THE

ONTARIO REPORTS,

VOLUME XXIII.

CONTAINING

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

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

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

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BARRISTERS-AT-LAW.

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JUDGES

OF THE

HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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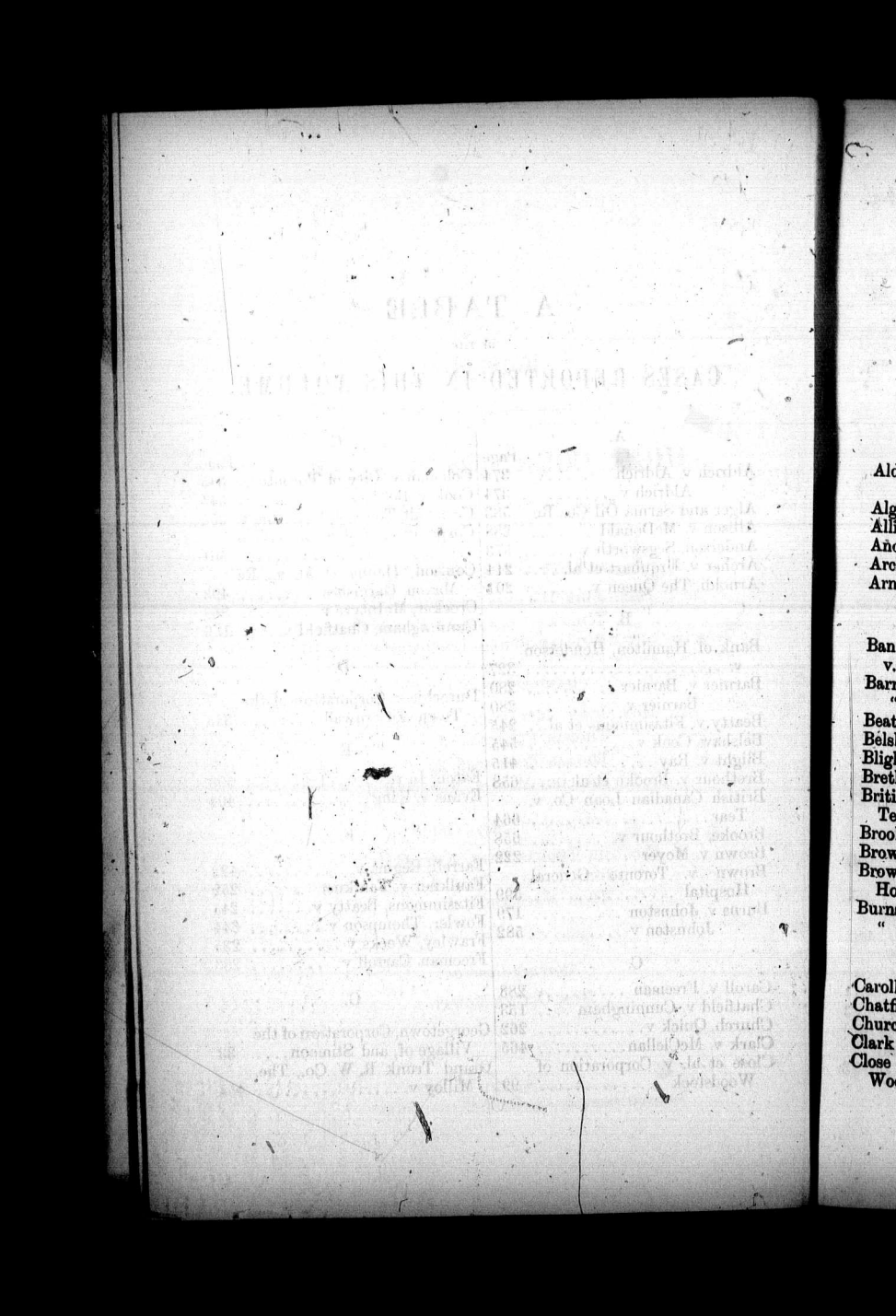
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ERRATA.

Page 150. Line 3, for "1883" read "1893."

" 214. Head-note, lines 4 and 7, for ("grantor") read ("grantee.")

" 320. Line 18, for "McKinnear" read "Mr. Kinnear."

" 429. Line 3 from bottom, for "defendant" read "plaintiff."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

THE COMMISSIONERS FOR THE QUEEN VICTORIA NIAGARA FALLS PARK ET AL.

V.

HOWARD ET AL.

Crown lands—Ordnance lands—Chain reserve along Niagara river—Slope—Military communication—Government reserve—Waste lands—Public purposes—Military purposes—User for—Ordnance Act (1843), 7 Vic. ch. 11.

In an action by the plaintiffs, claiming under a patent from the Ontario Government, and the defendant, claiming under a lease from the Dominion Government, to try the right to a part of the chain reserved along the bank of the Niagara river and the slope between the top of the bank and the water's edge, which had been reserved out of the original survey of the township of Stamford, and was claimed by the defendants to have been reserved or set apart for "Military" or "Ordnance" purposes:—

Held, that the "Chain Reserve" was part of the waste lands of the Crown held for public purposes.

It was a "Government Reserve" originally made for public purposes:—

Held, also, that as there was no evidence that this "Chain Reserve" was set apart for military purposes, or of any user, charge or control of it by the military authorities, that it was not affected by the Ordnance Vesting Act of 1843, 7 Vic. ch. 11, but remained a government reserve, held for public purposes generally, and that the portion in question vested

in the Province of Ontario, as successor of the old Province of Canada, until vested in the plaintiffs who were entitled to succeed :—
Held, also, that assuming the "Chain Reserve" had been so set apart for military purposes, the "slope" formed no part of such reserve, but always remained part of the waste lands of the Province.
History of the "Chain Reserve" along the west bank of the Niagara river from Niagara to Fort Erie traced.

Statement.

THIS was an action brought by the Commissioners for the Queen Victoria Niagara Falls Park and The Honourable Oliver Mowat as Attorney-General of the Province of Ontario, against George Henry Howard and another, to try the right to a considerable piece of land between the top of the bank on the west side of the Niagara river and the water's edge from the Railway Suspension bridge to the ferry at the Clifton House, known as the "slope," together with two pieces, at either end of this strip, on the top of the bank.

The land along the top of the bank for a distance of sixty-six feet from the brink was what was generally known as the "Chain Reserve," or "Ordnance Reserve," which presumably extended along the whole river from Niagara to Fort Erie.

The defendants, in 1887, obtained from the Dominion Government a lease of the lands in question as forming part of the Military or Ordnance lands, which passed to the Dominion under the British North America Act, for the purpose of constructing a carriage way along the slope, the erection of elevators, etc., and entered upon the lands for that purpose.

Subsequently the plaintiffs, the commissioners, obtained a grant of the same lands from the Government of Ontario, as being part of the unsurveyed lands of the township of Stamford, and with the Attorney-General of Ontario, brought this action to restrain the defendants from entering upon the lands and constructing the works.

It was denied by the plaintiffs that the lands were ever Military or Ordnance lands, or were vested in the Dominion as such, and they alleged that they were part of the ordinary waste lands of the old Province of Canada which became vested in the Province of Ontario at Confederation.

Statement.

The action was tried at the sittings at Toronto, on June 23rd, 24th, and 25th, and adjourned until October, when it was continued on the 3rd, 4th, 5th, and 6th days of that month before BOYD, C.

Irving, Q. C., and *Moss*, Q. C., appeared for the plaintiffs, and

Robinson, Q. C., and *Harry Symons*, for the defendants.

The evidence consisted of patents, maps, plans, reports, correspondence, etc., produced from different departments of both the Dominion and Provincial Governments, as well as other available sources; the principal relevant parts of which are referred to and extracts therefrom given in the judgment of the learned Chancellor.

The following statutes and cases were cited and referred to as bearing upon and affording information as to the property in question, and its title, position, etc.: 31 Geo. III., ch. 31; 7 Vic. ch. 11; 16 Vic. ch. 189; 18 Vic. ch. 91; 19 Vic. ch. 45, particularly secs. 2, 6 and 8; 19 Vic. ch. 63, particularly sec. 2; C. S. C. chs. 24 and 36; 31 Vic. ch. 42, sec. 34 (D.); B. N. A. Act, sec. 91, No. 7, secs. 108, 109, and 117; 40 Vic. ch. 8, particularly sec. 5 (D.); 44 Vic. ch. 35 (O.); 50 Vic. ch. 13 (O.); 51 Vic. ch. 7 (O.); *In re Macklem and the Commissioners of the Niagara Falls Park*, 14 A. R. 20; *Clark & Street* v. *Bonnycastle*, 3 O. S. 528; *Badgley* v. *Bender*, 3 O. S. 221; *Parker* v. *Elliott*, 1 C. P. 470; *Regina* v. *Davis*, 11 U. C. R. 340; *Doe d. Mallock* v. *The Principal Officers of Her Majesty's Ordnance*, 3 U. C. R. 387; *Dittrick* v. *O'Connor*, 7 U. C. R. 448; *The Attorney-General* v. *Garbutt*, 5 Gr. 181; *Moffatt* v. *Scratch*, 8 O. R. 147; *S. C.* 12 A. R. 157; *Doe d. Jackson* v. *Wilkes*, 4 O. S. 142; *Doe d. Sheldon* v. *Ramsay*, 9 U. C. R. 105; *The Attorney-General* v. *Grasett*, 6 Gr. 200; *Regina* v. *Renton*, 2 Ex. 216; *The Queen* v. *Fay*, 4 Ir. R. C. L. 606; *The Queen* v. *McFarlane*, 7 S. C. R. at p. 242; *The Queen* v. *The Bank of Nova Scotia*, 11 S. C. R. 1, at pp. 10 and 11; *Regina* v. *Hunt*, 16 C. P. 145; *The*

Argument. *Queen* v. *The United Kingdom Electric Telegraph Co. (Ltd.)*, 31 L. J. Mag. Cas. 166; *Elwood* v. *Bullock*, 6 Q. B. 383; *Windhill Local Board of Health* v. *Vint*, 45 Ch. D. 351; *The King* v. *Russell*, 6 B. & C. at p. 579; Glen on Highways 371; *The Attorney-General ex rel. Nepean* v. *The Bytown and Nepean Road Co.*, 2 Gr. 626.

December 19, 1892. BOYD, C.:—

The matter presented for determination has, in various forms, occasioned doubt and perplexity for some hundred years. It has given rise to much diversity of opinion among high officials, military and civil. Yet such has been the industrious research expended in the collection of materials, that I am perhaps as well placed for the consideration of the whole question as some from whose conclusions I may have to differ.

The inquiry cannot be conducted on strictly legal evidence, for owing to lapse of time, the historical element has to be taken into account. Therefore, in reaching my conclusions, I have overlooked none of the miscellaneous matters which were more or less discussed during a seven days' argument, in addition to certain augmentations sent in after argument. I have drawn also from other sources, historical or statutory, of a public character, so that I might, if possible, harmonize the various claims made and transactions had, with reference to this property, which may be conveniently spoken of as "The Chain Reserve," *i.e.*, along Niagara River from Queenston to Fort Erie. As to the propriety, and indeed necessity of using this class of material, note the observations of Lord Halsbury in *Read* v. *The Bishop of Lincoln*, 67 L. T. N. S. 128—now reported in [1892] A. C. 644.

Time and patience would fail did I attempt to deal with the whole mass of material in chronological detail, but my endeavour will be to make such selections (after consideration of the entire) as will indicate the path taken to reach the result. Reversing the manner of approach

adopted by the defendants in argument, I think that the only satisfactory way is to begin, not with the B. N. A. Act, but with the history of events which preceded the passage of the first Ordnance Act in 1843, 7 Vic. ch. 11. To do that necessitates going back, so as, if possible, to settle the origin of this so-called "Military Reserve." Judgment. Boyd, C.

A very important clue to the understanding of the early movements throughout what I may (anticipating its later name) call the Niagara District, is to be found in the historical situation at the time when the separation of the original Province of Quebec was projected.

The American Revolution was closed by the definitive Treaty of Peace in September, 1783, which fixed the boundary between the United States and Canada (in this locality) by a line through the middle of the water-communication between Lake Ontario and Lake Erie.

One of the terms of that treaty provided as to debts owing to, and other claims made by British merchants, that no lawful impediments to recovery should be interposed by the States. Some of the Southern States, however, passed laws with a view to sequester these claims, whereupon the British Government detained the forts and frontier posts at Oswego, Niagara, Detroit, and elsewhere in the west, as a substantial safeguard that no such impediment should be continued.

This armed occupation formed one of the difficulties in the framing of the Constitutional Act of 1791, and is thus referred to by Lord Grenville in 1789, when sending the draft out to Lord Dorchester (the governor). The boundaries of Upper Canada were left blank, and he said: "there will, however, be a considerable difficulty in the mode of describing the boundary between the district of Upper Canada and the territories of the United States, as the adhering to the line mentioned in the treaty with America would exclude the posts, which are still in His Majesty's possession, and which the infraction of the treaty on the part of America has induced His Majesty to retain; while on the other hand, the including them by express

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words within the limits to be established for the Province, by an Act of the British Parliament, would probably excite a considerable degree of resentment among the inhabitants of the United States:" Christie's Canada, vi. 18. It may be stated that by the expedient of having the boundary defined by Orders-in-Council, to be subsequently issued, all reference to them in the statute was obviated.

As appears by the report of Deputy Surveyor-General Collins, of December, 1788, the whole eastern frontier of the Niagara river (now on the American side) was used as the only means of communication and transport from the upper end of Lake Ontario to the lower end of Lake Erie. He suggests, however, the expediency of carrying on the communication on the present Canadian side of the river with the landing-place where Queenston (the new landing was called "Queenston" in 1792, from the fact that Lieutenant-Governor Simcoe hutted the Queen's Rangers at that place) now is, from which there should be land-carriage to Chippewa creek, and from thence by boats pulled from the shore to Lake Erie. He points out the advantages of the change of route by having the whole transport carried on completely on this side of the river, and by having the assistance of the new settlers with their waggons and teams at hand in case of exigence.

The new settlers were chiefly U. E. Loyalists, who began to come in before the conclusion of the treaty of peace. Of this, interesting evidence is found in the additional instructions sent to General Haldimand, in July, 1783. These provide for the allotment of lands to the loyalists leaving the United States for Quebec. He is to direct the Surveyor-General to lay out such quantity of land as, with the advice of Council, he shall deem necessary and convenient for the settlement of the said loyal subjects, etc., so that free grants may be made. Again, in August, 1783, further instructions were issued providing for grants to the Associated Loyalists and others on condition of settlement and taking the prescribed oaths. In 1785, an Order-in-Council was passed, allowing loyalists in

the upper settlements to erect mills where they had settled. Among other places pointed out are some between the Great Falls and Chippewa Creek. Judgment Boyd, C.

Lord Dorchester was Governor from 1786 to 1796, but it was under instructions to the Surveyor-General's department, issued by General Haldimand, that Augustus Jones made the Government survey of the township of Stamford in the winter of 1787-8. But settlement preceded as well as followed this survey. One, at least, of the lots near the Falls (so much discussed in this action) was taken up in 1790.

In 1788, Lord Dorchester divided Quebec into new districts, of which Nassau embraced the Niagara country. And in the next year an Ordinance of Quebec (29 Geo. III., ch. 3) was passed to provide for the dispensation of justice in this and the other districts, whereby provision is made that a juror shall not be challenged (though not a freeholder) if he has been for a year the actual occupant of 100 acres under the permission or authority of the Government within the district. Section 11 of this Ordinance recites that the western districts will be chiefly inhabited by persons born within the ancient dominions of the Crown of Great Britain.

In July, 1789, there was already existing on the west side of the Niagara river a means of communication with the upper country by which the residents of Nassau were enabled to transport merchandize, peltries, and other commodities. This was (so to speak) the civic means of communication as contrasted with the military which was as yet on the east side of the river. But in October, 1791, the new route opened by the settlers was adopted for the purposes of the Government. A sealed contract was entered into for the transport of stores and provisions for His Majesty's service, by which some of the settlers (then selected) were to be the carriers. The method employed was to carry overland on wheels the heavy loaded batteaux from Queenston to Chippewa (twelve miles), then to relaunch the boats and haul them up stream by horse-power some

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eighteen miles to Fort Erie. This contract recites:—"Whereas the carrying place at Niagara is a post of great consequence, as well for the passage of troops, as for the transport of stores and provisions for His Majesty's service." This new road of 1791 soon became known as the "old road," and was established as a public way in 1802.

Thus then appears to have been practically settled the problem propounded in the report of Collins, Deputy Surveyor General: land-carriage for government stores from the landing-place (now Queenston) to Chippewa over the road used by the inhabitants, and water-haulage along the river bank from that point to Lake Erie.

In 1792 the separate Government of Upper Canada was organized under Lieutenant-Governor Simcoe and Council, and the seat of government placed at Newark (Niagara), because that was "the most central spot for the convenience of the different settlements:" (*Simcoe's dispatch to Dundas, April*, 1792.) Forthwith the first Provincial Parliament in the same year changed the name "Nassau," to the more appropriate one of "The Home District."

By Jay's Treaty of 1794, provision was made for the withdrawal of British troops and garrisons from all positions within the boundary lines assigned to the United States by the Treaty of Peace (1783). This called for preparations in order to the removal of the seat of Government from Newark to York (Toronto), to which place Simcoe removed his headquarters in 1795. The evacuation of the posts in United States' territory was completed in 1796, and in the next year York became the capital of Upper Canada. This change was marked by the legislation in 1798, grouping the counties of Lincoln and Haldimand with islands in the Niagara river and Lake Erie under the designation of "the Niagara" (instead of "the Home") district.

Pending the occupation of the United States western frontier by the British troops strong hopes were entertained in the Province and by the mother country, that the American Revolutionists might grow dissatisfied with

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the confusion and difficulties of their new political situation, and that a restoration of British rule was still possible. Simcoe shared this hope, and though it was greatly dissipated after Jay's Treaty, he, as a military man, shaped his public policy with reference to it. He believed that whatever might happen, one great point of safety for Canada was, as concisely and correctly put by his biographer, "in keeping the military posts well in hand, and in communication with one another:" (Read's Life and Times of General Simcoe, 159).

Now the communication by means of the River Niagara in those early days, when the country generally was a wilderness, was the one great natural highway between the lakes and the upper country. And as the occupation of the interior was then of an almost exclusively military character, so the keeping open of this line of communication was more of a military than a civil matter in the eyes of Simcoe and his government. When the line of transit was changed from the eastern to the western side of the river by the force of the circumstances already detailed following upon Jay's Treaty—the same military character might be expected naturally to attach to the substituted way. But at this point arises confusion, because of the variance between the portage road actually travelled and the way of communication reserved along the brink of the Niagara river, under instructions from the old Quebec government.

