant damages for injuries sustained by her on the Intercolonial Railway on a train of which the appellant was conductor. She had a first class ticket from Sussex Station to Penobsquis Station, and was on the platform of the former station when the train arrived there, and which was somewhat behind time. When it arrived the first-class car was brought up to the platform and the appellant went through the station to a house in the rear of the station to get his dinner. During his absence, by the direction of the station-master, the train was moved back so that the first-class car and a part of the second-class car were behind the platform so that it was difficult for a passenger to enter it. After a few minutes the appellant returned to the platform and gave the notice "all aboard," which is in substance an order to passengers to get into the cars in which their tickets authorized them to go. He immediately passed to the other side of the train and gave the signal to the engine to start the train. The train was almost instantaneously started and, when the first-class car got up to the station, the respondent attempted to get in, but another person preceded her and the respondent missed stepping safely on the step to the car and was thrown down and injured. The defence mainly set up is that inasmuch as the respondent by attempting to get on the train when in motion, which is contrary to the railway regulations, was guilty of such contributory negligence as to bar her right to re-

cover damages for the injury she sustained. It is also contended that the respondent was impeded in her attempt to get on board the train by a bundle or package which she carried and was, therefore, guilty of contributory negligence and cannot recover. As to the latter objection, I find no satisfactory proof. It is not shewn that the carrying of the bundle or parcel was the cause of the respondent's missing to get on the step of the car and, if it were so shewn, I cannot consider it any defence. The package was a very light one and such as is often carried by passengers with the knowledge and sanction of railway conductors and managers, and a tacit license is, therefore, given to passengers to carry such with them in the cars.

The first objection is, however, more important. It is quite true that the respondent in her attempt to get into the car when in motion violated one of the railway regulations, but, admitting that position, has the appellant the right to take shelter under those regulations? He, when he gave the order "all aboard," knew, or at all events should have known, that the first-class passenger car was away from the platform, and it became his duty to advance it so that passengers could enter it from the platform, when no difficulty existed to prevent his doing so. The train was, as I have said, behind time, and the appellant, therefore, hurried it off. This he had a right to do as conductor, but not so as to injure any of the passengers. It is shewn that the train after arrival at a station is under the control of the station master and the conductor cannot proceed without his authority or permission. If, therefore, an injury be done to anyone while the train is so under the control of the station master the conductor is not answerable. Having, however, the permission of the station master to start, the train immediately becomes again under the control and management of the conductor. It is not shewn, but it may fairly be assumed that the conductor on the occasion in question had such permission and, acting on it, started the train. Such starting was, therefore, his act, and the time for doing

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so was at his election. Having then given the order to passengers to get into the cars he instantaneously caused the train to start. It is contended that as he could not give the signal to start to the engine driver from the platform, and as he could not see from the other side of the train passengers on the platform, he was not supposed to know if there were any to get in the cars. That, however, cannot be received as any excuse, for if it was necessary to go to the other side of the train to signal the driver he was bound as well to do so with a due regard to the rights of the passengers to get into their proper places on the train. In fact I should consider him bound to have advanced the train and stopped it so that the respondent could have got into the first-class car where her ticket authorized her to go.

The appellant, in substance, says he is not answerable for the immediate consequences of his own acts because the respondent violated one of the railway regulations. If an action like the one I am now considering had been brought against a company I can appreciate such a defence, but, even in that case, it would be, in my opinion, unsustainable. How can the appellant complain of the respondent doing what he directed her to do? He told her to get into her proper place on the train and he is estopped from complaining that she did as he directed or rather attempted to do so. He must have intended to start the train immediately when he directed the passengers to get "aboard," and, therefore, must be assumed to have directed them to get "aboard" while the train was in motion. He is, therefore, estopped from saying they did wrong when obeying his directions. Every one who has experience in railway travelling must know the trust and confidence reposed in the directions to passengers given by conductors, and, when suddenly ordered to get aboard, as a general rule, there is little time for reflections as to consequences. There is generally more or less excitement arising from a fear of missing the train, and passengers when ordered, rush to get their places. Conductors know well that such is the case and

should be held to act accordingly. After the notification "all aboard" is given by a conductor, it is his duty to wait a reasonable time for passengers to get to their places, and, if he starts the train without giving such reasonable time and a passenger is injured in attempting to get on it, he and those whose servant he is become answerable for the consequences. I have said that contributory negligence should not be ascribed to a passenger under the circumstances of this case. In *Pennsylvania Railroad Co. v. McCloskey's Administrator* (b) the principle was decided, and it was there held that

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a railroad company carrying passengers cannot shield themselves from the consequences of their negligence by shewing that a person injured obeyed specific instructions of the conductor, instead of general directions of which he had been informed.

When the absolute control which a conductor has of a railway train is considered, I think the decision just quoted is well founded and, in the interest of the travelling public is necessary to be sustained.