To make this plain, I revert now to earlier dates, passed over in order to bring them together at this point. Among the papers before me many theories are broached as to the origin of the Reserve along Niagara river, but I am satisfied that a sufficient explanation is to be found in the first authorized survey by the Government and its attendant circumstances. Prior to this period it seems vain to search.

Augustus Jones was the surveyor who, under instructions from General Haldimand to the Surveyor-General's department of Quebec, made the survey of Stamford in the

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winter of 1787-8. He says (in sworn testimony taken in 1833, before Sherwood, J., at Niagara) that it was recommended by the Commandant of Niagara, and by the land board, that one chain should be reserved for public purposes along the front in the township of Stamford, and other townships along the river. These in order from north to south, were: Niagara, Stamford, Willoughby, and Bertie.

This reserve was to be made from the top of the bank, or from the water's edge, according to the conformation of the ground,—the evident intention being to reserve a strip of land available for travel. This was accordingly done by producing the side lines to within one chain of the intersection with the top of the bank, or to within one chain of the river, as might be required: (see surveyor Burwell's account of it in letter of October, 1833, he then acting in privity with Jones). Jones tells us that the travelling was then in general along the banks of the waters of the country: this is confirmed by the first Provincial Statute of Upper Canada which recognized the custom of having "front roads on the w[illegible]" (33 Geo. III., ch. 4, sec. 5) (1793).

The chain thus reserved from or out of Jones's survey was made one of the lines of boundary for the settlers' lots along the river as expressed in the King's patent; and in this way it became colloquially spoken of as "the Chain Reserve," although no actual reserve appears. Jones thinks he reported to Mr. Smith (the Surveyor-General), in 1792, that there was a reserve of one chain along the bank. This was needful, because the chain is not laid down in the original map of Stamford called "the Quebec map." It is well proved, however, that he attended with maps, plans, and field notes, before Governor Simcoe in Council, and then pointed out that he had left, as instructed, a chain from the summit of the bank. This was soon after the 23rd April, 1793, at which time (as appears by the letter of Simcoe's secretary) it was supposed that below the Falls there was a reserve of two chains from the top of the bank.

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This chain being reserved at the instance of the land board, it becomes important to consider the terms of a mandate issued by that body on 3rd May, 1791. The local land board then call attention to the chain left by the surveyors for the purpose of having roads along the river from the landing (Queenston) to Chippewa Creek, and require the inhabitants to open the road to the width of one chain after the crops are got in.

This direction, be it observed, does not seem to have been obeyed, for the intended road all along the river between these two points was never opened up. From the height above Queenston to about the whirlpool is yet, I am told, very much in a state of nature; but however this may be, there has been certainly no user of this part of the chain on the top of the bank. Despite the action of the land board, public travel continued on the portage road, used by the settlers in 1789, which was doubtless in every way more convenient than one which would skirt the river. The chain along the bank in the neighbourhood of the Falls from the present Clifton House to Table Rock was, by living witnesses, proved to have been travelled publicly, as a road in 1837, and has ever since been, as Vert Fralick says, "a regular road."

South of the Clifton House, and down as far as the railway suspension bridge, there was only a footpath till about 1848, when the first bridge was thrown across. Above the Falls the course of travel has always been from earliest days along, or approximately along, the one chain from the water. Although this chain as reserved all along the river was never, as a whole, travelled for military or other purposes of communication between the lakes, it was still regarded officially, in the eyes of military governors, as the connecting link between the posts and military reserves proper, at Queenston, Chippewa and Fort Erie; and hence it was in some documents referred to as the means of military communication, or in shorter but less appropriated phrase as "the military reserve" along the river. Nevertheless, however it might be referred to or

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spoken of throughout the early years of provincial development, this chain was in law strictly part of the waste lands of the Crown, not surveyed or designated for sale or private occupation, but held for public purposes in the largest sense.

Before being aware of what Jones had actually done upon the ground, an Order in Council had been passed by Governor Simcoe on April 16th, 1793, by which Lord Dorchester's regulation as to the use of mill sites was repealed, as no longer suitable to the circumstances of the province; and it was provided by way of exception that the permission then given to use such sites did not extend "to any part of the river above or below the Falls of Niagara, forming the military communication between Lake Erie and Lake Ontario, which is reserved for the purposes of the Crown." It is obvious that the pertinence of this order disappears when it was made known that there was a chain of land reserved between the lands open to settlement and the river.

It soon became manifest however that the restriction was not applicable to non-navigable points of the river, for in July, 1794, permission was given to Canby and McGill to obtain a mill site "on the military communication" above the falls, adjoining the mill occupied by Burch (under Lieutenant-Governor Hope's order of 1785). This permission passed into a lease for twenty-one years to Canby and McGill under the seal at arms of Simcoe as Colonel Commanding the forces, and dated 10th November, 1794. It covers part of the chain abutting on the water's edge; describes it as part of the land reserved for military purposes, and provides for its resumption, if needed, for military purposes or by the exigencies of the Province.

This no doubt indicates the belief of the Lieutenant-Governor that the land was subject to his sign-manual as the head of the forces; and that it was a military reserve; but transactions with public lands were loosely conducted in those days, when the military *régime* was all prevalent: See *Doe d. Jackson* v. *Wilkes*, 4 O. S. 142.

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At this point of time Jay's Treaty had not been ratified by the Senate, and the whole political situation was being hotly discussed in the United States.

Light is thrown on the many strange sources of claim to land early in this century by the provisions of the Upper Canada Statute of 1802, by which parties were enabled to have title perfected whose claims were founded under the authority of General Haldimand's certificates, Lieutenant-Governor Hamilton's certificates, the Surveyor-General's Department, Land Board certificates, Magistrates' recommendations, Treasurer's tickets for Canada Bounty, and Orders in Council, or any other authority in anywise derived from His Majesty: 42 Geo. III. ch. 1, sec. 1.

It is perhaps important at this stage to follow the history of the Canby and McGill lease. I gather that a new lease was made by Colonel Simcoe in July, 1796, for 999 years, of the same land, about four acres, which was composed of part of the chain reserved along the river above the Falls, below the boundary of the reserve proper at Chippewa, down stream to another part of the chain obtained by Swayze, in 1804, as afterwards mentioned. This lease was assigned to Clark and Street, and was merged in a grant of the fee simple to Clark (assignee of Street) in January, 1816, pursuant to the directions of the Prince Regent.

I infer that the dealing with this land as a military reserve led to investigation on the part of Surveyor-General Smith. He seems to have pursued all means of search then open to him, and came to the conclusion that there was no chain reserved for military purposes on the bank of the river between Queenston and Chippewa. This is plain from the correspondence between him and the Commandant at Niagara (Pilkington), 13th November, 1795, 23rd April, 1796, and 22nd May, 1796, and also Ridout's letter of 18th June, 1818.

A transaction next occurs with reference to land in the township of Willoughby, above Chippewa Creek, and opposite Navy Island, and fronting on the river. Street

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applies for this, and it is conceded. Littlehales, the Governor's secretary, writes to Street (16th July, 1796) in which it is spoken of as the "Reservation of Crown lands being one chain in breadth along the bank of Niagara river, saving to the King the use thereof, as in all other military reserves whensoever his service shall require it." On the same day the same writer instructed the Surveyor-General Smith, to make out the assignment on the usual condition of reserving to the Crown the use thereof whenever the public service requires. This on the whole is in contrast with the previous dealing as to Canby and McGill, and treats the matter as one appertaining rather to the civil than to the military department.

Next comes Simcoe's recall, and a civilian chief magistrate follows, Mr. Peter Russell, the senior member of the Executive Council, whose reputation in respect of the use and acquisition of land, is still outstanding. The attention of the new administrator is called to the perplexity of patenting lands in this same township of Willoughby according to the certificates of the Land Boards: (letter of D. W. Smith, 2nd March, 1797). Mr. Russell writes (27th March, 1797), stating his objection to sanction any step which will break in upon the portion of ground *proposed to be reserved* along the river Niagara from Lake Ontario to Lake Erie *for roads and other purposes*, and to prevent which (he suggests) the Quebec plan may have possibly been drawn short of the real quantity from the river, as intended only to comprise the land within the power of the land board to give away. He further objects to the public being shut out of the use of any part of the land extending to the water. The military predilection of Colonel Simcoe has disappeared in this reference to the chain in question, and we have an estimate of its character which is in accord with the evidence of its origin and history. On 28th March, 1797, the Surveyor-General echoes his Excellency's opinion, that there should be no breaking in upon the ground proposed to be reserved along the river.

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Next in order comes the petition of Randall of November, 1798, for a lease of land on the river between the mouth of the Chippewa and the land leased to Canby and McGill. This led to instructions being given for Stegman's survey to be made of the shore of Niagara from Table Rock to Chippewa bridge, with special reference to a chain in width from the water's edge. Upon the completion of the plan Randall was summoned before the Council 11th January, 1799, and having declared that the exclusive possession of the reserve, between military reserve at the Chippewa and the head of Canby's mill-race was indispensably necessary for his purpose, the board was of opinion that his petition could not be granted "as the exclusive possession of the river banks was out of the question."

Lieutenant-General Hunter succeeded Mr. Russell, and he, on 9th May, 1804 (following the example of Colonel Simcoe), under his hand as commander of the forces, signed a license to Isaac Swayze for the occupation of five acres on the river between Burch's mill and Table Rock. This was described in the license as part of the land "reserved by His Majesty for military purposes," together with a small island in front of the said land containing two acres.

In 1806 Thomas Clark applies to Colonel Bowes, commander of the forces, for leave to erect a mill on the same part of the claim that Randall had applied for in 1798, calling it a military reserve. In 1807, apparently *apropos* of this claim Captain Vigoureux certified that the leasing of that part of the chain would not be prejudicial to His Majesty's service, as it would not in all probability be ever needed for military purposes.

In 1806, on the application of one Carter for part of the chain in Bertie, C. B. Wyatt, the surveyor-general, reports to the Governor-in-Council that there is a military reservation of one chain in breadth on the River Niagara, extending the whole length of Bertie on the river, upon which the application was refused.

With this contrast the letter of Chewett and Ridout, acting Surveyor-General, on 12th September, 1809, to the

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Governor's secretary, relating to the other end of the chain in Stamford and Niagara, setting forth by reference to the documents therein mentioned that the chain along the river was reserved for a road, and that as being a reservation of the Crown it was preposterous that it should be included in a patent to an individual.

Then follows a hiatus till the report of the Executive Council on 10th March, 1817, in connection with the conflicting claims of Randall and Clark to the land of which Clark had obtained the patent as before mentioned. The value of this document is, that it is the first deliverance upon the legal aspect of the chain, as reserved above the Falls—where it was measured from the water's edge. It is framed by Chief Justice Powell, and from it I make some extracts which follow. He says:—

"It appears that this chain along the river was generally reserved either for military purposes, or for public accommodation for landing on the beach, as the adjacent grants are bounded by it * * . The four acres leased by Colonel Simcoe, and the whole chain from thence to the river Welland [*i. e.*, the Chippewa], are not obvious to either purpose, but the owner of the land in rear might complain of any change in the destination of this reserve which might affect the value of his tenure * * . It appeared from the report of the Surveyor-General and the engineer that the reserve was useless from the rapidity of the water, either for military purposes or landing;" then he concludes by setting forth that Clark had bought in the rights of the owner in the rear, and had applied for a grant of the whole "rather than hold under the precarious title of a military tenure." One cannot say that this is a very exhaustive consideration of the purposes of the reserve, nor is it in conformity with its history. It is left *in dubio* for what purpose the land was reserved, and no observation is made on its original purpose as a means of communication, or on its obvious use in facilitating access to the water.

I suspect that the desire of the Chief Justice was to cast no unnecessary discredit upon the act of the former chief

executive officer in his report to the then head of the administration—Lieutenant-Governor Gore. But it is not using undue license to read much meaning into the closing phrase about the precarious tenure of a military title. "*Precarious*" in a double sense, not only from its terminable character but from its inherent invalidity. For the land in question was still the property of the Crown, and could be legally dealt with only upon the direction of the Lieutenant-Governor-in-Council, and under the Great Seal. Judgment. Boyd, C.

But one important aspect of this grant of the four acres is, that it places so much of the reserve in private hands and breaks that physical continuity of communication from one lake to the other which, in the eyes of the early Governors, had suggested its availability as a means of military transport and communication. In the result, however, it turned out to be practically unsuitable for any such purposes—below the Falls it was never used as a road: above the Falls a road existed, but not except at intervals along the reserved chain.

A letter of Mr. Ridout, Surveyor-General, in January, 1818, is noteworthy as shewing that the civil department had no accurate knowledge of the military reservation, and could not obtain any information after exhausting all available sources. The subsequent course of events develops the reason for this in that the military authorities themselves had no such knowledge; and that observation applies *à fortiori* to this particular chain along the Niagara.

In 1820, William Forsyth presents a petition for leave to occupy part of the chain reserved for military purposes below the Falls, and to have a ferry across the river. It was reported by Mr. Ridout, Surveyor-General, that a military reservation of one chain in width extended all along the Niagara river, and it was recommended (by Powell, C. J., in the Council), that no license to occupy the reserved chain be granted, and that the ferry should be refused, as it had been disposed of to a previous applicant.

Public attention was directed to this part of the chain in the litigation which arose out of the occupation by this

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Forsyth of part of the reserve, alleged to be at the top of the high bank, opposite the Falls, where his hotel "The Pavilion," was situated. Many of the details are not here important, because the main question was as to the precise site of the chain, there being at that point a lower and a higher bank.

The trouble began in May, 1827, by the removal on two occasions of Forsyth's fence by Captain Philpotts, the commanding engineer, with a fatigue party of soldiers, under direction of Sir Peregrine Maitland. Two actions were brought by Forsyth, and the verdicts went against him. He replaced his fence, and the Crown became plaintiff in an information for intrusion, in which the verdict was a third time against him, in September, 1827.

For the purposes of explaining subsequent statements I may here advert to the further litigation which arose in respect of this same spot in 1832, by Clark & Street against Captain Bonnycastle, in which the plaintiffs obtained a verdict (see 3 O. S. 528). This was set aside, and a new trial ending in the same result with the jury, owing to the absence of Augustus Jones, through sudden illness. For this reason the Crown offered no evidence, and the Judge refused to adjourn the trial. Proceedings were next taken against Clark & Street by way of intrusion, the course of which I have not been able to trace.

Despite the result of the litigation with Forsyth the Imperial Government did not approve of the action of Sir P. Maitland, in throwing open the reserve by means of the military. In the despatch (20th October, 1828) of the Secretary of State (Murray) to Sir John Colborne (Sir P. Maitland's successor), it is said: "I regret that he did not accomplish the object he had in view in preventing Forsyth's encroachments by means of the civil power, which is said to have been at hand, rather than by calling in military aid."

I next quote from Sir P. Maitland's own account of the transaction as given to the Right Hon. W. Huskisson (29th March, 1828): "Forsyth had taken upon himself to

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enclose part of a *public reserve*, of a chain in width, along the bank of the River Niagara. My attention was particularly called to the circumstance by a petition from some of the inhabitants of the country, who complained of their being shut out from the river by the illegal act of an individual. I directed the commanding engineer to survey the reserve along the river, and *throw it open to the public.*"

The chief actor, Captain Philpotts, gives this account on January 9, 1833 [as found in the appendix to the Book of Grievances]: "Mr. Forsyth took upon himself to enclose the strip of land originally reserved by the government for the purpose of securing a convenient access at all times to the river * * . All the most respectable inhabitants signed a petition to the Lieutenant-Governor requesting that the said reserve might be thrown open to the public."

Again, Sir P. Maitland in a despatch of 24th June, 1833, to Mr. Secretary Stanley, restates the matter thus: "Forsyth having taken upon himself to enclose with a high fence a government reserve, consisting of a chain in width along the bank of the Niagara river, and which afforded the public free access to the principal Fall of the river, I was repeatedly solicited by petitions and otherwise to cause the obstruction to be removed. In consequence of these solicitations I directed the officer of the engineers who had charge of the reserved lands, to survey the government property near the Falls, and remove any obstruction placed upon it."

In December, 1832, Robinson, C. J., who was Attorney-General when Forsyth sued, was called upon to make a report of the case to Sir John Colborne, for the purpose of transmission to the Home Government. I make extracts from this report. He says: "In laying out the lands on the river Niagara, a reservation of a chain in width was made along the top of the bank, partly, I think, with a view to the military defence of the Province, and partly for the purpose of preserving a convenient communication. The river, which in many places is of very moderate width,

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constitutes a boundary between us and the United States of America, and it no doubt occurred to the Government that in the event of war it might be necessary to construct batteries and other works upon the banks to repel invasion, or to command the passage of the river. In the war of 1812, batteries were in fact constructed at numerous points along the river.

"In the more recent surveys made under the authority of the Government of Upper Canada, it had been thought obviously proper, for other reasons independently of these considerations, to reserve to the Crown for the public convenience, the space of a chain along rivers and other waters of far less importance than the Niagara, such a reservation by preserving the land open affords to all persons access to the water without trespassing upon the lands of private proprietors.

"After General Simcoe assumed the Government of Upper Canada, as a separate province (in 1792), the particular public reservations which had been made along the Niagara river in the original surveys, were designated and reported to him by the surveyor who had made these surveys under the authority of the government. Among them (for there were others at particular points) was the general reservation I have mentioned of one chain from the top of the bank along the river Niagara * * . The reservation of a chain along the river had, it seems, been commonly regarded as made for military purposes, rather than for civil, and looking upon it in that light, as I suppose, Sir P. Maitland referred to the engineer officer in charge in that district, and instructed him to see that the space was kept open as it had been, and as it ought to be * * . Captain Philpotts * * did throw down the fence and throw open the land again to the public."

This report of the Chief Justice puts the matter more strongly in the military point of view than has previously appeared, though it is only put inferentially and not positively. He was influenced (not improperly) by a desire to put the case as strongly as possible to shield the Lieuten-

ant-Governor from animadversion on the part of the Home authorities, and for this reason introduces an element as to the reserve being for defensive purposes now first broached. It is, to be sure, only a surmise on his part, suggested possibly by his own personal experience in the war of 1812, but no such character has been attributed to this reserve, by any official or other authorized action up to the time of this transaction. On the contrary, the highest claim previously was based on the possibility of having it as a means of military communication between the lakes. But this disappearing with the development and advancement of the country, the military aspect rather clung to the strip as a mere tradition than as a real thing. The illadvised act of the Lieutenant-Governor in setting the military in motion led to a resuscitation of the supposed military character of the reserve, and because its value as a means of communication was not obvious its availability for defensive purposes is conjectured.

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Upon this point Captain Philpotts' evidence, pending the information (5th September, 1827), is thus reported [in the note book the property of Wilson, C. J.]: "Does not say it was a military reserve; understood it was a military reserve; supposed it was reserved for a road, not fortification." So in the evidence of Mahlon Burwell, the surveyor, examined in *Forsyth* v. *Philpotts* (22nd September, 1828), he swears: "The reservation is made where a road can be established." Again, Jameson, Adjutant-General, examined before a committee of the House on 20th March, 1835, says: "That the government adopted proceedings for the vindication of what it conceives to be the right of the public to the reserved chain, * * which the government is desirous to keep open as an approach to the view of the Falls." And the same officer, in a contemporaneous letter to the Lieutenant-Governor, refers to the verdict in the Forsyth cases as deciding that the *locus in quo* was a *public reserve*. There was no mistaking the attitude of the Legislative Assembly in this conflict, for on 21st November, 1833, Burwell, M. P., set the enquiry in motion by getting ap-

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pointed a committee to report upon the nature and extent of the reservation originally set apart by His Majesty's Government for the use of the public adjoining the Falls of Niagara.

Pending this litigation, a lease, during pleasure, of part of the land between Forsyth and the river, had been granted under the Great Seal to Clark & Street in September, 1827. Upon Forsyth's complaint this matter was brought before the Executive Council, and resulted in the cancellation of the lease, and the passage of an Order-in-Council (2nd April, 1829), that the one chain on top of the bank should be thrown open to the public for a road, with the understanding that it may be necessary to withdraw this indulgence should the ground be required for military purposes.

I read this Order-in-Council as a very politic, mediatory document; on the one hand conciliating the military authorities; on the other granting to the public the right for which all had been so solicitous during the Forsyth imbroglio. The truth is, this part of the reserve at the Falls had always been open to the public, and any attempted interruption was always promptly resented and rectified.

The next official act is by the Executive Council in December, 1836, upon the petition of Forsyth, for part of the river front in the township of Bertie, and the Council, speaking through R. B. Sullivan, cannot recommend the alienation of any part of the chain of reserve along the Niagara river, which was originally made for public purposes. And in November, 1842, that part of the chain is again spoken of by the Executive Council as a Government reserve.

I am prepared to accept that combination as a proper and accurate designation with reference to the whole of this chain, viz., it was a "Government reserve originally made for public purposes." And I can find up to this point no sufficient evidence of any limitation of these purposes to such as are of a merely military character. Before, as well as after, the 2nd April, 1829, the public enjoyed

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the free use of the chain in question in the neighbourhood of the Falls, and such has been the constant user ever since. Some permissive use is no doubt interjected by the saving clause in the order of April, 1829, but is that to outweigh all the other facts and considerations to which I have adverted, with perhaps too much minuteness?

A few words more and I come to the great resting place on the journey—viz., the Ordnance Act of 1843.

An important date is 1837, when the custody, control, and ownership of all public lands in Upper Canada was transferred to the Provincial Government by the Act 7 Wm. IV., ch. 118, to which the Royal assent was given. This very history of the struggle as to the reserve at the Falls was, I think, a considerable factor in producing this change.

Some stress may be laid on the expression used by Sir P. Maitland, that Captain Philpotts was at that time commanding the Royal Engineers, and "therefore" in charge of these reserves. But I gather from the evidence that this charge was not limited to purely military reserves—all the public lands were out of Provincial control, and it was a convenient thing to have the military forces in any district who were responsible to the head of the Government as Commander-in-Chief exercise supervision over Crown property. Thus Clark and Street in answering charges of removing stone from the reservation on June 22, 1835, write: "We beg leave to say, from our having resided in Upper Canada ever since it was a Province, we have always understood that the reserved chain of land along the waters of the St. Lawrence, Niagara and Detroit rivers were [*sic*] for the use of the public, and no more under the superintendence of the military than other ungranted lands of the Crown."

In September, 1840, we have the origin of the Ordnance Statute suggested by an order of the Executive Council framed by Mr. Sullivan. The appropriation of a piece of land (elsewhere) for military purposes is recommended, and that it be placed under charge of the officers of Her

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Majesty's Ordnance. The report proceeds: "The council are not aware that the Ordnance has in this Province any legal capacity to hold lands, but the appropriation in the present form by Order-in-Council will, it is apprehended, have all the effect desired."

In the same year (1840), the provinces were reunited under the name of Canada, and then came in 1843, the Act of Canada repealing certain ordinances *in pari materiâ* of Lower Canada (2 Vic. ch. 21, and 4 Vic. ch. 18), giving legal *status* to the Principal Ordnance Officers and vesting in them the estates and property therein described (7 Vic. ch. 11). The provisions of this Act as to what is to be vested are very elaborate and very complicated; and after many careful readings I venture to summarize what I conceive is conveyed thereby to the Ordnance Officers. The sound constitutional principle enunciated by Lord Glenelg (in despatch to Sir G. Arthur on 17th May, 1838), is to be borne in mind as affecting the construction of this Act. That is, "lands reserved for military purposes, which are subsequently found unnecessary, revert into the general mass of Crown estate to be disposed of in the same manner as any other Crown lands."

Four classes of land were, subject to the conditions named, within the provisions of the Act: (1) Lands acquired by the Crown upon the cession of the Province; (2) Crown lands set apart after the cession; (3) Purchased lands; (4) Expropriated lands; we need to deal with those in the second category only; to the officers are transferred all lands vested in Her Majesty, and "set apart, used or occupied for purposes connected with the military defence of the Province, or placed under the charge and control of the officers of the Ordnance department, or of the Commander of the forces or other military officer * * , or have been intended to be so set apart or transferred for any of the purposes aforesaid."

In the preamble light is thrown on the purposes mentioned. It sets forth that lands have been set apart from the Crown reserves or other Crown lands, and have been

placed under the charge of the officers, etc., for purposes connected with the defence of the Province and the service of the said department, or have been used and occupied for like purposes.

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That is to say: AND placed under charge and control of officers. { for purposes of defence / for service of the department

Land set apart OR used and occupied for like purposes { *defence* / *service* of the ordnance.

But the body of the Act goes further, and says "*land intended to be set apart*," etc., as if to say the actual setting apart by Order-in-Council, or the like, is not essential. You may infer the setting apart and take the intent to be manifested in act, if the user shews such an intent. That is, if there has been the use or occupation of the place for purposes of military defence, or for the service of the ordnance department, or if there has been the placing of it in charge and control of the department, or of military officers *for like purposes:* that suffices to vest the title under 7th Vic.

But it is not enough to say that it was intended to set the place apart for military or ordnance purposes unless the course of dealing is conformable to such an appropriation; and this course of dealing should come down to, and be contemporaneous with, the date of the statute.

In other words, if you find actual use, occupation, charge or control for military or ordnance purposes, you need not look further to find any formal act of reservation.

The chain in question is set apart as a military reserve by no Order-in-Council or other official act. It is significant also, that in the detailed and minute enumeration of the reserves proper covered by the statute no mention is made of this chain along the Niagara river.

No tangible evidence appears that this chain was to be for military as distinguished from ordnance purposes. The first suggestion as to this comes from Robinson, C. J., in 1832. Prior to then, and at the outset, the purpose of

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the chain was for military communication and transport between the lakes—therefore strictly falling within the ordnance department of the service. But all colour of such use disappears almost from the very first; that was the projected scheme possibly, but in hard fact there was no military road, and no road till the public made general use of the chain in the neighbourhood of the Falls, as has been already stated. Saving the military intervention directed by Sir P. Maitland, there is nothing to shew that the *locus in quo* was in charge or under control of the officers; ostensibly the public were in use and possession and had the apparent right so to be, subject of course to the ownership of the Crown. I find then an absence of any contemporaneous or indeed of any user, charge or control by the military authorities, which would evoke the operation of the statute, and my conclusion is, that no part of this chain was affected by the statute, but that it remained a government reserve held for public purposes generally.

One of course is staggered in this conclusion by what next happens after a lapse of seven years, when negotiations were opened for the surrender of parts of the ordnance property conveyed by the instrument of 1st October, 1852, to the Provincial Government. On 24th June, 1850, the Commissioner of Crown Lands, Price, admits that the one chain has of late years been regarded as ordnance property, and thenceforth it is taken for granted that it is vested in the ordnance department. From this point the current turns, and dealings take place without demur on the footing of the ownership of the chain being in that department. It would, to my mind, be unprofitable to go through these in detail. I am disposed to say that it is a case where the maxim *communis error facit jus* applies limited to all the land so actually dealt with.

The same course of dealing on the same assumption, obtains not only between the principal officers of Canada, but is continued after Confederation as between the Provincial and Dominion Governments. As said by Sir W.

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Scott in *The Charlotta*, 1 Dod. Ad. R., at p. 393. "If the Government of a country has fallen into an error, and has followed a course of practice which may have led its subjects into error, then, between them, *communis error facit jus*." And the like doctrine would apply as between dependencies of the Crown in the transaction of public business.

But the maxim would not extend beyond the particular parts of the property dealt with, so that it should not be applied in this case to transmute the title of the small fraction of the chain now in question. That remains, I think as it always has been part of the general waste lands of the Crown vested in Ontario, as successor to the old Province of Canada.

Should I be wrong, however, in the estimate of the character of the *locus in quo*, and be it assumed that it has passed under the B. N. A. Act as ordnance lands to the Dominion, then it would seem contrary to the infallible justice of the Crown now to derogate from the long established user of the public to have it as a highway. Going back to the governmental action of April, 1829, it was then declared that the public were not to be disturbed in the free use of it, unless it should be required for military or defensive purposes. No such exigency has arisen (and happily may never arise), and the present proposed diversion of it to the uses of a private company with a view to pecuniary gain is no reason for affecting the public right, as then (upon the hypothesis), conceded.

However this may be, it is evident that the small portion on the level which is to be occupied as a station or landing-place by the defendants will be of no practical value, unless the Dominion had the right to deal with the slope of the bank. But I am not pressed, so far as this part of the property is concerned, as to any course of dealing affecting the rights which existed when the Ordnance statute was passed in 1843. Though there was a conveyance of part of the bank by the Ordnance Officers to the Provincial authorities, it was not without demur on the part of the Province. The frame of the conveyance is such also as to

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detract from any controlling significance being given to that transaction. The evidence is, if possible, more cogent against this being part of the reserve than I have found that which militates against the chain itself being a military reserve. I may mention briefly some of the more salient points.

When very pointed attention was being given to the utmost limits of the military reserve, it is defined most particularly at the instance of the government by Chewett, Surveyor-General, on 28th October, 1829, in front of lots at the critical place now in dispute, as extending not to the water's edge, but only along the top of the bank. Chewett's return of 29th April, 1830, comprises this as the entire thing that could be classed as such a reserve. The Ordnance department knew nothing beyond this, and indeed accept the description of the reserve as defined by the Provincial lands department. Thus, it appears, in 1851, from reference to the Ontario book, 797 (Exhibit F.), that department has no plan to give any information as to the chain along the river; but its extent is said to be 276 acres, because it is 2,760 chains in length from Fort Erie reserve to Fort George reserve at Niagara, according to Captain Bayfield's survey. This is a correct summation if the reserve is limited to the top of the bank, but if the slope is included it is enormously erroneous.

Entirely confirmatory of this boundary of the reserve is the sworn testimony of Augustus Jones in *Rex* v. *Forsyth* (5th September, 1827), who is positive that the land below the bank was not intended as any part of the reserve whatever.

I am therefore decidedly of opinion that the slope of the bank has always been the public property of the Province till vested in the plaintiffs.

My judgment altogether is in favour of the plaintiffs: but such difficulty has arisen in the disposal of the case from Acts of former Provincial Governments, as well as from the inherent difficulty of the litigation, that I do not feel warranted in awarding costs to either side.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE WILSON V. HUTTON—TOWN OF BRAMPTON, GARNISHEES.

Prohibition—Division Court—Judge reserving judgment till a day named—Judgment not given till a later day—R. S. O. ch. 51, sec. 144—Acquiescence.

Where a Judge in an action in a Division Court has pronounced a judgment otherwise than in accordance with the directions of section 144 of the Division Courts Act, R. S. O. ch. 51, such judgment can, upon motion for prohibition, only be sustained upon clear and satisfactory evidence that the party complaining has agreed in advance to the adoption of the course which the Judge has actually adopted in delivering his judgment, or that he has subsequently acted in such a manner as to waive his right to complain.

And where at the trial of an action in a Division Court judgment was postponed till a named day, but was not then given, and two subsequent days were successively named by the Judge, but judgment was not actually given till three days later than the latest day named; and, upon motion for prohibition, it was not shewn that the party moving had ever agreed that the judgment might be given without previously naming a day for its delivery, and had not acted so as to waive his right to complain, an order was made prohibiting the enforcement of the judgment.

Statement.

THIS was a motion by the primary debtor for a prohibition to the first Division Court in the county of Peel.

The action in the Division Court against the primary debtor and primary creditor's claim against the garnishees were tried before His Honour Judge Kingsmill, on the 4th March, 1892, when judgment was reserved until the 17th March, 1892. On 15th March, 1892, the learned Judge wrote to the clerk, who notified the parties, that the time for giving judgment was postponed until 1st April, 1892. No judgment was given upon that day, nor was any consent or agreement arrived at that it should be postponed until any future day. On 10th May, 1892, the solicitor for the primary debtor, being present at the Division Court sittings at Georgetown then being held by Judge Kingsmill, mentioned the matter and, according to his affidavit, was told by the Judge that judgment would be given on the 16th May, 1892, at the office of the clerk of the Court, and he mentioned this, on

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his return, to the solicitor for the primary creditor. On the 17th May, 1892, the solicitor for the primary debtor inquired at the office of the clerk of the Division Court and found that the judgment had not been received. Thereupon he went to the garnishees, and, telling them that the proceedings had lapsed, obtained from them for his client the money which had been garnished. On the 19th May, 1892, the clerk of the Division Court received from the Judge his judgment, ordering the garnishees to pay to the primary creditor the amount which had been garnished.

The primary debtor then applied for an order for prohibition against the enforcement of this judgment, making his motion returnable on the 27th May, 1892.

The motion was argued before ROSE, J., in Chambers, on the 28th May, 1892.

Aylesworth, Q. C., and *Justin*, for the primary debtor.

T. J. Blain, for the primary creditor.

June 20, 1892. ROSE, J.:—

Having read the affidavits of the respective solicitors, I requested His Honour Judge Kingsmill to peruse them and to give me a certificate of the facts, which he was kind enough to do. The material parts are as follows:—

"About the 8th of May, by a letter awaiting me at Milton, and written by Mr. McFadden, of Brampton, my attention was called to the fact that my decision in this case had not been given. * * * At first I was unable to find the papers in the suit, but did so before going to the Georgetown Division Court, which I held on the 10th May. At that court Mr. Justin mentioned the matter, and I told him that my attention had been called to it by Mr. McFadden's letter, and I explained to Mr. Justin the cause of delay. I was at that time in the middle of my Division Court circuit, and remembering that, and

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also other appointments that I had requiring my presence out of the county of Halton, I stated that I could not promise to attend to it until about the 16th May. * * * On the 17th May I signed the judgment and forwarded the papers to the clerk of the Court at Brampton, and in so doing considered that I had done all that I had promised or arranged to do. From the tone of Mr. McFadden's letter, and from what passed between us when we met in Toronto, I gathered that no trouble would be caused by the primary creditor or garnishee, but had I not seen Mr. Justin at the Georgetown court and spoken to him about the case, I should have directed the clerk, as I had previously done in this very case, to notify the parties that the judgment would be given on a day certain, which I would have fixed. I did not intend to and did not absolutely appoint and fix the 16th day of May as the day on which the judgment should be at the clerk's office. That I left Georgetown with the impression that Mr. Justin was quite satisfied with my explanation of the delay and promise to forward my decision to the clerk, and that he acquiesced in my forwarding the same to the clerk at my earliest convenience, and that it would not be necessary for me to request the clerk to notify the parties of a day which I should fix; but, after what had passed, I considered it would be sufficient to merely direct the clerk to notify the parties that he had received the judgment."

On the facts thus stated, I am of the opinion that Mr. Justin, the solicitor for the primary debtor, acquiesced in the proposition of the learned Judge to give judgment after the day named, and that the acquiescence did not relate to a day certain, but to such time on or after such day as would be convenient to the learned Judge.

In my opinion there is no reason for prohibition, and the motion must, on the law and merits, be dismissed with costs.

The primary debtor at the Michaelmas Sittings, 1892, appealed against the order dismissing his motion, and his

Argument. appeal was argued on the 22nd November, 1892, before the Divisional Court (ARMOUR, C. J., and STREET, J.).

Aylesworth, Q. C., and *Justin*, for the primary debtor.

T. J. Blain, for the primary creditor.

The following cases were referred to: *Re Smart and O'Reilly*, 7 P. R. 364; *Re Tipling* v. *Cole*, 21 O. R. 276; *Re McPherson* v. *McPhee*, *ib.* 280 *n.*, 411; *Re Bank of Ottawa* v. *Wade*, *ib.* 486.

December 24, 1892. The judgment of the Court was delivered by

STREET, J.:—

We regret to find ourselves unable to concur in the conclusions of fact drawn by our learned brother Rose from the affidavits and papers filed; and as his judgment is based upon those conclusions as taking the present case out of the law as laid down in *Re Tipling* v. *Cole*, 21 O. R. 276, we are obliged to differ also from him in the conclusion at which he has arrived.

We are of opinion that where the Judge in an action in the Division Court has pronounced a judgment otherwise than in accordance with the very positive directions contained in section 144 of the Division Courts Act, such judgment can only be sustained upon clear and satisfactory evidence that the party complaining has agreed in advance to the adoption of the course which the Judge has actually adopted in delivering his judgment; or that he has subsequently acted in such a manner as to waive his right to complain.

We think that the evidence here does not shew that the solicitor for the primary debtor ever agreed that the judgment in question might be given without previously naming a day for its delivery; at the most it would shew an assent on his part to the delivery of the judgment on the 16th May—and no judgment was delivered on that day.

We think, therefore, that the case cannot be distinguished from *Re Tipling* v. *Cole*, above mentioned, and that the order for prohibition against the enforcement of the judgment which has been pronounced should go, but without costs. Judgment. Street, J.

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE VILLAGE OF GEORGETOWN AND STIMSON.

Municipal Corporations—By-laws—Payable by instalments based on aggregate debenture debt—Variation in different years—Registration—Effect of.

A by-law passed under the formalities required by law for contracting a debt for a purpose within the jurisdiction of the council under the Municipal Act, R. S. O. ch. 184, sec. 340 *et seq.*, was made payable by instalments, but in settling the amount payable in each year the total existing debenture debt of the municipality was estimated, and although the aggregate annual amount payable under all the by-laws was approximately equal to that payable in other years, there was a very large variance in the amounts payable in the different years under the present by-law. The by-law was duly registered under section 351, and notice published under section 354, and no application to quash was made within three months after the said registry:—

Held, that the by-law and debentures issued thereunder were valid and binding on the municipality.

SPECIAL case stated for the opinion of the Court. Statement.