For the reasons given I think the appeal herein should be dismissed and the judgment below confirmed with costs.

GWYNNE J.—This is an action on the case for negligence in which the plaintiff complains that the defendant being the conductor of a train of cars upon the Interecolonial Railway (a public work of the Dominion of Canada worked under the control and management of the Dominion Government), which train was then under the management and control of the defendant for the purpose of carrying passengers upon the said railway, so negligently, carelessly and unskillfully managed the said train of cars and omitted to place them in a proper position for passengers to enter the same, that the plaintiff, having a right as a passenger to go upon and to be carried on the said railway, while attempting, as she lawfully might, to enter the said trains of cars to be carried on the said railway was thrown

(b) 23 Pa. St. 526.

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down and the said train was driven and struck against the plaintiff whereby the plaintiff was injured, etc., etc., etc. In a second count she complained that the defendant being a conductor in charge of a train for carrying passengers on the said railway so negligently and unskillfully managed the said train of cars that the plaintiff having a right as a passenger to go upon and be carried on the said railway and being requested and permitted by the defendant to enter the said cars, while attempting, as she lawfully might, to enter the said train of cars to be carried upon the said railway the said train of cars was negligently and carelessly driven and struck against the plaintiff, whereby she was thrown down and wounded, etc., etc., etc. To this declaration the defendant pleaded that he was not guilty.

Now it will be observed that the negligence charged in the first count of this declaration consisted in the alleged omission of neglect of the defendant to place the train of cars, of which he was the conductor, in a proper position for passengers by the said train to enter the same. And that charged in the second count consisted in this, that, while the plaintiff was lawfully attempting to enter the said train, the engine and train were negligently and carelessly driven against the plaintiff.

But the defendant is not alleged to have been connected with the alleged negligent and careless driving of the engine and train against the plaintiff, and what was the particular negligence of the defendant which is relied upon as giving the plaintiff a cause of action against him is not stated in this count. At the trial before the learned Chief Justice of the Supreme Court of New Brunswick, it appeared that the plaintiff in the month of October, 1876, was at the Sussex Station of the Intercolonial Railway on her return home to Penobscus, having a first-class passenger ticket and waiting for a train then due to pass through Sussex for Penobscus. While there so waiting, the defendant arrived in charge of a mixed train, having an engine and 17 freight cars, one first-class carriage and one second-class carriage

attached thereto. After arriving at Sussex Station the defendant alighted and went to get his dinner. The railway was worked under regulations contained in orders of the Governor in Council ordained and published under the authority of an Act of Parliament in that behalf. It was proved that, while at the station and until the station master directs the conductor of a train to start, the train is under the control of the station master. While the defendant was at his dinner the train, upon which he was a conductor, was backed a short distance from the position in which the defendant left it when he alighted and went to get his dinner. The new position in which it was then placed was such as to place one-half of the second-class car oposite the platform at the station with the first-class passenger car in rear of it, and so about half the length of the second-class car from the end of the platform.

The train remained at Sussex Station for full 15 minutes, during all which time the plaintiff was there but made no attempt to get on to the train. Upon receiving notice to start, which is given by the ringing of a gong, the conductor having got his dinner went on to the platform and called out "all aboard"; he then looked down the platform, and seeing no person making for the train to get on to it, and the train being ten or fifteen minutes behind time, he crossed it so as to get into a position to give the signal to the driver to start, which he could not do from the platform in consequence of a curve in the road. The train started as soon after the defendant gave the signal to the driver as a train of 19 cars could be made to start, the engine moving about twenty feet in a train of that length before the passenger cars would move, in consequence of the length of the couplings. Upon getting on to the train after it had started the defendant heard a call that someone was hurt, and he immediately stopped the train and found that the plaintiff was hurt. The plaintiff in her evidence said that she was on the platform for 15 or 20 minutes; that she did not make any attempt to get on to the

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cars until after the conductor called out "all aboard"; that she remained near the station house door from which she only moved a few steps; that the cars were going pretty fast when she tried to get on; that the train had moved five or six rods when she attempted to get on; that it had gained quite a motion; and, at the time of the accident, she said that she thought a box, which was about 18 inches long, 12 inches wide and 4 inches deep, which she was carrying in her hand hindered her somewhat in getting on to the car. Another witness, who saw her trying to get on to the train, said:

She seemed to reach forward with the box; she held it in front of her; she stepped on the steps both feet I think; it seemed to me she lost her balance and stepped back and missed her step and fell. * * I think the box fell with her; she seemed bothered getting on the car and stepped back; I saw the danger and rushed forward, but it was too late. I will not be positive whether she had hold of the rail at all with either hand; my impression is she had hold of the rail with one hand and the box with the other; to a certain extent her having the box in her hand would interfere with her getting on the train.