The corporation of the village of Georgetown passed a by-law to create a debt for waterworks, payable by instalments with interest, and in the division of the aggregate amount to be payable in each year brought into account the existing debenture debt of the municipality, created under former by-laws, and equalized the payments so that the aggregate amount of money to be collected under all the by-laws during each year was approximately equal, but this provision for the total debenture debt caused the annual payments under this by-law to vary from $600

Statement. to $3,975 in apparent violation of section 342 of the Municipal Act, R. S. O. ch. 184.

The by-law was approved by the ratepayers and passed by the council, and registered under sec. 35, of R. S. O. ch. 184, and notice thereof published under section 354.

No application was made or action brought to quash or set aside the by-law within the three months from the registry thereof.

The corporation sold the debentures to the defendant, who refused to perform the contract, on the ground that the by-law and debentures were invalid because they violated the limitations of said section 342 in making the aggregate amounts payable under the by-law vary from year to year.

Two questions were submitted for the opinion of the Court.

1. Was the by-law a valid by-law binding on the plaintiffs and the ratepayers of the plaintiff municipality according to the terms thereof?

2. Were the debentures issued, or to be issued, in accordance with the provisions of the said by-law, valid and binding obligations of the plaintiffs, and enforceable by the holders thereof against the plaintiffs, and the ratepayers of the plaintiff municipality according to the terms thereof?

Meredith, Q. C., for the defendant Stimson. Section 342 provides that the instalments shall be such amounts that the aggregate amount payable for principal and interest in any year shall be equal as nearly as may be, to what is payable for principal and interest during each of the other years of such period, and the municipality may issue debentures for the amounts and payable at the times corresponding with such instalments with interest, etc. This is peremptory, and the breach thereof is fatal to the validity of the by-law and the debentures issued under it. The fact of registration and the failure to move to quash within the limited period, cannot give validity to the debentures.

Laidlaw, Q. C., for the corporation of Georgetown, referred to the payments under former by-laws which would all mature during the early years of the period under this by-law, and argued that although the consolidation of the debt of the municipality so that the aggregate amount payable under all the by-laws would be approximately equal, might be in violation of the letter of section 342, it would not be a violation of the powers of the ratepayers under sections 342 and 351. The ratepayers decided to consolidate their debt and provide for the immediate construction of their water-works instead of waiting for ten years until the debenture debt under former by-laws was paid off; and sections 351 and 354 gave statutory validity to the by-law referred to: *Canada Atlantic R. W. Co.* v. *Corporation of Cambridge*, 11 O. R. 392; *Canada Atlantic R. W. Co.* v. *Corporation of Ottawa*, 12 A. R. 234; *Bickford* v. *Corporation of Chatham*, 14 A. R. 32, 16 S. C. R. 235. Argument.

January 19, 1892. ARMOUR, C. J.:—

The Municipal Act R. S. O. ch. 184, sec. 340, provides that "Every municipal council may, under the formalities required by law, pass by-laws for contracting debts, by borrowing money or otherwise, and for levying rates for payment of such debts on the ratable property of the municipality, for any purpose within the jurisdiction of the council, but no such by-law shall be valid which is not in accordance with the following restrictions and provisions, except in so far as is otherwise provided in the next two following sections of this Act."

This by-law in question was passed, as is admitted, under the formalities required by law and for contracting a debt for a purpose within the jurisdiction of the council, but is not in accordance with "the following provisions and restrictions" in the said section referred to, except in so far as is otherwise provided in the next two sections of the Act, and its defects in not so according with such

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provisions and restrictions are apparent upon its face; and it is therefore invalid by force of the section of the Act above quoted.

But this by-law was duly registered under the provisions of section 351 of the said Act, and no application or action to quash or set aside the same, was made to any Court of competent jurisdiction within three months from the registry thereof; and I am of opinion, therefore, that by force of this section, the said by-law and the debentures issued, or to be issued thereunder, is, are, and will be absolutely valid and binding upon the corporation of the village of Georgetown, according to the terms of the said by-law.

If there is any repugnancy between section 340 and section 351, as it appears to me there is, the former section must give way to the latter, as the latter is the later expression of the will of the legislature: *Wood* v. *Riley*, L. R. 3 C. P. 26, 27.

The decisions of the Court of Appeal in *Bickford* v. *Corporation of Chatham*, 14 A. R. 32, and of the Supreme Court in the same case, 16 S. C. R. 235, are authorities showing that this by-law has been made valid and binding upon the municipality by its registration.

The section Mr. Justice Osler was discussing in *Canada Atlantic R. W. Co.* v. *Corporation of Cambridge*, 14 A. R. 392, at p. 397, was section 321, R. S. O. (1877), ch. 174, which is now section 331 of R. S. O. (1887), ch. 184; and he was so discussing it in respect of a by-law passed on the 22nd day of March, 1880, which was before the passing of the Act 44 Vic. ch. 24, sec. 287, (O.), which was the foundation of section 351 of R. S. O. (1887), ch. 184.

It was argued that registration did not cure defects apparent on the face of the by-law; but it is impossible, in my opinion, to hold that registration does not cure defects as well those that are apparent on the face of the by-law, as those that are not so apparent, for I do not think it allowable to so limit the very wide words of the section declaring the effect of registration.

I answer, therefore, both questions submitted in the affirmative. Judgment. Armour, C.J.

See The Consolidated Municipal Act, 1892, 55 Vic. ch. 42, sec. 352, sub-sec. 6: "Nothing in this section contained shall be taken to make valid a by-law or the debentures issued thereunder where it appears in the face of such by law that the provisions of sub-secs. 2, 3, 4 and 5 of section 340, or section 342 of this Act have not been substantially complied with."

[COMMON PLEAS DIVISION.]

RE ROSBACH AND CARLYLE.

Assessment and taxes—Court of Revision—Right of counsel to appear before —Mandamus.

Courts of Revision created under the Consolidated Assessment Act, 1892, are not obliged to hear counsel in support of an appeal against an assessment of property under that Act.
A mandamus for such purpose was refused.

THIS was an application for a mandamus to compel the Court of Revision of the city of Toronto to hear counsel in support of an appeal by the plaintiff against an assessment of his property under 55 Vic. ch. 48 (O.), the Consolidated Assessment Act, 1892. Statement.

November 12th, 1892. *George G. S. Lindsey*, supported the motion.

Herbert Mowat, contra.

November 12, 1892. ROSE, J.:—

It was admitted that the Court did refuse to hear counsel, and both plaintiff and defendants desired an opinion as to the rights of parties appearing before the Court of Revision to be represented by counsel for the purpose of addressing the Court as advocates, and cross-examining witnesses.

Judgment.

Rose, J.

It was stated to be the practice of the Court to refuse to hear any person appearing either as counsel or agent for an appellant or party interested unless first sworn as a witness; and counsel for the city stated that as he understood it the rule of procedure guiding the Court was not to hear any one except a witness in reference to any matter before them, and that a party interested appearing before the Court either in person or by agent had no right to be heard until sworn, and thus as a witness.

The argument on behalf of the plaintiff was that the Court of Revision was a Court created by statute, the members of which were bound to take an oath of office, and had power to summon witnesses and administer an oath to a witness—*had power to impose obligations*, and whose judgment or decrees were subject to appeal: *Re Godson and City of Toronto*, 16 A. R. 452; that this constituted a Court before which any barrister had the right to appear as counsel for a party interested; and that a refusal to hear counsel under such circumstances was a refusal of a right which this Court had the power to enforce by a mandamus.

I do not understand that it was contested that the Court of Revision is a Court, and for the purpose of my judgment I will assume it to be so, without expressing any opinion on the point. The argument, as I understood it, was that the statute provided a procedure, and that the power to examine witnesses was in the Court itself, and that even if the Court was wrong in refusing to hear counsel no remedy by mandamus lay, as there was the right of appeal given by statute from a refusal to hear, and that this was a refusal to hear.

Looking at section 68 the right of appeal is given "against the omission, neglect or refusal of the Court to hear or decide an appeal."

I do not think, however, that refusal to hear counsel would be a refusal to hear an appeal; and I am rather of the opinion that if this application is otherwise well founded it is not answered by this objection.

Judgment.
Rose, J.

I have difficulty, however, in coming to the conclusion that the Court has not power to regulate its own procedure; and so a right to refuse to hear counsel or any one as an advocate; and my doubt arises from the wording of the Act itself, and from one or two decisions to which I shall refer.

The notice of appeal is to be by the appellant personally or by his agent: section 64. This language is different from that found in section 68, sub-section 2, providing for an appeal to the County Judge from a decision of the Court of Revision where the person appealing may act in person or by his solicitor or agent. The word "solicitor" is not found in the provisions for appealing to the Court of Revision if that makes any difference.

By sub-section 14 of section 64, providing the procedure for the trial of complaints with reference to personal property or taxable income, it would appear that the person complaining, or his agent, may appear and make a statutory declaration in the form set out in the schedule as to the facts supporting the complaint, and the Court is empowered to act upon such declaration, and in case of dissatisfaction that the party making the declaration, and any witnesses whom it may be desirable to examine "may be examined on oath by such Court" respecting the correctness of such declaration.

It will be observed that this provides for the examination of witnesses by the Court.

In the next sub-section, it is provided that "In other cases, the Court, after hearing the complainant, and the assessor or assessors, and any witness adduced, and, if deemed desirable, the party complained against, shall determine," etc. By sub-section 16, it is provided that "it shall not be necessary to hear upon oath the complainant or assessor, or the party complained against, unless where the Court deems it necessary or proper, or the evidence of the party is tendered on his own behalf or required by the opposite party."

These clauses seem to me to provide a procedure, which

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Rose, J.

leaves a discretionary power in the hands of the Court as to the mode in which evidence is to be received and acted upon. True, except with regard to personal property in sub-section 14, it is not stated that the witnesses shall be examined by the Court; but if the witnesses are to be examined by the Court under sub-section 14, it would not be reasonable to have a different mode of procedure under sub-section 15.

I find also, that when an appeal is made to the County Judge by section 70, it is declared that such Judge shall possess all powers "for compelling the attendance of, and for the examination on oath of all parties," etc., "and for the enforcement of his orders, decisions and judgments, as belong to or might be exercised by him in the Division Court or the County Court." These powers are much wider than those conferred upon the Court of Revision, and probably the County Judge would hear counsel and follow the practice obtaining in the Division Court and County Court.

Of course it not necessary for me to determine whether parties have the right to appear by counsel on an appeal to the County Judge. It was stated at bar that it was the custom for parties to appear by counsel before the County Judge on an appeal from the Court of Revision.

I also find by reference to the case of *Agnew* v. *Stewart*, 21 U. C. R., 396, that it was held that a barrister could not insist upon being present at a coroner's inquest, and upon examining and cross-examining the witnesses. That most learned judge Sir John Robinson, C. J., does not refer to any authority or give any reason for so holding, but states his conclusion as an undoubted proposition of law. He further said, at p. 404: "The plaintiff has no more right to insist upon taking part in proceedings at the inquest than he would have to go into a grand jury room and insist on examining witnesses called before them."

The contrary was argued in *Cox* v. *Coleridge*, 2 D. & R. 86, reported also, but not as fully, in 1 B. & C. 37. For a reference to this case I am indebted to Mr. Aylesworth,

amicus curiæ. In that case it was said that if the right contended for were conceded it would be difficult to deny it in proceedings before a grand jury. In Jervis on Coroners, 5th ed., at p. 25, the law is stated as in *Agnew* v. *Stewart*.

Judgment
Rose, J.

I find in the Law Magazine (1865), vol. 20, p. 169, an article headed "Court Martial Reform," and beginning "An important circular on Court Martial procedure has been recently issued from the Horse Guards. It is highly interesting to the legal profession, as it not only authorizes the employment of barristers as assessors to Courts Martial but also recognizes counsel when appearing for either party." From this it would seem that prior to the issue of the circular the right of counsel to appear before such Courts had not been recognized.

In *Ex p. Evans*, 9 Q. B. 279, it was held that justices in Quarter Sessions might, in their discretion, make an order that barristers, providing as many as four attend, should have exclusive audience.

In the argument, *Collier* v. *Hicks*, 2 B. & Ad. 663, was referred to, where Parke, J., said, at p. 672: "No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the Superior Courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any and what persons, to act as advocates before them."

Lord Denman, C. J., in *Ex p. Evans*, said, at p. 281: "It is an important rule that, in this as in other respects, all courts should have power to regulate their own practice," and the Court refused to interfere with the order of the justices.

In *Cox* v. *Coleridge*, it was held that on a preliminary examination before a magistate on a charge of felony, the

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Rose, J.

accused had not the right to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation and not conclusive upon him. The argument of inconvenience seemed to have great weight with three of the judges. This case is of great interest as containing a history of the law.

The right of parties to appear by counsel before justices of the peace in this country is regulated by statute: R. S. C. ch. 176, sec. 16; R. S. C. ch. 178, secs. 34, 35. See also as to indictable offences, R. S. C. ch. 174, sec. 278.

It is probable that it was not intended by the Legislature that the proceedings in the Court of Revision should be conducted with very great formality, but that there should be a forum where the judges should be permitted to dispense justice according to their best judgment upon such evidence as to them might seem necessary for the purpose of determining the issues presented for trial; and, it may be, that it is not in the interest of the public that proceedings in such a Court should be attended by formalities, or lengthened by addresses and examination and cross-examination of witnesses by counsel learned in the law, especially as no very great hardship can arise, there being given a simple and inexpensive mode of appeal to the County Judge. No doubt, where matters are of sufficient importance to warrant an appeal, counsel will be employed and the right of parties to appear by counsel to advocate their cause and to examine and cross-examine witnesses will be conceded.

I do not feel justified in establishing a precedent for such an order as is here asked for, in view of the peculiar wording of the statute and the decisions to which I have referred. Beyond question the Court may hear counsel, and in some cases may deem it advisable to do so, but I am not prepared to say that it has no discretion in the matter.

The application must be refused; but I do not think it is a case for costs.

Since preparing the above, Mr. Lindsay has sent me a reference to the case of *The Queen* v. *Assessment Committee of St. Mary Abbotts, Kensington*, (1891), 1 Q. B. 378, C. A., where it was decided that a householder had a common law right to appoint an agent to appear for him before the assessment committee. I do not find any assistance from such decision. Our statute provides for an agent acting for a complainant, but also provides the procedure. The decision does not, as it seems to me, touch the point in question. Judgment. Rose, J.

[COMMON PLEAS DIVISION.]

ROSS v. ROSS.

Jurisdiction—Ontario Courts—Title to land outside of Ontario.

The Courts in this Province have no jurisdiction to entertain an action for determining the title to lands in the North-West Territories, even though the parties be resident here.
Re Robertson, 22 Gr. 449, distinguished.

THIS was a motion for judgment under Con. Rule 756. The facts are fully set out in the judgment. Statement.

R. McKay, for the motion.
J. Hoskin, Q. C., for the defendants.

December 23, 1892. STREET, J.:—

The plaintiff became the owner of 160 acres of land in the North-West Territories. He was an unmarried man leading an unsettled life in the North-West, and at the request of his father, some years ago, conveyed to him the lands in question, the object being, as he states, "so that in case of my death, or of anything happening to me there might be no difficulty in his acquiring a title to the same":

Judgment.

Street, J.

he further states that he received no consideration from his father, and that it was agreed and understood that the lands were his: that his father had no right or title to the said lands whatsoever excepting that in case of the plaintiff's death it was his intention that his father should have the land, and it was in order to prevent any difficulties as to title arising in case of the plaintiff's death, that he conveyed the land to his father. The father afterwards died intestate, leaving the plaintiff and one adult brother and one adult sister surviving him, and leaving also the infant defendants surviving him.

The present action is brought against the administrator of the deceased and the heirs-at-law asking for a declaration that the land is the property of the plaintiff, and that the defendants may be ordered to convey it to him. The adult defendants, one of whom is also the administrator, admit the plaintiff's right to the land, and the guardian of the infants submits their rights to the Court.

On 23rd December, 1892, the plaintiff moved for judgment under Rule 756: the facts are sworn to by the plaintiff, and the adult defendants add their belief that his statements are true.

The property is of small value, and the guardian for the infants having satisfied himself of the truth of the facts mentioned in the affidavit, merely submitted their rights to the Court.

The action, however, is one for directly determining the title to land lying outside the limits of this Province; and I am of opinion that I have no jurisdiction to entertain it for the reasons appearing in the judgments of Lawrence and Wright, JJ., and of Lord Esher, M. R., in *Companhia de Mocambique* v. *British South Africa Co.* (1892), 2 Q. B. D. 358. In that case the two first named Judges held in the Court below that an English Court would not entertain an action for determining the title to land in South Africa, and upon appeal to the Court of Appeal this portion of the plaintiff's claim was abandoned.

The jurisdiction to maintain the present action was

attempted to be supported upon the ground that the defendants are all residents of this Province, and that the Court could therefore act upon them *in personam*; but I should first of all have to enquire whether by the law of the North-West Territories the land belongs to the plaintiff or to the defendants, and if I were able to determine this point in the plaintiff's favour, I must then find some method of effectually vesting in him the estate now vested in the infant defendants. I think this case is clearly distinguishable from that of *Re Robertson*, 22 Gr. 449, in this, that there no question of title was involved, and the infants interested in the Manitoba lands were plaintiffs in the action, and were from that circumstance held bound by their own proceedings as plaintiffs. Whether that case is sustainable since the case of *Companhia de Mocambique* v. *British South Africa Co.* (1892), 2 Q. B. D. 358, above referred to, it is not necessary to determine.

Judgment.

Street, J.

If the present case was to be determined under our own law instead of under that of the North-West Territories, the plaintiff would have much difficulty, in my opinion, in succeeding in the face of the 7th section of the Statute of Frauds.

The motion must, in my opinion, be dismissed with costs, to be paid to the guardian of the infant defendants.

[COMMON PLEAS DIVISION].

REGINA v. STONE.

Constitutional law—Act to prevent frauds against cheese factories—Intra vires—Dominion Parliament—Information taken and summons issued by interested magistrate—Hearing before another magistrate—Defendant appearing and answering charge—Validity of conviction.

The Act 52 Vic. ch. 43 (D.) an Act to provide against frauds in the supplying of milk to cheese factories, etc., is *intra vires* of the Dominion Parliament.

The justice of the peace before whom the information was laid and who issued the summons was claimed to be interested. The hearing, however, took place before, and the adjudication and conviction were made by another justice whose qualification was not attacked, while the defendant pleaded to the charge and raised no objection to the validity of the proceedings until the application for a certiorari :—

Held, that the conviction could not be impugned.

THIS was a motion to quash a conviction under 52 Vic. ch. 43 (D.), being an Act to provide against frauds in the supplying of milk to cheese, butter, and condensed milk manufactories. The Act came into force on the 2nd of May, 1889.

Argument. In Easter sittings, May 18, 1892, before GALT, C. J., ROSE and MACMAHON, JJ., *DuVernet* and *McCall* supported the motion. There was no power in the Dominion Government to pass the Act in question. The power is in the Provincial Legislature, and there cannot be an overlapping of jurisdiction : *Regina* v. *Wason*, 17 A. R. 221 ; and judgment of the dissenting Judge in the Court below, which shews that this Act is *ultra vires* of the Dominion Legislature as dealing with civil rights. The Act of the Ontario Legislature, 51 Vic. ch. 32, is almost identical with the Act in question. The magistrate who issued the summons was the vice-president of the association, who are the prosecutors in this case, and under *Regina* v. *Gibbon*, 6 Q. B. D. 168, he would be disqualified, and have no right to issue the summons, which amounts to a taking part in the proceeding. Where the justice has the smallest interest, as being a member or shareholder of the company, he is disqualified from acting:

Regina v. *Gaisford* (1892), 1 Q. B. D. 381. No offence was proved. To constitute an offence, the act must be knowingly done. Personal knowledge must be brought home to the defendant. The alleged offence here was the putting of a little salt into the milk to keep it from getting sour. This was done by the defendant's wife in good faith, and without the knowledge of the defendant. It has been decided by the Judge of the County Court of Oxford in *Regina* v. *Matheson*, that under this Act *scientia* must be clearly established. The conviction does not set out the persons entitled to the fine, and there has been no distribution of the fine as provided: *Regina* v. *Seale*, 8 East 568; *Rex* v. *Glossop*, 4 B. & Al. 616. There is no evidence of the question of locality. The only allusion to the premises where the offence is alleged to have been committed is, that they were called "The Wicklow Cheese Factory." This in no way indicates the municipality, or even the county, in which the offence was committed: *Regina* v. *Young*, 5 O. R. 184 (*a*). Argument.

Riddell, contra. The provision here complained of is a matter of adulteration which is within the power of the Parliament of Canada to deal with. Moreover the Parliament of Canada and the Provincial Legislature can deal with the same subject matter, except that the jurisdiction of the legislature is confined to the Province: *Regina* v. *Hodge*, 9 App. Cas. 117. No interest in the magistrate is shewn; and at the very most it is merely a sentimental interest. There is a distinction between a pecuniary interest and an interest of the character alleged here. It must be shewn that there was a substantial interest: *Regina* v. *Milledge*, 4 Q. B. D. 332; *Regina* v. *Klemp*, 10 O. R. 143, 149; *Regina* v. *Meyer*, 1 Q. B. D. 173, 177; *Regina* v. *Bishop of St. Alban's*, 9 Q. B. D. 454. The case referred to of *Regina* v. *Gibbon*, 6 Q. B. D. 168, is certainly very wide, but it is merely a dictum of the learned Judge, and it is overruled by *Regina* v. *Handsley*, 8 Q. B. D. 383, 386. But notwithstanding the information may be taken and the summons issued by a justice having

Argument.

an interest, it is of no importance so long as the magistrate who hears and determines the case is free from interest, and where, as here, the defendant appears at the hearing and pleads to the charge, and raises no objection: *Regina* v. *Vice-Chancellor of Cambridge*, 8 Times L. R. 151; *Dixon* v. *Wells*, 25 Q. B. D. 249; *Regina* v. *Hughes*, 4 Q. B. D. 614. The defendant also obtained an enlargement which constitutes a waiver of objections. Then, as to the offence: no *scientia* is required. The Act is absolute, namely, "No one shall sell," etc. Moreover there is plenty of evidence of knowledge: *Re Haldimand Election Case*, 1 Elec. Cas. 557; *Regina* v. *Prince*, L. R. 2 C. C. R. 154. There is nothing in the objection as to the distribution of the fine, and the locality where the offence was committed. This is clearly apparent from the evidence.

The Minister of Justice of the Dominion and the Attorney-General for Ontario received notice of the motion, but were not represented upon it.

December 23, 1892. ROSE, J.:—

All points taken except two were disposed of on the argument. The first was that the Act was *ultra vires* the Parliament of Canada. The second was that the conviction was illegal as the justice who took the information and issued the summons was an interested party.

The first objection was supported by an argument on the decision in *Regina* v. *Wason*, 17 A. R. 221, where a somewhat similar Act of the Ontario Legislature, 51 Vic. ch. 32, was considered and held to be *intra vires* the Ontario Legislature, the holding in that case being that the Act of the legislature merely protected private rights. That case was considered by this court, in *Regina* v. *Hart*, 20 O. R. 611, at p. 614, where the result of the decision in *Regina* v. *Wason*, was stated to be that the Provincial Act was not a criminal enactment, although its provisions were enforceable by fine and imprisonment. As has been

pointed out in *Regina* v. *Wason*, the Act of the legislature differs in form from the Act of Parliament in that under the former, the offence consists in doing certain things without notifying in writing the owner or manager of the cheese or butter manufactory. The Act in question forbids all persons doing the acts therein stated; and is in form similar to other Acts found upon the pages of the Revised Statutes of Canada, creating crimes. Judgment. Rose, J.

It was urged upon us that if the legislature had power to deal with the subject, it followed that it was not within the jurisdiction of Parliament. I think this is not so. In my opinion, Mr. Edward Blake in his argument in *Regina* v. *Wason*, correctly stated the law as follows: "The jurisdiction of the Provinces and the Dominion overlap. The Dominion can declare anything a crime but this only so as not to interfere with or exclude the powers of the Province of dealing with the same thing in its civil aspect, and of imposing sanctions for the observance of the law; so that though the result might be an inconvenient exposure to a double liability, that possibility is no argument against the right to exercise the power;" or, as put by Mr. Justice Osler, at page 241 of the same report: "I suppose it will not be denied that the latter" (*i.e.*, the Parliament), "may draw into the domain of criminal law an act which has hitherto been punishable only under a Provincial statute."

Mr. Justice Maclennan in the same case, at p. 248, referring to the Adulteration Act, R. S. C. ch. 107, sec. 15, used language which I think is apposite: "The Act in question seems to me to be very different from the Dominion Act. The latter is universal in its scope and application, and prohibits the forbidden acts by all persons whomsoever, under all circumstances and in all places throughout the Dominion, while the Provincial Act is confined to the dealings between these two particular kinds of manufacturers and their customers. The one has all the features of a public criminal law passed in the interest of the general public; the other is merely the regulation

Judgment.

Rose, J.

of the mode of carrying on a particular trade or business within the Province, so as to secure fair and honest dealing between the parties concerned."

Had there been no Provincial statute, I do not think it could have been argued that the Act in question did not create a crime, and was not within the powers of Parliament. Apart from any distinction between the two Acts as to the provisions and enactments, I am of opinion that the passing of a Provincial statute, within the powers of the Legislature, cannot in anywise take away from Parliament the right to legislate respecting the same matters, and to prohibit them and to enforce the prohibition by such punishment by way of fine or imprisonment as may be deemed best; or again, to quote from the judgment of Mr. Justice Osler, to "draw into the domain of criminal law an act which has hitherto been punishable only under a Provincial statute." I think the quotations I have made, so completely cover the ground, and so clearly and distinctly express the conclusion at which I have arrived from a perusal of the arguments and opinions in that case, that I cannot hope to express more clearly the result. I content myself simply with saying that in my opinion the Act in question was clearly *intra vires* the Parliament of Canada.

As to the second objection, it is a somewhat novel one. The information was laid before one justice of the peace, who issued a summons, but the hearing and adjudication were by another justice of the peace, whose qualification is not attacked. As far as I could make out from the papers, no objection was taken at any time during the proceedings that the information and complaint had been laid before the first named justice, nor indeed was the point now pressed upon us as far as I can learn taken prior to the motion for *certiorari*. Assuming, therefore, for a moment that the act of the justice who took the information and issued the summons was illegal, and that there was in effect no summons, yet as there was a plea of "not guilty" to the charge, and there were a hearing and

adjudication upon such charge, to which such plea had been made without any objection to the legality of the summons or proceeding, the conviction is valid. I think that this point is concluded against the defendant as far as this Court is concerned by the decision in *Regina* v. *Clarke*, 20 O. R. 642, where it was held that if there had been no information and no summons, the defendant, by appearing, pleading to the charge, and allowing the evidence to be given and the case to be closed without objection, waived his right to object to the absence of either information or summons.

Judgment. Rose, J.

In addition to the cases cited, I refer to *Regina* v. *Hughes*, 4 Q. B. D. 614, referred to by the present Chief Justice of the Queen's Bench Division, in *Regina* v. *Roe*, 16 O. R. 3, and *Dixon* v. *Wells*, 25 Q. B. D. 249, at p. 256.

In *Regina* v. *Hughes*, the decision was on a case reserved. Opinions were delivered by several of the Judges. Mr. Justice Hawkins in his opinion, at p. 622, says as follows: "I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the Justices upon as illegal a warrant as ever was issued. A warrant signed by a magistrate, not only without any written information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of the illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to *Caudle* v. *Seymour*, 1 Q. B. 889, 1 G. & D. 454; *Morgan* v. *Hughes*, 2 T. R. 225, 231 per Ashurst, J.; *Stevens* v. *Clark*, 1 C. & M. 509, 2 M. & Rob. 435. Wrongful however as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment, had never been legally preferred against him, before those magistrates, and in his presence, a charge was made, over which, if duly made, they had jurisdiction. * * Process is not essential to

Judgment. the jurisdiction of the justices to hear and adjudicate. * *
Rose, J. A flood of authorities might be cited in support of the proposition that no process at all is necessary when the accused being bodily before the justices, the charge is made in his presence, and he appears and answers to it. In 2 Hawk. 28, it is said: 'It seemeth plain, from the nature of the thing, that there can be no need of process where the defendant is present in Court, but only where he is absent.'"

In that case the charge was an indictable offence. The magistrates treated it as one subject to summary jurisdiction, and the conviction was probably illegal. As I understand the opinions given, although the fact of its being an indictable offence was relied upon as supporting the judgment as given by the Court, I do not understand from the extracts which I have quoted, that if the charge had not been of an indictable offence, the conclusion would have been different.

The case of *Regina* v. *Gibbon*, 6 Q. B. D. 168, was much pressed upon as being in the defendant's favour. There the information was laid before a justice of the peace who was a member of the corporation interested in the prosecution; and the justices, before whom the defendant was brought for a hearing upon the summons, the interested justice not being one of them, refused to proceed. The Court consisting of the late Lord Chief Justice Cockburn and Mr. Justice Manisty, refused a mandamus.

The judgment was given after the death of Lord Chief Justice Cockburn, by Mr. Justice Manisty, and reference was made to *Regina* v. *Milledge*, 4 Q. B. D. 332, as governing the case.

I confess I do not clearly see how *Regina* v. *Milledge* governs the case, unless it is that it determined that the summons thus issued was illegal, and therefore that the justices were justified in refusing to proceed to a hearing upon it, for the decision in *Regina* v. *Milledge*, was as follows: "Cockburn, C. J.—The mere fact that some of the council who passed resolutions for this prosecution,

were borough justices might have been no objection to the order, if these justices had not assisted at the hearing of the summons. But I cannot see how we can get over the fact of their presence when the order was made. They practically made an order in a case where they were prosecutors."

Judgment.

Rose, J.

It is, however, not necessary to consider the case of *Regina* v. *Gibbon*, for it is clear that it is no authority that where the justices enter upon the hearing, the defendant not objecting, and an adjudication is had upon the evidence given before justices who had jurisdiction over the offence, the conviction is bad.

I think this ground fails.

I do not think the objection that was pressed upon us that the justice who received the information, interfered in the subsequent proceedings so as to in fact take part in the adjudication, is at all sustained by the evidence.

As to the merits, there was evidence upon which a conviction might be had. It is not within our jurisdiction to weigh the evidence, nor should we say what opinion we might have formed if the matter had been before us in the first instance. I do not at all say that I should have come to a different conclusion from the justice who adjudicated. It is not within our province to review the finding.

In my opinion the motion fails and must be dismissed with costs.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

MULLIGAN v. THOMPSON.

Seduction—Married woman—Evidence of, to prove seduction and non-access of husband.

In an action for the seduction of a married woman the non-access of her husband, and her seduction by the defendant, may be proved by her own evidence.

Evans v. *Watt*, 2 O. R. 166, considered.

Statement. THIS was an action tried before ARMOUR, C. J., at the Sittings at Brockville, on the 18th October, 1892.

The action was one brought by the mother for the alleged seduction of her daughter, a married woman. The daughter Catharine Clark, had separated from her husband, and had, as was stated in the pleadings, for a long time prior to the alleged seduction lived separate and apart from him, and had no intercourse with him.

It appeared from the evidence that after Catharine Clark's husband left her she had no communication with him, and apparently his exact residence was not known. It was stated that he might be living either at Kingston or Cataraqua.

Catharine Clark, was married to her husband in 1889. They separated in February of 1890. A child, the issue of such marriage was born in May, 1890. She was then living with her mother, the plaintiff. She was called as a witness, and after stating the facts as to her marriage, the separation from her husband and birth of her child, counsel for the plaintiff was about to interrogate her about her husband having had access to her since the birth of the first child, when he was stopped by the learned Chief Justice, saying "I am not going to allow any evidence that this child does not belong to him," *i. e.* Catharine Clark's husband.

The learned Chief Justice then said: "I don't think that a woman can be allowed to say that the child is not her husband's." And upon being pressed by counsel, the

learned Judge further ruled: "It is just as well for me to state now, I will not receive the evidence—any evidence from this woman, that any person other than her husband is the father of this child. It is surely contrary to public policy that a woman should come into court and bastardize her issue. He is still, according to the evidence, in the province, at Kingston or Cataraqua. He is separated from her, that is all can be said. * * I refuse to receive the evidence, because under the circumstances I am of the opinion the evidence is not receivable in an action such as this." Statement.

The counsel for the plaintiff tendered the evidence to show the separation was complete and absolute, and that there had been no communication since the separation, but the learned Chief Justice refused to receive it, and judgment was directed as follows: "I direct that judgment be entered in this cause on and after the 5th day of next Michaelmas Sittings, dismissing this action with costs. If the Court shall be of opinion that I ought to have received the evidence of Catharine Clark of non-access by her husband, and that some one other than her husband was the father of the child, the defendant consents that he shall be ordered to pay the costs of the motion in Term and of this trial."

The plaintiff moved on notice to set aside the judgment entered for the defendant and for a new trial.

In Michaelmas Sittings, November 24th, 1892, of the Divisional Court, composed of GALT, C. J., and ROSE, J. *Pepler*, Q. C., supported the motion. The action clearly lies in the case of a married woman separated from her husband and living, as is the case here, with her mother, where non-access by the husband is proved; and the fact necessary to maintain the action may be proved by the married woman herself: *Harper* v. *Luffkin*, 7 B. & C. 387; Roscoe N. P. 16th ed., 910; Addison on Torts, 6th ed., 587; *Evans* v. *Watt*, 2 O. R. 166; *Doe d. Marr* v. *Marr*, 3 C. P. 36, 44, 50.

Argument.

The Court called on the other side.

Marsh, Q. C., and *Mickle*, contra. The action is not maintainable under the Seduction Act R. S. O. ch. 58, as this Act only applies to unmarried women, and therefore loss of service should have been averred and proved. [The Court—This is not open now.] The learned Judge at the trial ruled properly in refusing to admit the evidence of the married woman to prove the seduction by the defendant, and the non-access by the husband. In the *Aylesford Peerage Case*, 11 App. Cas. 1, 7, 11, although a legitimacy case, the rule is broadly laid down as applicable to all cases, where even inferentially the legitimacy of the child may be brought into question, that the husband and wife are not admissible witnesses to prove such facts, although the facts may be proved by the evidence of other parties. The same rule is laid down in *Guardians of Nottingham* v. *Tomkinson*, 4 C. P. D. 343. See also *Rex* v. *Inhabitants of Sourton*, 5 Ad. & E. 180; *Atchley* v. *Sprigg*, 33 L. J. N. S. Ch. 345; *Re Walker*, W. N. 1885, p. 196; *Burnaby* v. *Baillie*, 42 Ch. D. 282.

Pepler, Q. C., in reply, The cases referred to by the other side are all legitimacy and bastardy cases, and there the evidence is inadmissible; and in the cases which have been referred to on behalf of the plaintiff this distinction is pointed out. The cases also point out that the evidence is admissible on the ground of necessity: Starkie on Evidence, 4th ed., 26; *Morris* v. *Davies*, 5 Cl. & F. 163, 244.

December 23rd, 1892. ROSE, J.:—

The sole question that we have to consider is, whether or not on the facts of this case the evidence of Catharine Clark to prove non-access of her husband and access of the defendant under such circumstances that a jury might infer that the defendant was the father of her child born subsequently to May 1890, was receivable.

That such an action as this lies is beyond question: *Harper* v. *Luffkin*, 7 B. & C. 387; Roscoe's N. P. 16th ed.

p. 910; Addison on Torts, 6th ed., p. 587; *Evans* v. *Watt*, 2 O. R. 166, and other cases. That non-access of the husband and access of the defendant under such circumstances as would justify a jury in finding the defendant was the father of the child may be proved is also beyond question. See the above cases, and *Doe d. Marr* v. *Marr*, 3 C. P. 36, especially pp. 43, 44, and 45.

Judgment. Rose, J.

At page 43, Macaulay, C. J. said: "Formerly in post-nuptial conceptions, the absence of the husband beyond the seas during the whole period within which the child could have been begotten—and indeed throughout the whole period of gestation—was deemed essential to the proof of illegitimacy. But that doctrine has been long since exploded, and non-access may be now established, notwithstanding the place of residence of the husband may have admitted opportunities of sexual access to the wife."

Therefore, if in this case the plaintiff could have given clear evidence of the non-access of the husband to his wife as for instance, by showing that during the whole period prior to the birth of the illegitimate child, when by nature it would be possible for the husband to procreate such child, he had never seen his wife, had never been in her company, or in the neighbourhood where she resided, such evidence would have been not only admissible, but sufficient to establish non-access; and if it had also been possible for the mother, the plaintiff, to have proved that her daughter and the defendant were together at such a time and place, and under such circumstances as would have justified the jury in finding that there had been sexual connection between them at such time, being at such a period prior to the birth of the illegitimate child, as by the laws of nature would have justified the conclusion that the defendant was the father of the child, the fact could have been thus proven, and a verdict against the defendant could have been well rested upon such ground. The sole question then is whether or not the mother of the illegitimate child can be allowed to prove the facts that might well have been proven by another witness.

Judgment.
Rose, J.

In *Evans* v. *Watt*, 2 O. R. 166, it was held that where the seduction took place prior to the marriage, and a child was born after marriage, a right of action had vested in the father of the seduced girl which could not be divested by the subsequent marriage, and that in such a case the daughter was a competent witness to prove that the child was the child of the defendant.

In that case, the learned Judge who tried this case delivered a dissentient judgment in which he referred to *Rex* v. *Luffe*, 8 East 193, in which Lord Ellenborough, C. J., stated the principle on which a wife is not permitted to bastardize her issue and the exceptions to the rule.