This witness professed to have a great deal of experience in getting on trains, which he said he had boarded when they were going pretty fast. That he considered it nevertheless dangerous to get on a moving train, even though the person doing so be skilled, but that there is less danger in getting on to a moving train at the rear of the train than at any other part, and that there was more danger with one hand encumbered than with both free.

At the close of the plaintiff's case, counsel for the defendant moved for a nonsuit upon the ground that the defendant had not been shewn to have been guilty of any negligence to which the accident could in law be attributed, and that the evidence, in fact, shewed that the plaintiff was herself the sole cause of the injury she received by wrongfully attempting to get on to the train when it was in motion.

The learned Chief Justice refused to nonsuit, and, in his charge to the jury, told them that a material question

for their consideration was, whether any part of the first-class car stopped opposite to the platform on the arrival of the train at Sussex? 2ndly. If it did come up to the platform, did it remain there a reasonable time to enable the passengers to get on board from the platform? And he told the jury that passengers were entitled to have the car in which they were to be passengers brought up to the platform for the purpose of their getting on to the train, and that they were not obliged to go down upon the ground in order to get to the car and to climb up into it from the ground; that neither was a first-class passenger bound to get into a second-class car and pass through it to the first-class car; that he was entitled to have the first-class car brought opposite the platform and to remain there a reasonable time to enable him to get on; that, if the words "all aboard" were intended as a notification to passengers to get into the cars, they were not obliged to get in until that notification was given, and that they were entitled to a reasonable time to get in after such notification was given; and that, if the defendant started the train without waiting such reasonable time and the accident occurred in consequence, it would be negligence for which he would be liable; that, if the box which the plaintiff had in her hand interfered with her getting on the train and it would not have happened if both her hands had been free to assist her in getting on, she could not recover because, in that case, she had herself contributed to the injury which she had sustained. The jury rendered a verdict for the plaintiff and \$2,000 damages. The jury also answered certain questions submitted to them by the learned Chief Justice.

These questions and answers were as follows:

1. Was the first-class car or any part of it brought up in front of the platform when the train arrived at Sussex, and if so, did it remain there long enough to enable the plaintiff to get into the car from the platform?

To this question the jury unanimously answered that when the train arrived at Sussex the first-class car was at

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the platform, but that, when the conductor called "all aboard," it was not, and five of the jury found that the cars did not remain long enough at the platform to let the plaintiff get on board.

2. Was the call "all aboard" a notice to the passengers to get into the cars?

To which the jury answered that it was.

3. Was any part of the first-class car opposite the platform when the conductor called "all aboard?"

To which the jury answered that they believe it was not.

4. Was the train moving when the conductor called "all aboard?"

To which the jury answered that they thought not.

5. If the train was not then moving, did the conductor allow sufficient time for the passengers to get into the cars after giving that call?

To which the jury answered that they thought not.

6. Did the box which the plaintiff had in her hand interfere with her getting on the train, and would the accident have been avoided if she had had the use of both hands at the time?

To which the jury answered: "We think it did not interfere."

7. Was it negligence on the part of the plaintiff attempting to get on the train while in motion, and did that fact contribute to the accident?

To which the jury answered: "We think it did not."

A motion was made in the Supreme Court of New Brunswick to set aside the verdict and for a new trial for the following among many other reasons:—That the learned Chief Justice should have directed a nonsuit or a verdict for the defendant; because there was no breach of a duty due from the defendant to the plaintiff shewn; that there was no negligence on defendant's part to leave to the jury; that the plaintiff was herself proved to have directly caused the accident by unlawfully attempting, and that, too, when she was encumbered with a box, to get on to the

train when it was in motion; and for misdirection and non-direction of the learned Chief Justice. In telling the jury that passengers were entitled to have the car in which they were to be passengers brought up to the platform, for that purpose, and that they were not obliged to go down upon the ground in order to get into the car, and to climb up into it from the ground, and that a first-class passenger was not bound to get into a second-class car and pass through to the first-class car, and that he was entitled to have the first-class car brought opposite the platform and to remain there a reasonable time to enable him to get in; and in telling the jury that if the words "all aboard" were intended as a notification to passengers to get into the cars, they were not obliged to get in until the notification was given and they were entitled to a reasonable time to get in after such notification was given. That he should have charged them that, if it was a notification to passengers to get on board, it was a notification to get on board a stationary and not a moving train; and that he should have charged the jury that, if the defendant saw no one attempting to get in after calling "all aboard," he was not bound to wait any longer. And that the learned Chief Justice should not have submitted to the jury the 6th and 7th of the above questions, but should have told the jury that the plaintiff, having met with the accident in attempting to get on a train in motion, was herself the cause of its occurring, and that, therefore, she could not recover, and in not telling the jury that there was no negligence on the part of the defendant to which the accident could in law be said to be attributable. The court refused the rule and hence this appeal.