I think it necessary to repeat the quotation "This objection (that is to the wife proving non-access by her husband) is grounded upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter affecting his interests or character, unless in cases of necessity, where from the nature of the thing no other witnesses can probably have been present; but exceptions of that sort have been established; and that it is necessary, and on that account allowable, to examine her as to the fact of her criminal intercourse with another, has been held by various judges at different periods; for this is a fact which is probably within her own knowledge, and of the adulterer only. And by parity of reasoning, it should seem that if she be admitted as a witness of necessity to speak to the fact of the adulterer's intercourse, it might also perhaps be competent for her to prove that the adulterer alone had that sort of intercourse with her by which a child might be produced within the limits of time which nature allows for parturition." Whereupon, Mr. Justice Armour said: "The plaintiff has clearly a right of action, and one that can only be established by the evidence of his daughter, she being the only person who can prove that the defendant is the father of the child; and I think that she is a competent and admissible witness to prove that fact, if on no other ground, at all events on the ground of necessity."

Judgment.

Rose, J.

Although the judgment thus delivered was a dissentient judgment, there was no difference of opinion among the members of the Court as to the admissibility of such evidence. The case went off on the ground that loss of service was not proved.

Hagarty, C. J. said, at p. 169: "Nor do I clearly see how the parent may not put her in the witness box, and prove by her a connection with defendant, and that she was then pregnant."

Unless there is a distinction between the case of *Evans* v. *Watt*, and the case before us, it is a clear authority in favour of the plaintiff, and must govern the present case.

The learned Chief Justice at the trial expressed the opinion that *Evans* v. *Watt* did not govern this case, saying "I don't think that helps you at all; that was a case in which the cause of action vested before marriage."

With the very greatest respect for the opinion of the learned Judge, and with the doubt which must be raised by realizing that the distinction drawn between the two cases by the same judicial mind, I cannot come to the conclusion that there is any distinction in principle between *Evans* v. *Watt*, and the case before us. I do not see how the fact of the vesting of a cause of action before marriage can make any difference as to the principle upon which the evidence of the wife is receivable. Once admit that by the seduction of a married woman after marriage, a cause of action may arise, and that the father or mother of such married woman may bring such action, and that the facts may be proven, and judgment had for the plaintiff in such an action, how can the admissibility or non-admissibility of the evidence of a daughter in such a case be put on a different ground from that in the case of *Evans* v. *Watt*? In each case the exception by Lord Ellenborough above referred to, applies. As far as the evidence in this case shows, the non-access of the husband and the access of the defendant can be alone proved by the daughter. It is highly improbable, as said by Lord Ellenborough, that the fact is within the knowledge of any one other than herself and the adulterer.

Judgment.

Rose, J.

The illegitimacy of the child is not in issue in this action. The finding of the fact by the jury in this case would not be evidence to establish the illegitimacy of the child in any other proceeding. The fact that indirectly such evidence would go to show that the child born of such intercourse was illegitimate cannot prevent the evidence being received if otherwise admissible.

There is no case against the reception of such evidence in an action like the present, except *Ryan* v. *Miller*, 21 U. C. R. 202, 22 U. C. R. 87, which, as pointed out by Mr. Justice Armour in *Evans* v. *Watt*, is not a binding authority.

I have referred to all the cases cited on the argument, and some others, and I cannot summarise the result of such examination in language more apt or forcible than that employed by the learned trial Judge in his dissentient judgment in *Evans* v. *Watt*, where at page 172 he said: "The most of the cases on the subject which I have met with are cases in which the child was a party to the litigation, and its status was directly in question, and the residue of the cases are bastardy cases, in which the status of the child was directly affected. But in this case the status of the child cannot be at all affected by this litigation. I think, therefore, that the cases I have referred to cannot be held to govern this case, nor can *Ryan* v. *Miller* be held to govern it, for that case was decided in my opinion on the erroneous supposition that the cases to which I have referred governed a case like it, and was therefore erroneously decided."

I desire for the purpose of my opinion in this case, to adopt the language of the learned Judge to express the opinion which I have formed, as far as possible independently, upon a perusal of the cases which have been cited, among which are the *Aylesford Peerage Case*, 11 App. Cases 1; *Guardians of Nottingham* v. *Tomkinson*, 4 C. P. D. 343; *Rex* v. *Sourton*, 5 A. & E. 180; *Atchley* v. *Sprigg*, 33 L. J. N. S. Ch. 345; *Re Walker*, W. N. (1885) 196; *Burnaby* v. *Baillie*, 42 Ch. D. 293.

I am therefore of the opinion that the evidence of the daughter should have been received to prove the non-access of her husband and access of the defendant, and that following the terms on which judgment was directed, the costs of this motion and of the trial must be paid by the defendant.

Judgment.

Rose, J.

I see no reason in principle or in justice for shutting out such evidence. If the defendant is the father of the illegitimate child born to the plaintiff's daughter, they have been partners in the guilt, and in whatever of illicit pleasure there was in such forbidden connexion, and it is not fair that the woman should bear the suffering and the shame, and the defendant escape without loss. If, according to the mistaken notions which I venture to say prevail in society, the stigma of shame cannot be placed upon the man as well as the woman, let him at any rate bear his share of the financial burthen which is the result of the illicit connexion. To that end, let the woman with whom he has cohabited be permitted to give evidence, as he is permitted to give evidence to defend himself against the claim. The woman has been deprived of the protection and comfort of her husband without, as far as appears, any fault on her part. If in such a position of temptation, she has fallen a prey to the wiles of the seducer, or has been led to submit herself to unlawful intercourse, it would be unfortunate indeed if, by reason of a rule of law, or a principle of evidence invoked for other purposes, she should not be permitted to give evidence in an action permitted and sustainable by evidence other than her own. Certainly, if her husband has abandoned her, his interests are no longer to be considered, nor is his character to be so tenderly guarded as to permit an injustice to be done.

Varying the language used by the learned trial Judge in *Evans* v. *Watt*, at p. 173, to meet the facts of this case, I say I think it more in the interest of decency, morality and policy, that this wrong should be exposed by the evidence of Catharine Clark than that her mouth should be closed, and thus the defendant should escape condemnation.

Judgment.

Rose, J.

Since writing the above, I have had the privilege of a consultation with the learned Chief Justice, the trial Judge, and am permitted to say that had he felt untrammelled by the decision in *Evans* v. *Watt*, *supra*, and in *Regina* v. *Bissell*, 1 O. R. 514, he would have admitted the evidence. I have pointed out why *Evans* v. *Watt* seems to me not to stand in the plaintiffs' way, but rather to assist her, and as I read *Regina* v. *Bissell*, it merely decides that as the law then stood a wife might not, in a prosecution for non-support, give evidence again her husband.

These cases, however, are of much interest as containing that learned Judge's dissentient judgments, which present the most powerful arguments I have seen in favour of the conclusion I have reached, and supported by which I with the less hesitation declare my opinion.

It will be observed that this case does not raise any question as to the paternity of a child born in wedlock, when both the husband and an adulterer had access to the wife. No doubt, in such a case, an inquiry into the facts would not be permitted.

The case of *Gardner* v. *Gardner*, 2 App. Cas. 723, for a reference to which I am indebted to my learned brother Osler affords an interesting illustration of a case where the evidence of both husband and wife is admissible on the question of the legitimacy of a child born in wedlock.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

RE HARPER.

Habeas Corpus—Judge in Chambers—Appeal from to Court of Appeal.

Under R. S. O. ch. 70, sec. 1, the writ of habeas corpus may be made returnable before "the Judge awarding the same, or before a Judge in Chambers for the time being, or before a Divisional Court"; and by sec. 6 an appeal is given from the decision of the said Court or Judge to the Court of Appeal:—

Held, that the right of appeal must be exercised in the manner provided by the statute, and therefore an appeal from a Judge in Chambers must be to the Court of Appeal.

Statement.

THIS was an appeal from a decision of FERGUSON, J., in Chambers, remanding to custody the prisoner William Harper, refusing his discharge under a writ of habeas corpus issued in pursuance of an order granted by ROSE, J., in Chambers.

In Michaelmas Sittings, November 30, 1892, *DuVernet*, supported the motion, before ROSE and MACMAHON, JJ.

J. R. Cartwright, Q. C., contra.

The arguments sufficiently appear from the judgment.

December 23, 1892. ROSE, J.:—

The writ was made returnable before the "President of the Queen's Bench Division or the President of the Common Pleas Division, or any Judge of any of the Divisions of our High Court of Justice for Ontario presiding in Chambers in Toronto."

This is not proper. It should have been made returnable as directed by the order which was in accordance with the statute.

The preliminary objection was taken by Mr. Cartwright that no appeal lay in such a case from a decision or judgment of a Judge in Chambers to the Divisional Court, and, as I understood it, the case was argued on the provisions of the statute as found in 29 & 30 Vic. ch. 45, and R. S. O. 1877, ch. 70, counsel referring to *Re Hall*, 32 C. P. 498, 8 A. R. 135; *Re Mélina Trepanier*, 12 S. C. R. 111, at p. 121.

Judgment.

Rose, J.

As the statute stood at the time of the decision in *Re Hall* and as found in R. S. O. of 1877 a writ might be made returnable before "the Judge awarding the same or before any Judge in Chambers for the time being"; and by section 9 an appeal was given from the decision or judgment of the Court in Term to the Court of Appeal.

Mr. Justice Patterson in *Re Hall* came to the conclusion that when an appeal was given to the Court of Appeal from the decision of the full Court in Term by implication also was given an appeal from a Judge in Chambers to the full Court.

On this expression of opinion Mr. DuVernet relied to support his appeal.

But upon the revision of 1887 R. S. O. ch. 70, the provisions of the Act were altered, probably in consequence of the opinion expressed by Mr. Justice Patterson, for we find that by section 1 a writ may be returnable before "the Judge so awarding the same or before the Judge in Chambers for the time being, or before a Divisional Court"; and by section 6 of that Act, an appeal is given from the decision or judgment of the said Court or Judge to the Court of Appeal.

It is clear, therefore, as it seems to me, that the right of appeal given by the statute must be exercised in the manner given by the statute; and there is no appeal from the judgment of a Judge in Chambers, otherwise than to the Court of Appeal; and that therefore this motion fails and must be disallowed.

It is not therefore necessary to discuss the other objection taken, namely, that the application should have been by order *nisi*.

I have called attention to the form of the writ as being made returnable before the President of either of the Queen's Bench or Common Pleas Divisions. The writ should follow the provisions of the statute and be made returnable either before a Divisional Court or before a Judge in Chambers, or before the Judge awarding it accordingly as the order might direct.

MacMahon, J., concurred.

[QUEEN'S BENCH DIVISION.]

RE TALBOT'S BAIL.

Criminal procedure—Recognizance of bail, form of—Notice to sureties—Estreat—Order of Judge—Estreat roll, form of—Signature of clerk of Court—Forfeiture of recognizance—Writ of fieri facias and capias, form of—R. S. O. ch. 88—R. S. C. chs. 174, 179—Release of bail.

1. A recognizance of bail is taken in open Court by the clerk of the Court addressing the parties, being then before him in open Court, by name, and stating the substance of the recognizance; and the verbal acknowledgment of the parties so taken is quite sufficient without more.
2. In this case a recognizance was drawn up which stated that the principal and sureties personally came before the clerk of assize, in open Court, and acknowledged, etc.; and also stated that it was taken and acknowledged in open Court before the clerk of assize. As a matter of fact the parties actually came before the Court, and properly acknowledged the debt to the Crown in open Court:—

Held, that the recognizance should have stated that the parties personally came before the Court and that the recognizance was taken and acknowledged in open Court; and the name of the clerk should merely have been subscribed to it; but the errors made in drawing it up were not sufficient to avoid it.

3. Notice to the sureties of the recognizance is not necessary where it is taken as and where this one was.
4. The provision of R. S. C. ch. 179, secs. 10 and 11, and R. S. O. ch. 88, secs. 7 and 8, requiring the written order of the Judge for the estreating or putting in process of a recognizance, applies only to recognizances to appear to prosecute, or to give evidence, or to answer for any common assault, or to articles of the peace, and does not apply to a recognizance such as the one here in question, whereby the bail became bound for the appearance of their principal to stand his trial upon an indictment for conspiracy.
5. The estreat roll was sufficiently signed by the clerk when he signed the affidavit at the foot of the roll.
6. It is no part of the duty of the clerk in making up the roll to instruct the sheriff as to what disposition he is to make of the money therein mentioned when collected.

And where the clerk in making it up stated it to be made in accordance with a Provincial statute and also with two Dominion statutes, thus leaving it uncertain whether the moneys were to be paid over to the Provincial Treasurer or to the Dominion Minister of Finance:—

Held, that the words so used were surplusage, and did not affect the validity of the roll, and should be stricken out.

7. The estreat roll as drawn up stated that it was a roll of fines, issues, amerciaments, and forfeited recognizances, set, imposed, lost, or forfeited, by or before the Court, etc., commenced, etc., and contained the names of parties, residences, etc., with the amounts for which the bail were bound, filled in under the heading "amount of fine imposed":—

Held, that the roll sufficiently shewed the recognizance to have been forfeited, and that it was fairly entered and extracted on the roll as a forfeited recognizance.

8. *Held*, that the proceedings to collect the debt due to the Crown under the recognizance were civil, and not criminal, proceedings, and were to

be regulated by R. S. O. ch. 88; and the writ of *fieri facias* and *capias* issued in this case, following the form given in the schedule to that Act, was not open to any objection.

9. *Held*, that, under the circumstances set forth in the affidavits, the Court would not be justified in releasing the bail from their liability.

Statement.

ON the 26th May, 1892, *Aylesworth*, Q. C., obtained an order *nisi* calling upon the Minister of Justice and the Attorney-General for Ontario to shew cause why the estreat roll upon the recognizance of bail entered into upon the 8th day of January, 1892, by Horace Talbot, Oliver Durocher, Tertullian Lemay, Denis Nelson Charlebois, Napoleon Faulkner, Charles Christian, and Oscar McDonell, and the writ of *fieri facias* and *capias* thereupon issued, and all proceedings had and taken toward estreating the said recognizance, or enforcing against the said bail the estreating thereof, should not be set aside, and all proceedings thereon be for ever stayed, upon the grounds following:

1. It does not in any way appear that the said recognizance was acknowledged before any Judge of the High Court of Justice for Ontario, or before what Judge the same was acknowledged.

2. Notice of the said recognizance was not at any time given to the sureties above named, or to any of them.

3. The said recognizance was estreated and put in process without any previous written order in that behalf of the Judge who presided at the Court at which the said recognizance was so estreated.

4. The estreat roll is not signed by the clerk of the Court.

5. The said roll is uncertain in that it purports to be made as well in accordance with chapter 88 of the Revised Statutes of Ontario, as also of chapter 174, and chapter 179, sections 8, 9, 10, 11, and 13, of the Consolidated Statutes of Canada; and under the language of the said roll it is left uncertain whether the sheriff is to pay over moneys collected by him thereunder to the Provincial Treasurer of the Province of Ontario, or to the Minister of Finance and Receiver-General of the Dominion of Canada.

Statement.

6. The said roll does not shew any entry or extract of any "forfeited recognizance," but professes to record a "fine imposed" on each of the persons therein mentioned, and which is in truth contrary to the fact.

7. The said writ of *fieri facias* and *capias* is irregular and defective and not in accordance with the form in the schedule to the Act respecting recognizances; no proper name or description of any Court into which it is returnable is shewn therein; no return-day is mentioned in the writ; and its description of the security to be given by any person arrested thereunder in order to obtain his discharge out of custody, is meaningless and unintelligible, and not in accordance with the provisions of section 16 of chapter 179 of the Revised Statutes of Canada.

Or, in the alternative, why, under the circumstances of the case as set forth in the affidavits filed, the Court in its discretion should not order the discharge of the whole of the said recognizance, and make such order thereon as to the Court appeared just.

The estreat roll was as follows:

"Roll made in accordance with chapter 88 of the Revised Statutes of Ontario, an Act respecting Estreats, and also of chapter 174 and chapter 179, sections 8, 9, 10, 11, and 13, of the Consolidated Statutes of Canada, an Act respecting the Procedure in Criminal Cases, and an Act respecting Recognizances, of all fines, issues, amerciaments, and forfeited, recognizances, set, imposed, lost, or forfeited, by or before the Courts of Oyer and Terminer and General Gaol Delivery, and of Assize and Nisi Prius, in and for the county of Carleton, commenced at Ottawa, in the said county of Carleton, on Monday the eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-two, and in the 55th year of Her Majesty's reign (made in duplicate)." Then followed columns headed "name of party," "residence," "addition," "amount of fine imposed," etc., and "why imposed, etc.," with the names, etc., filled in. The amounts for which the bail were bound were filled in under the heading "amount of fine imposed." The

Statement. roll was signed by the Judge, and at the foot of it was the following affidavit sworn to by the clerk:—

"I, John P. Featherston, of the city of Ottawa, in the county of Carleton, clerk of assize in and for the said county of Carleton, make oath that this roll is truly and carefully made up and examined, and that all fines, issues, amerciaments, recognizances, and forfeitures which were set, lost, imposed, or forfeited, at or by the Court therein mentioned, and which in right and due course of law ought to be levied and paid, are, to the best of my knowledge and understanding, inserted in the said roll; and that in the said roll are also contained and expressed, all such fines as have been paid to or received by me, either in Court or otherwise, without any wilful discharge, omission, misnomer, or defect whatsoever. So help me God."

The writ of execution and capias ran as follows:—

"Victoria, by the grace of God," etc.

"To the sheriff of the county of Carleton, Greeting.

"You are hereby commanded to levy of the goods and chattels, lands and tenements of all and singular the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged as therein is specified; and if any of the said several debts cannot be levied, by reason of no goods or chattels, lands or tenements being to be found belonging to the said parties respectively, then, and in all such cases, that you take the bodies of such parties and keep them safely in the gaol of your county, there to abide the judgment of our High Court upon any matter to be shewn by them respectively, or otherwise to remain in your custody as aforesaid until such debt is satisfied unless any of such persons respectively gives sufficient security for his appearance at the said Court, or within thirty days after the giving of the security, or so soon after as the Court shall sit, for which you will be held answerable; and what you do in the premises make appear before us in our High Court of Justice at Toronto immediately after the execution hereof and have then and there this writ.

"Witness my hand and seal, John Peter Featherston, deputy-clerk of the Crown for the county of Carleton, this twenty-sixth day of April, 1892, and clerk of assize at the present sittings of the High Court of Justice in and for the county of Carleton. Statement.

"JOHN P. FEATHERSTON,
"*Deputy Clerk at Ottawa,*
"*And C. A.*"

The affidavits filed shewed that at the sittings of this Court for the trial of criminal causes at the city of Ottawa, in the month of January, 1892, an indictment was found by the grand jury against the said Horace Talbot and one A. C. Larose, for conspiracy to defraud and for defrauding Her Majesty by false pretences; that upon this indictment the said Talbot and Larose were arraigned, and pleaded not guilty; that the said indictment was thereupon traversed to the next sittings of this Court for the trial of criminal causes; and that the said bail became bound for the appearance of the said Talbot at the next sittings of the said Court, to stand his trial upon the said indictment; that the next sittings of the said Court was held on the 18th day of April, 1892; that the said Talbot was called in open Court on the 25th day of April, 1892, and not appearing, the said recognizance was estreated. Copies of the recognizance, estreat roll, *fieri facias* and *capias*, and of the indictment, were set out; and it was deposed that Mr. John P. Featherston, clerk of assize and deputy clerk of the Crown for the county of Carleton, had informed deponent "that no written order was given by the Honourable Mr. Justice MacMahon to estreat the said bail, but that the said Judge gave him a verbal order to estreat the said bail, and then signed the roll;" and that no notice was attached to the recognizance, nor was any notice given to the cognizors of the nature of their obligation, and that the only notice received by them was the calling of the said Horace Talbot in open Court, and the said bondsmen to produce the said Talbot; and that the bail were not present in Court when their recognizance was estreated.

Statement. It was set forth in the affidavits, as a reason why the Court should relieve the bail from their recognizance, that a bill was found by the grand jury at the said last mentioned sittings of this Court against said Talbot alone for larceny, and that the Crown intended to try him upon such indictment, using the said A. C. Larose as a witness on behalf of the Crown, and did not intend to proceed upon the said indictment against said Talbot and Larose jointly, and that upon finding of the said indictment against said Talbot alone for larceny, the said Talbot absconded.

On the 5th December, 1892, *J. R. Cartwright*, Q. C., shewed cause; and *Aylesworth*, Q. C., supported the order *nisi*.

December 24, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

A recognizance is taken in open Court by the clerk of the Court (the parties being before him in open Court) addressing them by their names, and stating the substance of the recognizance thus: You, A. B., acknowledge to owe to our Sovereign Lady the Queen the sum of , and you, C. D., acknowledge to owe to our Sovereign Lady the Queen the sum of to be levied of your respective goods and chattels, lands and tenements, if default shall be made in the condition following, that is to say: that you, A. B., shall appear, etc.:—and the verbal acknowledgment by the parties so taken is quite sufficient without more: *Regina* v. *The Justices of St. Alban's*, 8 A. & E. 932. The clerk then makes a minute in his book of the recognizance so taken and acknowledged, and if need be draws up the record of the recognizance.

The recognizance drawn up in this case is objected to because it does not in any way appear that it was acknowledged before any Judge of the High Court of Justice, or before what Judge the same was acknowledged.

Judgment.
Armour, C.J.

The recognizance states that the principal and sureties "personally came before me, the clerk of assize in and for the said county of Carleton, in open Court, and acknowledged, etc.," instead of stating, as it ought to have done, and as the fact was, that they personally came before the High Court of Justice for Ontario at its sittings for the county of Carleton.

It also states that it was "taken and acknowledged in open Court of Oyer and Terminer and General Gaol Delivery in and for the said county of Carleton, at the city of Ottawa, the day and year first above written, before me, John P. Featherston, clerk of the assize in and for the said county of Carleton," instead of stating, as it ought, that it was taken and acknowledged in open Court the day and year first above written—John P. Featherston, clerk, etc.

It appears, however, from the recognizance that the debt to the Crown therein mentioned was properly acknowledged by the principal and his sureties, and it also sufficiently appears from it that such acknowledgment was made in open Court.

We think, therefore, that the errors made in drawing up the recognizance are not sufficient to avoid it.

The second objection taken, that notice of the said recognizance was not at any time given to the sureties above named, or to any of them, cannot prevail, for the recognizance having been taken as and where it was, no such notice was required to be given. See *Regina* v. *Schram*, 2 U. C. R. 91.

The third objection taken is that the said recognizance was estreated and put in process without any previous written order of the Judge who presided at the Court at which the said recognizance was so estreated.

The provision of the law that "no officer of the Court shall estreat or put in process a recognizance without the written order of the Judge before whom the list has been laid": R. S. C. ch. 179, secs. 10 and 11; R. S. O. (1887) ch. 88, secs. 7 and 8; applies only to recognizances to appear to prosecute, or to give evidence, or to answer for any com-

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Armour, C. J.

mon assault, or to articles of the peace, and does not apply to the recognizance in this case. See 4 & 5 Vic. ch. 24, sec. 49; C. S. U. C. ch. 117, sec. 15; C. S. C. ch. 99, secs. 120 and 121; R. S. C. ch. 179, secs. 10 and 11; R. S. O. (1877) ch. 88, secs. 7 and 8; R. S. O. (1887) ch. 88, secs. 7 and 8.

The fourth objection is that the said estreat roll is not signed by the clerk.

We think the roll was sufficiently signed by the clerk to satisfy the statutes when he signed the affidavit at the foot of the roll.

As to the fifth objection. The clerk, wholly unnecessarily, in drawing up the roll, stated it to be "made in accordance with chapter 88 of the Revised Statutes of Ontario, an Act respecting estreats, and also of chapter 174 and chapter 179, sections 8, 9, 10, 11, and 13, of the Consolidated Statutes of Canada, an Act respecting the procedure in criminal cases, and an Act respecting recognizances;" and, his doing so has given rise to this objection, besides calling the Revised Statutes of Canada the Consolidated Statutes of Canada. It was no part of the duty of the clerk in making up the roll to instruct the sheriff as to what disposition he was to make of the money therein mentioned, when collected. We think that the words so unnecessarily made use of by the clerk in making up the roll were surplusage, and did not at all affect the validity of the roll, and that we ought, if necessary, to amend the roll by ordering them to be stricken out, which we do.

As to the sixth objection, we think that the roll sufficiently shews this recognizance to have been forfeited, and that it is fairly entered and extracted on the roll as a forfeited recognizance.

As to the seventh objection. The recognizance was taken in the High Court of Justice, and was estreated in that Court, and was a debt due to the Crown to be collected in the High Court of Justice, and the proceedings to collect such debt, at all events after estreat, were civil, and not criminal, proceedings, and were to be regulated

by R. S. O. ch. 88; and the writ of *fieri facias* and *capias*, following the form given in the schedule to that Act, is not open to any objection: *Regina* v. *Shipman*, 6 U. C. L. J. O. S. 19. Judgment. Armour, C.J.

We do not think that under the circumstances set forth in the affidavits we would be justified in releasing the bail from their liability, but must leave them to the lenity of the executive.

We think that the motion must be dismissed, but as it was induced for the most part by the blundering of the clerk, we think it should be without costs.

[QUEEN'S BENCH DIVISION.]

POTTS ET AL. V. TEMPERANCE AND GENERAL LIFE ASSURANCE COMPANY OF NORTH AMERICA.

Life insurance—Surrender of policy—Contract—Absence of deceit—Evidence of fraud.

The rules which govern the purchase and sale of policies of life insurance are the same as those which govern the purchase and sale of any other species of personal property.

A contract for the surrender of a life policy, unlike a contract for life insurance, is not *uberrimæ fidei*.

The insured in a life policy, having no surrender value, applied to the insurers to purchase it, which they did for a small sum, he being at the time, to their knowledge as well as his own, seriously ill with heart disease. The insurers in no way misled the insured, who died shortly after the sale.

In an action by his executors to set aside the transaction:—

Held, that there was no evidence of fraud to submit to a jury.

Hill v. *Gray*, 1 Stark. 434, explained and distinguished.

Smith v. *Hughes*, L. R. 6 Q. B. 597, followed.

Jones v. *Keene*, 2 Moo. & R. 348, distinguished.

THIS was an action brought by the executors of the Reverend Thomas Wesley Jeffery, deceased, to set aside the surrender of a policy of insurance on his life for $5,000, on the ground that this surrender had been obtained through fraud and fraudulent representation; and for payment of the amount of the policy. Statement.

Statement.

The policy was issued on the 17th November, 1887. In March, 1890, the insured was obliged to retire almost entirely from the discharge of his pastoral duties through heart disease. In April of that year the defendants' manager was aware that the insured was in ill-health; the medical evidence was to the effect that this was apparent; but there was no evidence to shew that the manager had any special knowledge of his condition, or any knowledge of it which it was not reasonable to suppose the insured also had.

The insured applied to the manager several times in order to effect a favourable surrender of the policy, and was told that it had no surrender value, which was true.

The policy had been assigned as collateral security to a mortgage held by one W. S. Lee, and the manager ultimately offered to recommend payment of this mortgage, amounting to $530, and a cash payment of $250, alleging that the only ground upon which the defendants would purchase the policy was the badness of the risk. These terms were agreed to both by the defendants' committee and by the insured.

Before the arrangement was carried out, Mr. Lee remonstrated with the insured on making such a bargain, and offered to advance him any money which he needed. The insured, however, persisted, and on the 29th of December, 1890, the surrender was completed. Premiums to the extent in all of $415.75 had been paid on the policy by the insured, who died on the 2nd March, 1891.

The action was tried at the Autumn Sittings of this Court at Toronto, before MacMahon, J., and a jury.

The trial Judge at the close of the plaintiff's case held that there was no evidence to go to the jury, and dismissed the action.

At the Michaelmas Sittings of the Divisional Court, 1892, the plaintiffs moved to enter judgment for them, or for a new trial, on the grounds that the case should have

been submitted to the jury, there being sufficient evidence to warrant the jury in finding that the surrender was fraudulent and void; that the case ought not to have been withdrawn from the jury; and that the judgment of the learned Judge was contrary to law and evidence. Argument.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ., on the 7th December, 1892.

J. J. Maclaren, Q. C., for the plaintiffs, referred to *Jones* v. *Keene*, 2 Moo. & R. 348; *Lindenau* v. *Desborough*, 8 B. & C. 586; *McCan* v. *O'Ferrall*, 8 Cl. & F. 30; *Moens* v. *Heyworth*, 10 M. & W. 147; *Dalglish* v. *Jarvie*, 2 MacN. & G. 231; *Wheelton* v. *Hardisty*, 8 E. & B. 232; *Ionides* v. *Pender*, L. R. 9 Q. B. 531; *Hill* v. *Gray*, 1 Stark. 434.

W. Cassels, Q. C., and *A. W. Anglin*, for the defendants.

December 24, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

It was contended that, because contracts for insurance are said to be *uberrimæ fidei*, a contract for the purchase and sale of a policy was also *uberrimæ fidei*; but this contention is not maintainable. The rules which govern the purchase and sale of policies of insurance are the same which govern the purchase and sale of any other species of personal property.

It was next contended that the insured was at the time of the transaction under the delusion that he would live a long time, and that the defendants permitted him to remain under that delusion, knowing that he could not recover, and that this was such fraud as avoided the transaction, and *Hill* v. *Gray*, 1 Stark. 434, was cited in support of this contention.

The case of *Hill* v. *Gray* has, however, been explained by *Keates* v. *Cadogan*, 10 C. B. 591, as having proceeded on the ground of conduct amounting to aggressive deceit

Judgment. Armour, C.J.

on the part of the agent of the seller, and is referred to in *Peek* v. *Gurney*, L. R. 6 H. L. 377.

In *Smith* v. *Hughes*, L. R. 6 Q. B. 597, Mr. Justice Blackburn said: "I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

It will thus be seen that *Hill* v. *Gray*, as reported, is not sustained by later authorities.

Assuming then that in this case the insured was under the delusion that he would live a long time—an assumption which it is very difficult to find warrant for in the evidence—it is quite clear that the defendants neither said nor did anything to induce such delusion or to encourage it.

The only evidence that the insured was under any such delusion was the encouragement given to him by Dr. Graham, of which it is not shewn that the defendants had any knowledge, and the conversation which was had by the insured with the defendants' manager and Mr. Bell, in which he stated that he was going to disappoint every body and live a long time, and that he was good for twenty years; but this conversation took place after he had received the cheque, and the transaction, so far as he was concerned, had been completed. See *Thompson* v. *Lambert*, 2 Ir. R. Eq. 433.

It was also contended that the statement made by the defendants' manager to the insured that "he would recommend what had been proposed, $250 for him, and that that was the best he could recommend to the committee" was evidence of fraud to go to the jury.

But there is no evidence to shew that the statement

that that was the best he could recommend to the committee was not made in good faith, or that the defendants or their committee were prepared to give more, or that they were prepared to act in the matter at all, except upon the recommendation of their manager; and it does not even appear that the manager would have been willing to recommend anything more, had what he proposed not been accepted by the insured.

In *Vernon* v. *Keys*, 12 East 632, Lord Ellenborough, C. J., said: "Can it be contended that an action might be maintained against a man for representing that he would not give, upon a treaty of purchase, beyond a certain sum; when it could be proved that he had said he would give much more than that sum?"

In support of this contention, however, the case of *Jones* v. *Keene*, 2 Moo. & R. 348, was cited; but in that case there was active concealment and aggressive deceit; the purchaser in that case applied to the seller; in this case the seller applied to the purchaser; in that case the purchaser knew that the insured was alarmingly ill, and was in imminent danger, and that the seller was not aware of it; in this case both purchaser and seller knew of the condition of the insured; in that case the seller asked the purchaser what was the value of the policy, and the purchaser, although having the knowledge that he had, put a very low value upon it; in this case both seller and purchaser were upon an equal footing.

No doubt, as the result was in this case, the defendants made a good bargain, but the making of a good bargain is not of itself any evidence of fraud.

We see no evidence whatever in this case that ought properly to have been submitted to the jury in support of the fraud and fraudulent concealment relied on, and we think that the learned Judge was right, and that this motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

RE UNITT AND PROTT.

Assignments and preferences—R. S. O. ch. 124—Assignment for benefit of creditors—Benevolent society—Interest of debtor in fund—R. S. O. ch. 172, sec. 11.

An assignment by a debtor of all his estate for the benefit of his creditors under R. S. O. ch. 124, is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not; but the form in which it is made and the effect of such form not being optional with him, in this sense it is not voluntary; and, having regard to the provision of section 11 of the Benevolent Societies Act, R. S. O. ch. 172, such an assignment does not pass to the assignee the benefit to which the debtor is entitled in the fund of a society properly incorporated under that Act.

Statement. THE "Toronto Police Benefit Fund" became incorporated under R. S. O. 1877 ch. 167, the purpose being to grant gratuities and pensions for long service in the Toronto police force, and to assist members of the force who might be disabled in the actual execution of their duty, or incapacitated from duty by long sickness, and to make provision for old age and for families in case of death. The rules prescribed, *inter alia*, for the appointment of a committee to be called the "Benefit Fund Committee," the persons who should compose such committee, and the mode of appointing such committee; that every application for a pension, gratuity, or aid should come before the committee, when the whole circumstances of the case would be fully gone into, and a report on the case sent in for the sanction of the Board of Police Commissioners; and in case of difference between the committee and the commissioners, the committee should be heard in person by the commissioners, and if possible concurrence arrived at; but, in case of failure to concur, the judgment or decision of the police commissioners should be final; that in all cases where the medical officer of the force had returned a member as being physically or mentally unfit for further police service, or where a member claimed the right to retire from the force on any of the grounds above specified,

a medical board might be convened to inquire into such case, who should report to the committee; that the Board of Police Commissioners should contribute all moneys at their disposal then or thereafter which might legitimately be applied to the fund; that all members of the force should contribute three per cent. of the gross amount of their pay monthly towards the fund; that any member resigning in good health after having completed a service of ten years should receive a gratuity of fifteen days' pay for each year's service up to fifteen years; from fifteen to twenty years, twenty days' pay for each year's service. Statement.

John Hendry joined the Toronto police force in 1873, and continued therein until the 2nd day of February, 1891, when he sent in his resignation.

By indenture bearing date the 18th day of July, 1890, made in pursuance of the Revised Statutes of Ontario 1887, ch. 124, the said John Hendry, one John Rose Hendry, and one Hugh Rose Hendry (the last two trading under the firm name of the Hendry Express Company) assigned "all their personal property which may be seized and sold under execution, and all their real estate, credits, and effects" to Frederick William Unitt, the assignee therein named. And by indenture bearing date the 20th day of August, 1890, made in pursuance of the Revised Statutes of Ontario 1887, ch. 124, the said John Hendry assigned "All his personal property which may be seized and sold under execution, and all his real estate, credits, and effects" to the said Frederick William Unitt, the assignee therein named.

By assignment under his hand and seal bearing date the 2nd day of February, 1891, the said John Hendry, in consideration of the sum of $550 to him in hand paid at or before the delivery thereof, the receipt whereof he thereby acknowledged, assigned, transferred, and set over unto Francis Prott all interest, title, claim, and demand which he then had or might thereafter have in and to the Toronto Police Benefit Fund, which said sum thereby was alleged to amount to $600.

Statement.

This last-mentioned assignment was left in the hands of one Foster, as was also a cheque made by Prott for $550.

Upon this being done, Hendry handed in his resignation, but he was not relieved from duty till the 14th or 15th day of March following.

Two or three days after the assignment was made to Prott, he took up his cheque and paid Hendry the amount of it.

The amount to which Hendry was entitled from the Toronto Police Benefit Fund being in the hands of the treasurer of that fund, and being claimed by both Unitt and Prott under the respective assignments to them, the treasurer applied for an interpleader to the Master in Chambers, and the facts above set forth being made to appear, and it being also admitted that at the time that the assignment was made to Prott he was aware of the assignment that had been made by Hendry to Unitt, the Master in Chambers determined that Prott was entitled to the money in the treasurer's hands, and that the claim thereto by Unitt should be barred, and that he should pay the costs of the claimant Prott and of the applicant.

From this order Unitt appealed to a Judge in Chambers, who referred the appeal to the Divisional Court.

The appeal was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 28th November, 1892.

F. E. Hodgins, for Unitt. The assignment for the benefit of creditors was a voluntary one. It assigned all the estate of Hendry except such as was by law exempt from seizure or sale under execution, which refers to the exemptions provided for in the Execution Act, R. S. O. ch. 64, sec. 2, and not to such a provision as sec. 11 of the Benevolent Societies Act, R. S. O. ch. 172, which enacts that money payable to a member of a society shall be "free from all claims by the creditors of such member." Creditors could not claim this money *in invitum*, but there was nothing to prevent the debtor voluntarily assigning it, and

that, I submit, was the effect of the assignment. I refer to *Morgan* v. *Taylor*, 5 C. B. N. S. 653, 663; *Re Huggins*, 21 Ch. D. 85; *Re Shephard*, 43 Ch. D. 131; *Levasseur* v. *Mason* [1891], 2 Q. B. 73, 79; *McGee* v. *Campbell*, 2 O. R. 130. The debtor's interest in this fund is property such as would pass under an assignment: *Beckham* v. *Drake*, 2 H. L. C. 579; *Crowe* v. *Price*, 22 Q. B. D. 429; *Willock* v. *Terrell*, 3 Ex. D. 323; *Booth* v. *Trail*, 12 Q. B. D. 8; *Lucas* v. *Harris*, 18 Q. B. D. 127, 135; *Wells* v. *Foster*, 8 M. & W. 149, 152. Argument.