I am of opinion that the appeal should be allowed and that, upon the evidence appearing in the case, no recovery can be had against the defendant upon this record. That the conductor of a train would be liable to a plaintiff for all damage and injury sustained by him which is the natural and direct consequence of any wrongful or negligent

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act of the conductor committed by him, or of any negligent omission of the performance of some act in breach of a duty imposed upon him as the conductor of the train under his charge, and that the party suffering from the effects of such breach of duty is not driven to have recourse by action against some person or body corporate whose servant the conductor is, and between whom and the plaintiff some contract may exist of which the negligence of the conductor would constitute a breach, may be admitted, and, indeed, does not, I think, admit of a doubt, but it is necessary in the present case, as it is in all actions brought against anyone to recover damages for personal injury alleged to have been caused to a plaintiff by the negligent conduct of a defendant, for the plaintiff to prove, not merely that the defendant was guilty of the neglect of some duty cast upon him under the circumstances, but that the damage sustained by the plaintiff was the consequence of that particular neglect of duty. The alleged neglect of duty must be the cause of the accident.

And, if it appear that the plaintiff was guilty of negligence which contributed to the accident, he cannot recover although, in the absence of such contributory negligence, he could. As a consequence from the above it follows that, if the cause of the accident was wholly the act of the plaintiff, he cannot recover, for in such case it cannot be said that the defendant was guilty of any negligence which caused the accident.

Now, what the plaintiff here has undertaken by the first count of her declaration to establish is that it was a neglect of duty in the defendant to omit, as is alleged he did, to place the cars in a proper position for the passengers getting on the train to enter the same, and that such omission was the cause of the accident. It must, I think, be admitted that the learned Chief Justice fell into the error of improperly pressing upon the jury his own view of matters of fact and in such a manner as to convey to the jury an impression injurious to the defendant, as imputing to him

a neglect of duty which subjected him to liability in this action when he stated to them as a proposition of law that passengers by railway

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are entitled to have the car in which they were to be passengers brought up to the platform for that purpose, and that they were not obliged to go down upon the ground in order to get to the car and to climb up into it from the ground, and that a first-class passenger was not bound to get into a second-class car and pass through to the first-class car; that he was entitled to have the first-class car brought opposite the platform and to remain there a reasonable time to enable him to get in.

Such a charge could not, in my opinion, fail to convey to the minds of the jury that, if the first-class passenger car attached to the train of which the defendant was conductor, in which the plaintiff, having a first-class ticket, was entitled to travel, was not brought up close to the platform, although the second-class car immediately in front of it was, through which she might all the time that the train was at the station have passed with perfect ease and safety into the first-class car, and, although by getting down from the platform to the ground, she might, with like ease and safety have entered directly into the first-class car from the ground, that this omission was such negligence upon the part of the defendant as subjected him to liability in this action.

It may be true that a passenger is not bound to do what in practice is done every day, that is to say, to enter into a passenger car at the platform and to pass through a long string of cars until he finds a place where he would like to sit, or it may be where there is room for him to sit, or it may be true that he is not bound to go down from the platform for the purpose of entering from the ground a particular car near the end of the train where many people prefer sitting, and which car, from the length of the train, does not reach the platform, but it is equally true that he is not bound to enter the train at all and that his not being bound to do any of the things suggested in the charge of the learned Chief Justice does not

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give him a right, at the risk and peril of the conductor as to the consequences, to attempt to enter upon any car while the train is in motion passing the platform; nor can it justify and excuse his making the attempt. In such a case there is no connection whatever between the neglect of duty attributed to the conductor and the damage ensuing to a passenger from his unsuccessful attempt to enter the train in motion. If there were any such rule of law as suggested by the learned Chief Justice, it must needs, as a rule of law, apply in all cases, but daily experience shews that it would be impossible to apply it in many. It would be utterly impossible when, as is frequently the case, the train is not upon the track which is nearest to the platform, and in a long train of passenger cars, which are frequently much longer than the longest platform, if each passenger car below the platform was to be brought up to it in succession and stopped as they came opposite to it to give passengers an opportunity to select which car they would enter, it would be difficult if not impossible, to avoid a breach of the peremptory injunction contained in the regulations which prohibits conductors to suffer the train to be in motion while passengers are entering the cars. But whether, in any case or in any action, such an omission would constitute negligence in any person, it is plain that the question is not one of law at all, but of fact for the jury, who would have to determine whether it was or was not negligence under the circumstances of each particular case, and whose was the negligence, if any there was, namely, whether that of the defendant in the action or of some other person, and, in the latter case, whether the person chargeable with the negligence was a person for whom the defendant was responsible. So that when the learned Chief Justice charged the jury, as he did, treating it as a question of law, he was, in my opinion, improperly pressing upon the jury his own views as to what was in truth a matter appertaining to the region of fact and not of law. But, whether such omission was or was not a breach of the

defendant's duty as conductor of the train, it is obvious that the omission charged cannot be said to have caused the accident, which could not have happened if the plaintiff had not, in the perfect exercise of her free will and with her eyes open, attempted to get on the train when it was in motion. The taking the train away without bringing up the first-class passenger car to and stopping it at the platform if at all an actionable breach of duty, its natural consequence would be to prevent passengers who were on the platform waiting to go by the train from entering the cars, and so to deprive them of their right to go by that train, but the damages recoverable for such a breach of duty would be of a very different nature from the damages sought in the present action. The taking away the train without stopping the first-class passenger car at the platform could not excuse or justify the voluntary act of the plaintiff in attempting to enter upon the train while in motion, passing the platform, which voluntary act can alone be said to be the cause of the damage and injury sustained by the plaintiff from the attempt proving to be unsuccessful.

Then, as to the second count, it appears by the evidence that the act of negligence relied upon is the not waiting a sufficient length of time for passengers to get on the train after the conductor called "all aboard." The jury found that this call is an invitation to passengers to get on to the train. Whether this finding is correct or not it is not necessary to enquire, but I confess that I think daily experience would rather pronounce it to be a warning that the last moment for getting on board had arrived, and a notice that the train was immediately about to start. But adopting the findings of the jury upon this point there is no rule of law which can be said to authorize persons intending to travel upon the train to disregard the gong by which it appears the warning is given at the station in question and to abstain from getting on until they hear the call of "all aboard," a call the necessity of giving which is not imposed

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as a duty upon the conductor by the regulations nor by any rule of law.

It is not suggested that the conductor gave the order for the train to start while any passenger was getting on, and it does not appear that he saw the plaintiff or anyone attempting to get on or moving towards the train, indeed the contrary is sworn to, so that even if he was guilty of any breach of duty in not waiting a reasonable time after calling "all aboard" before starting the train the same observations that I have made in relation to the first count equally apply to the second count, namely, that between such a breach of duty, if it be one, and the damage accruing to the plaintiff from her unsuccessful attempt to get upon a train in motion, there is no connection. Her doing so, as she admits she did, after the train had acquired considerable motion, and had moved five or six rods, is just such conduct as called for a charge to the jury such as that suggested by Lord Chancellor Cairns in the *Dublin, Wicklow and Wexford Ry. Co. v. Slattery (c)*, namely, the learned judge who tried this cause should have told the jury that it was the folly and recklessness of the plaintiff and not any carelessness of the defendant which caused her the injury of which she complains, and that, however much they might sympathize with her in her misfortune, she could not, upon this evidence, recover in this action against the defendant.

Following a decision in a recent case, *Watkins v. Rymill (d)*, and the decision of the Privy Council in *Davenport v. The Queen (e)*, I think our judgment should be to order a verdict to be entered for the defendant without a new trial or that a nonsuit should be entered for the reason that there was no evidence upon which the jury could properly find a verdict against the defendant.

The appeal, therefore, should be allowed with costs and

(c) 3 App. Cas. 1155.

(d) 10 Q.B.D. 178.

(e) 3 App. Cas. 115.

a rule absolute be ordered to issue in the court below to
enter a nonsuit with costs to the defendant.

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Appeal dismissed with costs.

Solicitor for the appellant: *C. A. Palmer.*

Solicitor for the respondent: *C. W. Weldon.*

1889 **April 2, 3. **June 14.	*THE COUNTY OF VICTORIA (PLAIN- TIFF)	}	APPELLANT;
AND			
	THE COUNTY OF PETERBOROUGH (DEFENDANT)	}	RESPONDENT.

*Municipal corporation—Boundary roads—Rivers and streams—
 Bridges—Deviation of boundary road—Liability of adjoining
 counties for repairs to bridges.*

The county of Victoria adjoins the county of Peterborough on the west and, up to 1863, the counties were united for municipal and other purposes. The boundary line road between the counties in part of its course formerly passed between the 10th concession of the township of Verulam in the county of Victoria and the 19th concession of the township of Harvey in the county of Peterborough, and the lots in the latter concession from 1 to 15 constituted a range of broken lots forming a narrow strip of land fronting on the west side of Pigeon Lake, and separated by that body of water from the rest of the township. The boundary line road between these counties deviated at several places, owing to natural obstructions, and near the village of Bobcaygeon, which was wholly situate in the township of Verulam, the road in deviating from the boundary line crossed the two outlets of Sturgeon Lake, and bridges were built there, during the union at the joint expense of the two counties, and were treated as subject to a joint control and liability. By 42 Vict. ch. 47 (O.), which came into force on the 5th March, 1880, that portion of the township of Harvey, lying on the west of Pigeon Lake was detached from Harvey and joined to Verulam for all purposes. The bridges near the village of Bobcaygeon having got into disrepair, the defendants refused to admit any liability therefor, contending that, since the passing of 42 Vict. the repair of these bridges rested wholly with the county of Verulam. At the trial before Robertson, J., it was held (15 O.R. 446) that, notwithstanding the provisions of 42 Vict., the bridges remained under the joint control and liability of the two counties. On

*Cass. Dig. 558.

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

appeal to the Court of Appeal (15 A.R. 617), it was held that by virtue of the legislation, Verulam had become a township bordering on a lake, and that the boundary line between the two townships, which was also the county boundary line, had now become the centre line of Pigeon Lake, and not, as formerly, on the original road allowance between Verulam and Harvey.

On appeal by the plaintiff to the Supreme court of Canada,

Held, that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed with costs.

Per Taschereau, Gwynne and Patterson JJ., that since the passing of 42 Vict. ch. 47, the boundary line must be regarded as having always been as by that Act established, with the range of broken lots wholly in the township of Verulam in the county of Victoria, and with the boundary between Verulam and Harvey running along the centre line of Pigeon Lake; and that sections 535 and 538, ch. 184, R.S.O. (1887), had no application, as those sections only applied to cases where the intention of the survey was that there should be a road upon the boundary line, but, viewing the boundary line as located by the Act of 1880 in and through Pigeon Lake, it could not be said that the bridges in question were upon the road between the two townships, or on a deviation from such road.

APP^EAL from a decision of the Court of Appeal for Ontario (*a*), reversing the judgment of Robertson, J. (*b*), and dismissing the action with costs.

The facts of the case are sufficiently set out in the head-note and judgments.

Blake, Q.C., Moss, Q.C., and Hudspeth, appeared for the appellants.

Christopher Robinson, Q.C., and Edwards, appeared for the respondents.

STRONG J.—I am of opinion that this appeal must be dismissed with costs for the reasons stated in the judgment of Mr. Justice Osler in the Court of Appeal.

FOURNIER J., concurred in dismissing the appeal.

TASCHEREAU J.—I am of opinion to dismiss this appeal for the reasons given by my brother Patterson.

(*a*) 15 Ont. App. R. 617.

(*b*) 15 O.R. 446.

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GWYNNE J.—The question presented in this case is very simple, and the surprise to me is that any doubt should have ever been entertained upon it. Since the passing of the Ontario statute, 42 Vict. ch. 47, the boundary line between the townships of Verulam and Harvey, the former of which is in the county of Victoria and the latter in the county of Peterborough, must be regarded as having always been as they are established by that Act to be, that



boundary line commencing at the northerly limit of the township of Verulam and proceeding thence, in a southerly direction, consists of a road or highway laid down on the ground on the original survey of the townships. Upon this southerly course it proceeds until it reaches on its west side the southerly limit of a lot numbered 17 in Verulam and on its east side the southerly limit of a lot numbered 16 in Harvey, which limits of lots 17 and 16 are

lines drawn at right angles with the said boundary line road. From the point of intersection of the southerly limit of lot 16 in Harvey with the said road, the line between the townships deflects easterly along the southerly limit of said lot No. 16 continued to the centre line of a lake called Pigeon Lake, and proceeds along such centre line in a southerly direction until it reaches a point in the centre of the lake opposite to the front or southerly lines of the two townships, which but for the intervention of the lake would be one straight line.

Now, although the road as above described from the northern limit of the township of Verulam ceased to be a boundary line between that township and the township of Harvey when it reached the southerly limit of lot 16 in the latter township, the road nevertheless continued in a straight line into and through the township of Verulam within the limits of which township it is crossed by two little streams forming an island between them and flowing from Sturgeon Lake into Pigeon Lake; the road continues still in a straight line in a southerly direction until it reaches Pigeon Lake at a point wholly within the township of Verulam, and distant about half a mile north of the southern limit of the township of Verulam. The two little streams therefore which flow from Sturgeon Lake into Pigeon Lake do not cross the boundary line between the townships of Verulam and Harvey at all, but are wholly within the limits of the township of Verulam. Now, the section of the statute under which the question arises is section 535, of ch. 184 of the Revised Statutes of Ontario (0000), which enacts that:

1. It shall be the duty of county councils to erect and maintain bridges over the rivers forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county.

And in case they differ as to the proportion of the expense to be borne by each, provision is made for having

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the difference determined by arbitration. Then the section enacts that:

2. A road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section, although such road may deviate so that it is in some places wholly within one of the municipalities and a bridge built over a river crossing such road where it deviates as aforesaid shall be held to be a bridge over a river crossing a boundary line within the meaning of this section.

Now, the bridge in question is one across the stream flowing from Sturgeon Lake into Pigeon Lake at a point distant over $1\frac{1}{2}$ miles west of Pigeon Lake, and in the village of Bobcaygeon, which is a village situate within the township of Verulam, so that it is apparent: First. That this not a bridge over a river forming or crossing any boundary line between two municipalities so as to come within the above section 535, and, Secondly: As there is no river which in point of fact does cross the boundary line between the two townships at any place, no question of deviation within the meaning of the section does or can arise. The bridge is one across a river wholly within the limits of the village of Bobcaygeon, and which is said to exceed 100 feet in width. The bridge, therefore, seems to come within the provision of section 534 of the Act, which enacts that:

The county council shall cause to be built and maintained in like manner all bridges on any river or stream over 100 feet in width within the limits of any incorporated village in the county necessary to connect any main public highway running through the county.

It certainly does not come within section 535, and the appeal therefore must be dismissed with costs.

PATERSON J.—The question raised by this appeal may in my opinion be decided without touching several of the arguments urged at the bar.

The township of Harvey, in the county of Peterborough, and the adjoining township of Verulam in the

county of Victoria had been surveyed, in the mode customary in the Province of Ontario, with an allowance for road along the line dividing the townships. It happened that the line ran a short distance only from the west shore of Pigeon Lake, the township line running nearly north and south, and Verulam being west of Harvey. A strip of land on the Verulam side of the lake was by the rectangular and rectilinear system of survey left between the township line and the lake. That strip belonged by virtue of the survey to Harvey, but was cut off from the rest of that township by the waters of the lake.

To get rid of this inconvenience, the strip of land, which consisted of lots one to fifteen, both numbers inclusive, in the nineteenth concession of Harvey, was, by the Act 42 Vict. ch. 47 (O.), detached from the township of Harvey and made part of Varulam.

The two townships are coterminus at the north and also at the south. The concession lines run north and south, and the lots are numbered from the south. The nineteenth concession of Harvey adjoined the township of Verulam, and lot fifteen in the nineteenth concession was where the line between the two townships, coming from the north, first struck the water. Pigeon Lake is one of a chain of lakes which find their outlet by way of the River Trent. Another of the chain, called Sturgeon Lake, empties its waters into Pigeon Lake by two streams called the Big Bob and the Little Bob, the former flowing at the north and the latter at the south of an island through which the boundary line in question runs at the village of Bobcaygeon, the village being on the Verulam side of the line. The water struck by the township line at lot fifteen is the Big Bob and not Pigeon Lake proper, though lot fifteen at its eastern extremity reaches the lake.

The result of the Act referred to was to make the land in each township as far north as the said lot fifteen border the lake. The townships became two of those described in

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the Act respecting the territorial divisions of Ontario, R. S.O. (1887), ch. 5, sec. 10, as "the townships on the River Trent and its lakes," and the limit of each township extended, by virtue of that section, to the middle of the lake.

It is scarcely necessary to say that no allowance for road ever was or could be laid out on that imaginary line.

The road upon the original allowance between the townships is travelled from the north as far as lot 17. There the travelled road, in place of continuing on the line and crossing the Big Bob on the line at lot 15, is deflected towards the west and runs in a south-westerly direction obliquely across three lots in Verulam till it strikes the Big Bob, in the village of Bobcaygeon, at the width of a whole concession from the township line and at a spot as far south as the northern line of lot 14 of the Harvey lots, then turning south-easterly it crosses the Big Bob by a bridge which is the principal subject of the present controversy, and, re-crossing the concession on the Verulam part of the island, rejoins the original allowance for road on the island at lot fourteen. From that point the travelled road pursues the original allowance, for some distance southward, crossing the Little Bob on the original line by a bridge which is also in question.

This somewhat tedious narration brings us to the question for decision upon this appeal.

The corporation of the county of Victoria insists that under the municipal law of Ontario the county of Peterborough is jointly responsible with Victoria for the maintenance and repair of the bridges. The corporation of Peterborough maintains that no such liability attaches to that county.

The decision in the court of first instance was in favour of Victoria. That decision was reversed by the Court of Appeal, and Victoria appeals to this court.

The provisions on which the matter turns are contained in the Municipal Institutions Act, now composing chapter 184 of the R.S.O. (1887).

Section 535, omitting words which do not apply to counties, may be read as follows:

It shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and in case of a bridge over a river forming or crossing a boundary line between two or more counties, such bridge shall be erected and maintained by the councils of the counties respectively, and in case the councils fail to agree as to the respective portions of the expense to be borne by the municipalities interested, it shall be the duty of each to appoint arbitrators as provided by this Act, to determine the proportionate amount to be paid by each, and the award made shall be final.

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Sub-section 2:

A road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section, although the road may deviate so that it is in some place or places wholly within one of the municipalities, and a bridge built over a river crossing such a road, where it deviates as aforesaid, shall be held to be a bridge over a river crossing a boundary line within the meaning of this section.

Rivers forming boundary lines and rivers crossing boundary lines, are both included in the duty here imposed to erect and maintain bridges. In the former position it is evident that we must import by implication the qualification that the bridges are to be built and maintained only on the line of roads which cross the boundary line formed by the river, although the section is silent as to where those bridges are to be. Where a river crosses a boundary line, it is equally evident that the duty to build a bridge over it attaches only when there is a road on the boundary line. Nor is this entirely left to implication. We find the word "road" used in the second sub-section from which, as well as from the use of the words in other sections, and from the reason of the thing, it is plain that the expression "boundary line," or "boundary road," or "line," or "road," means, in all cases, except where a river is spoken of as forming a boundary line, a road upon a boundary line. By section 533, county councils are empowered to assume, *make*

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and maintain, county and township boundary lines, and by sections 536 and 537 townships are, in the cases there mentioned, to maintain township boundary lines, which directions would be meaningless unless line denotes a road. This understanding of the term does not explain away all the looseness of the language. Thus, when a river is spoken of as forming or crossing a boundary line, the word "line" means "road" where the river crosses, and means simply "line" when the river forms the boundary. With that exception, however, the expressions are used indifferently in the sense of "boundary road." By the system of surveys which has prevailed in the province there is an allowance for a road whenever the boundary line between townships is actually laid out. At least that is the general rule, and it accounts for, though it may not in strictness justify, the interchangeable use of the terms boundary, line and boundary road.

Under sections 536 and 537 township councils are charged with the duty of maintaining the roads on the boundaries between townships, even though they form also the boundaries between counties, unless the roads have been assumed by the county councils, that duty not extending to bridges over rivers forming or crossing boundary lines, but extending (by section 538) to portions of the road which may so deviate as to be wholly or in part in one of the townships.

The road between the townships of Harvey and Verulam comes within these provisions. The road is to be maintained by the townships and the bridges over rivers that cross the road are to be maintained by the counties.

Previous to March, 1880, when the detaching statute took effect, this wide loop made by the road from lot 17 in Harvey through Bobcaygeon and back to the line at lot 14, seems to have been recognized by the councils of the municipalities as no more than a deviation of the boundary road. The Council of Peterborough bore its share in the maintenance and repair of the bridge over the Big Bob, and I suppose the township of Harvey did the same with regard

to the loop road. I do not think it necessary to enter on a discussion of the limit, if any, to be assigned to the deviation provided for by the Act. I notice that the learned judge who tried the action inclined to the opinion that, when the statute speaks of the road being *wholly* in one township, a wider deviation is contemplated. I do not regard the statute in that light. The road will be as wholly in one township if it diverges its own breadth from the true line as this road which is a mile and more from the line.

I am content for the purposes of this appeal to follow the municipal councils in assuming this to have been originally a deviation within the meaning of the statute.

But after March, 1880, there was no road between the townships at lot 14, where the one bridge is which was on the assumed deviation, or at 13, where there is a bridge over the Little Bob on the original boundary.

Notice that it is *the road* that may deviate, under sections 535 and 538. That is to say, the road that was intended to run on the line may accidentally by reason of inaccurate surveying, or purposely in order to shun some obstacle, or for some other cause, get off the line. In that case it is to be treated as it would be treated if it had adhered to the line. That is the effect of the statute. But when there is no road intended to be on the line, there is no road that can deviate from the line.

It may be very useful and desirable to have a road on the boundary between townships or counties, but there is no law that requires such a road.

It is not a function of the Municipal Institutions Act of Ontario to provide these roads. They depend on the original survey of the country, and the Act, in apportioning the duty of maintaining them, deals as a rule with the allowances for road laid out in the original survey. The general scheme of survey no doubt includes such allowances where practicable to lay them out, but there can be none in the cases, of which this is an example, provided for in the tenth section of the Territorial Divisions Act already re-

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ferred to, where townships lie on opposite sides of a lake or river.

I agree, therefore, with the Court of Appeal, that the rivers over which the bridges in question are built do not cross any road between the counties of Victoria and Peterborough, and that the provision of section 535 that

a road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of the municipalities, and a bridge built over a river crossing such road, where it deviates as aforesaid, shall be held to be a bridge over a river crossing a boundary line within the meaning of this section.

cannot aid the claim of the county of Victoria, because, no road existing in law between the counties at the place in question, there is no such deviation of a road. The bridges, if made where the rivers called the Big Bob and the Little Bob cross the original allowance, could not be said, since March, 1880, to be over rivers crossing the boundary line between the townships. *A fortiori*, the bridge on the deflected road cannot be held to be over a river crossing the boundary line.

Another argument for the county of Peterborough was advanced by Mr. Edwards, founded on the duty of the county under section 534 to make bridges over all streams of over 100 feet in width in incorporated villages. That argument does not aid or alter the inquiry. The duty only exists when the bridge connects some main public highway leading through the county. The question is whether this is such a highway, or whether it must not be held to be a boundary line of the county. If held to be a boundary line under the statute, it is out of section 534. If not held to be a boundary line, *cadit questio*.

In my opinion we should dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Hudspeth & Jackson.*

Solicitor for the respondents: *E. B. Edwards.*

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