E. D. Armour, Q. C., (with him *Abbott*) for Prott. This fund was not assignable because it was not exigible: *Gathercole* v. *Smith*, 17 Ch. D. 1. And it did not at the time of the assignment belong to the assignor: R. S. O. ch. 124, sec. 4. As to what is a vested and what a contingent interest see Hawkins on Wills, 2nd Am. ed. (1885), p. 221. A policeman under the rules is not in any event absolutely entitled to the gratuity. It is not assignable till it actually becomes his property: *Flarty* v. *Odlum*, 3 T. R. 681.

Hodgins, in reply, referred to *Sutton* v. *Armstrong*, 32 C. P. 11.

December 24, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

There can be no doubt, I think, that the "Toronto Police Benefit Fund" was properly incorporated under the provisions of the law and is entitled to the benefit of the provisions of the Revised Statutes of Ontario 1887 ch. 172, "An Act respecting Benevolent, Provident, and other Societies."

By section 11 of this Act it is provided that: "When under the rules of a society money becomes payable to, or for the use or benefit of, a member thereof, such money shall be free from all claims by the creditors of such member."

Judgment.
Armour, C.J.

There is nothing in this statute nor in the rules of the Toronto Police Benefit Fund preventing the assignment by a member of the police force entitled to any benefit from such fund of such benefit, nor would such assignment be contrary to public policy: *Re Huggins*, 21 Ch. D. 85.

The question, then, is, did the benefit to which Hendry was entitled from such fund pass by his assignment to Unitt?

By Revised Statutes of Ontario 1887, ch. 124, sec. 41, it is provided that "Every assignment made under this Act, for the general benefit of creditors, shall be valid and sufficient if it is in the words following, that is to say:—all my personal property which may be seized and sold under execution and all my real estate, credits and effects, or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure, or sale under execution."

The words "except such as are by law exempt from seizure or sale under execution" refer clearly to the chattels declared to be exempt from seizure by Revised Statutes of Ontario 1887 ch. 64, sec. 2, and do not affect the construction to be put upon the assignment to Unitt, so far as the benefit to which Hendry was entitled is concerned.

The words of the statute, "all the personal estate, rights, property, credits and effects," are quite sufficient to include such benefit; and it was contended that the assignment to Unitt being voluntary on the part of Hendry, and the words of the statute being sufficient to include such benefit, the benefit passed to Unitt.

The assignment to Unitt was, no doubt, voluntary on the part of Hendry in this sense, that it was optional with him whether he made it or not; but the form in which it was made and the effect of such form were not optional with him, and in this sense it was not voluntary, for, if

made at all, it could only be made in the form prescribed by the statute and with the effect given to that form by the statute: *Blain* v. *Peaker*, 18 O. R. 109. Judgment. Armour, C.J.

Looking, then, at the form and effect of the assignment to Unitt as a statutory provision, and looking at the statutory provision that the benefit in question should be free from all claims by the creditors of the persons entitled to it, and giving effect to both those statutory provisions, we must treat the latter as an exception to the former, and construe the assignment to Unitt as not passing the benefit to which Hendry was entitled from the Toronto Police Benefit Fund.

The appeal will, therefore, be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

PEGG v. STARR.

Landlord and tenant—Distress for rent—Goods of third person—Resort first to goods of tenant.

Where a landlord has distrained for arrears of rent, goods upon the demised premises liable to such distress, belonging in part to the tenant and in part to a third person, such third person has no right to compel, or to ask the Court to compel, the landlord to sell the part belonging to the tenant before selling the part belonging to such third person.

THIS was an action tried before BOYD, C., at Barrie. Statement.

The defendant, being the owner of the west half of lot 13 in the 4th concession of the township of East Gwillimbury, leased it to one Shier for $250 a year. Prior to the lease Shier had borrowed from the plaintiff $320, and as security for the repayment of that sum and interest, gave the plaintiff a chattel mortgage dated 10th November, 1890, on certain farm stock and implements of his (Shier's), upon the land, which mortgage was at the date of the dis-

Statement.

tress proceedings hereinafter mentioned in force and overdue and unpaid. In addition to the goods mortgaged to the plaintiff, there were certain other goods upon the premises at the time of the distress. On the 21st November, 1891, the defendant distrained upon all the goods, and advertised them for sale on the 1st December, 1891. On the 30th November, 1891, an order was made in this action restraining the defendant from proceeding with the sale of the goods included in the plaintiff's chattel mortgage, until he should have first sold such other goods as had been seized and advertised.

The plaintiff alleged that the defendant had disobeyed this order, and had gone on and sold the goods to himself by a pretended sale; and he prayed for a declaration that the sale was a pretended sale, and that the goods covered by the chattel mortgage were still subject to it; or, in the alternative, for a declaration that the defendant was obliged by law to sell such goods as were not covered by the chattel mortgage before selling such goods as were so covered; and that the plaintiff was entitled to stand in the place of the defendant as to such first mentioned goods, and to be paid their value by the defendant; and for a declaration that the defendant had committed a breach of the injunction order, and for $600 damages for such breach.

The additional facts are stated in the judgment of BOYD, C.

At the trial *C. C. Robinson* appeared for the plaintiff; and *Moss*, Q. C., and *T. J. Robertson*, for the defendant.

April 14, 1892. BOYD, C.:—

Rent being in arrear, the landlord (the defendant in this case) seized goods on the premises of his tenant Shier, who is not a party to the action. The goods so seized were in part the property of the tenant, and in part were mortgaged to secure money advanced to the plaintiff, and in part were owned by the tenant's wife, as trustee for his son, under a duly registered bill of sale from her husband;

and she is not a party. The plaintiff, upon affidavits that a collusive sale was contemplated by the landlord with a view of cutting him out of the mortgaged chattels, obtained an *ex parte* injunction, by which it was ordered that in the prosecution of the distress sale the goods not covered by the plaintiff's mortgage should be first sold. The fact of the wife's claim to certain of the goods not covered by the mortgage was not known or was not disclosed to the Court. This injunction was served on the day of the sale and before it had begun. Judgment. Boyd, C.

The bailiff of the landlord after seizure left the goods on the premises in care of the tenant's wife and son, but himself returned to the place on the day before the sale, and in effect resumed possession. The tenant's wife was then advised by a person acting on her behalf to remove the chattels claimed by her under the bill of sale, and this was done before appraisement. As a consequence these things were not forthcoming during the sale, and they were not and could not be, for this reason, sold in priority to the goods mortgaged pursuant to the terms of the injunction.

The evidence does not shew collusion, though it does indicate that those advising the landlord were willing to assist the wife of the tenant in saving her chattels from the effect of the sale. Goods distrained are till the sale in the custody of the law, with the ownership still in those entitled thereto, whether tenant or other person. As to the wife, the rescue of her goods revested the possession in her subject to the claim of the landlord, if he chose to exercise or could exercise his right of recaption. But if he assented to her recovery of the goods, that would operate as an abandonment of the seizure: *Swann* v. *Falmouth*, 8 B. & C. 459.

As to the common law rights of the landlord, I apprehend that it was optional with him to select what he would seize out of all the distrained goods, and that he could abandon if he chose after seizure goods of the wife out of humanity towards her, or for any other honest reason: *Roberts* v. *Jackson*, Pea. Add. Cas. 36.

Judgment.

Boyd, C.

If goods other than the tenant's are sold to satisfy the rent, then the owner has his remedy against the tenant for the value of the goods: *Edmunds* v. *Wallingford*, 14 Q. B. D. 811.

But it was objected that there was no jurisdiction to interfere with the landlord by injunction in the *bonâ fide* exercise of his powers; fraud and collusion being eliminated, as I find upon the evidence.

I am disposed to think that the landlord's manner of sale may be shaped by the direction of the Court at the instance of a mortgagee of the chattels, so that the goods not covered by the mortgage may be first sold. This is contrary to general expressions to be found in text-books and some judgments, to the effect that the landlord is not called upon to embarrass himself with the rights of third persons: Oldham and Foster on Distress, p. 238, founded on *Evans* v. *Wright*, 2 H. & N. 527 (1857); and that it is not necessary to observe any particular order on the sale of the goods distrained: Oldham and Foster, p. 229, founded on *Jenner* v. *Yolland*, 6 Pri. 3. See also Foa on Landlord and Tenant, pp. 404 and 443.

In a case before Martin, B., in 1860, he ruled that the landlord was liable for selling the goods of a lodger first, when it turned out that the tenant's proper goods were sufficient to satisfy the rent, notice having been given to him of the lodger's claim, and this ruling was affirmed by the full Court of Exchequer: *Wilkinson* v. *Ibbett*, 2 F. & F. 300. In conformity with this, and viewing the matter from its equitable side, Knight Bruce, V.-C., said in *Ex p. Stephenson*, De Gex at p. 590 (1847):—"The simple case of a person having lent or entrusted goods to a man, whose landlord distrains for rent, both on those goods and also on the proper goods of the tenant, may be thought to exhibit, possibly, more strikingly than the present (that being the case of a mortgagee) a necessity in point of reason and justice for judicial interference, but does not, I suppose, in substance differ from it."

Judgment.

Boyd, C.

That observation was made in a case where the tenant had become bankrupt after the landlord had obtained his rent by sale of the goods, which were subject to a prior mortgage, and it was adjudged that the mortgagee was entitled to be paid the amount of his mortgage debt out of other goods taken in the distress which were not comprised in his security.

This equitable interference, however, will not go further, so as to compel the landlord to seize or sell any particular property, nor can it be invoked so as to cast the burden of the distress upon the goods of others than the tenant, which being upon the property are liable to distress: R. S. O. ch. 143, sec. 28.

The legal rights of the landlord, *bonâ fide* exercised, are not to be delayed or prejudiced by the intervention of a claimant of the goods seized; and if the object be merely to direct the order of sale, that should be done at the expense of the applicant.

But if, as in this case, goods are seized, some of which are the property of the wife, and some of which are held under a chattel mortgage, the Court will not discriminate as to which should be sold under a distress for rent, but will let the landlord proceed as he is advised. No superior equity exists in favour of the plaintiff as against the wife holding under a registered bill of sale, and if the landlord choose to respect her claim more than that of the mortgagee, I do not know on what principle the Court could interfere.

The meaning and true scope of the injunction here is to have the tenant's goods first sold; that is expressed by a reference to goods not covered by the mortgage, among which were the goods owned by the wife under the bill of sale. But the Court never intended that these should be sold first, in exoneration of the goods claimed by the plaintiff, and, in my opinion, in the circumstances of this case, that injunction was not violated in spirit or even in letter; because the goods claimed by the wife had been removed prior to the notice of the injunction, and it was not proved

Judgment.

Boyd, C.

that the plaintiff had any means of reseizing them upon fresh pursuit, so that literally they were not under seizure nor available to be sold on the day of sale. But apart from this, I think the landlord could have validly exempted these goods from sale without being answerable in equity for so doing.

Thus regarded, the plaintiff's action totally fails, and should be dismissed with costs.

At the Michaelmas Sittings of the Divisional Court, 1892, the plaintiff moved to set aside the judgment for the defendant and to enter judgment for the plaintiff, or for a new trial, on the following among other grounds:—

That the defendant was bound by law to sell, under his distress warrant against his tenant Shier, such goods as were not covered by the chattel mortgage from Shier to the plaintiff, before he sold such goods as were included in the chattel mortgage, and that the plaintiff was entitled to stand in the place of the defendant as to such first mentioned goods, and to be paid their value by the defendant.

He also moved, in the alternative, to vary the judgment by declaring that under the distress sale, the goods included in the chattel mortgage to the plaintiff, to the value of $100, were allowed to Shier as exemptions, and that the plaintiff was thereby deprived of his security to the extent of $100; and by directing that the defendant should pay the costs of the action or some portion thereof, on the ground that he disobeyed or wilfully allowed his bailiff and agents to commit a breach of the injunction.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 1st and 5th December, 1892.

A. H. Marsh, Q. C., for the plaintiff. This action was brought to compel the defendant to marshall his securities, *i. e.*, to make him resort first to goods not covered by the chattel mortgage; and the plaintiff claims, in the alternative, a declaration that the pretended sale carried no title

to the chattels sold, and therefore that the goods are still subject to the plaintiff's mortgage. The tenant claimed the exemption referred to in the notice of motion under R. S. O. ch. 64, sec. 3, and R. S. O. ch. 143, sec. 27. There is no direct authority as to whether the Act respecting mortgages and sales of personal property applies to a distress sale; but upon principle the case must fall within the Act, for every sale, not accompanied by delivery and followed by change of possession, is required by section 5 to be in writing and to be registered. I refer to *Whiting* v. *Hovey*, 13 A. R. 7, where the Act was held to apply to an assignment for the benefit of creditors. The sale was a farce, a mere artifice; the purchasers were never even asked to pay for the goods; the sale was not to realize the rent, but to protect the goods. As to marshalling, I refer to *Ex p. Stephenson*, DeGex 586; Coote on Mortgages, 5th ed., p. 1065; Fisher on Mortgages, 4th ed., p. 668; *Ex p. Salting*, 25 Ch. D. 148; *Jones* v. *Beck*, 18 Gr. 671; *Clark* v. *Boyart*, 27 Gr. 450. In marshalling, the equities must be weighed; here the plaintiff had the prior equity, and the marshalling should not have been against him and in favour of the wife. Argument.

C. C. Robinson, on the same side, referred to *Ex p. Lewis*, L. R. 6 Ch. 626.

Moss, Q. C., for the defendant. The purchasers are not parties, and their rights cannot be determined here. The goods did not disappear with the connivance of the defendant or his bailiff. The landlord has no duty to the chattel mortgagee to keep the goods at all hazards. The landlord had a right to release goods if he found he had too large a distress; he had a right to sell whichever part he liked. There can be no such thing as marshalling here. I refer to the notes to *Aldrich* v. *Cooper*, 2 W. & T. L. C., Bl. ed., p. 118 *et seq.* A chattel mortgagee cannot redeem a landlord and take an assignment of his rights: *Wilkinson* v. *Ibbett*, 2 F. & F. 300; *Bail* v. *Mellor*, 19 L. J. Ex. 279. With regard to the interim injunction in this case, it was obtained upon an affidavit that turned

Argument.

out to be untrue. The landlord has no property in the goods distrained, and if they are rescued, he cannot maintain trover: Woodfall on Landlord and Tenant, 13th ed., p. 417. The alleged right of recaption could only be exercised upon a fresh pursuit, and here it would have been of no use. See Foa on Landlord and Tenant, p. 459; *Thornton* v. *Adams*, 5 M. & S. 38; *Roe* v. *Roper*, 23 C. P. 76. The landlord is not concerned with the rights of third parties: Oldham and Foster on Distress, p. 238. The rule as to marshalling will not be applied to third parties: *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; *Re Mower's Trusts*, L. R. 8 Eq. 110.

T. J. Robertson, on the same side.

Marsh, in reply. As to the equity of the plaintiff to be subrogated to the rights of the defendant, I refer to Harris on Subrogation, section 203. The doctrine of marshalling has no dependence upon the right to redeem: *Ex p. Salting*, 25 Ch. D. 148; *Lilford* v. *Powys*, L. R. 1 Eq. 347; *Ex p. Willock*, 2 Rose 392.

December 24, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The decision of this case depends upon the answer to be given to the question whether where the landlord has distrained for arrears of rent goods upon the demised premises liable to distress for rent belonging in part to the tenant, and in part to a third person, such third person has any right to compel, or to ask this Court to compel the landlord to sell the part belonging to the tenant before selling the part belonging to such third person.

It is much against such right that no case can be found in support of it.

The learned Chancellor was clearly mistaken in supposing that Martin, B., in *Wilkinson* v. *Ibbett*, 2 F. & F. 300, ruled that the landlord was liable for selling the goods of

a lodger where it turned out that the tenant's proper goods were sufficient to satisfy the rent, notice having been given to him of the lodger's claim, and that such ruling was affirmed by the full Court of Exchequer. Judgment. Armour, C.J.

And we cannot agree with the view of the learned Chancellor, that the landlord's manner of sale may be shaped by the direction of the Court at the instance of a mortgagee of the chattels, so that the goods not covered by the mortgage may be first sold.

Such interference by the Court could only be justified under the provision of the Judicature Act that in all cases in which it shall appear to the Court to be just or convenient an injunction may be granted.

But such interference would necessarily conflict with the various provisions of the law regulating and prescribing the mode of dealing with distresses for rent, and would be likely to create more injustice and inconvenience than it would cure.

Besides, such interference could not be had except upon the terms of the person applying for such interference bringing into Court the amount of the rent distrained for.

It was under this provision of the Judicature Act that the Court interfered in *Shaw* v. *Earl of Jersey*, 4 C. P. D. 120, 359, and in *Walsh* v. *Lonsdale*, 21 Ch. D. 9, at the instance of the tenant; in the former of which cases a distress being threatened, and in the latter a distress being made, and it being disputed in both cases that any rent was in arrear.

No case can be found where relief has been sought from the Court by such a third person by way of redemption of the landlord's claim, nor would such relief be of any service; for owing to the peculiar right of the landlord to distrain, the Court could not place the person redeeming in the position of the landlord, so as to clothe such person with the right of the landlord to distrain, or to sell the goods distrained.

Nor does the statute R. S. O. 1887, ch. 122 apply to the case of such third person.

Judgment. Armour, C.J.

But such third person is not without remedy; he has all the remedies that the tenant has against the landlord for illegal, excessive, or irregular distress, and he can pay the rent and look to the tenant for indemnity against the payment, or his goods being sold, can look to the tenant for indemnity against the sale of them: *Exall* v. *Partridge*, 8 T. R. 308; *Edmunds* v. *Wallingford*, 14 Q. B. D. 811. Or it may be that he would be entitled to the relief granted in *Ex p. Stephenson*, De Gex 586, as to which we give no opinion.

We think, therefore, that the judgment of the learned Chancellor is right in result; and we see no reason to differ with him in his disposition of the injunction motions; and we dismiss this motion with costs.

[COMMON PLEAS DIVISION.]

REGINA v. GROVER ET AL.

General Sessions—Order by to sheriff to abate nuisance—Validity of—Certiorari—Right to issue—Costs.

The defendant was convicted at the General Sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance, which not having been done, the Sessions made an order directing the sheriff to abate the same at defendant's costs and charges, and to pay the County Crown Attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order:—

Held, that the Sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ *de nocumento amovendo*: that the order being a judicial act was properly removed by *certiorari*, and must be quashed, but without costs.

Remarks as to the jurisdiction of the Sessions as to the costs.

Statement.

On the 14th December, 1891, the General Sessions of the Peace for the county of Norfolk made an order whereby the sheriff of the said county was directed forthwith to

abate a certain nuisance of which the defendants Lorenzo D. Grover, James Joyce, and Archibald B. Walker were convicted of having erected. Statement.

Upon reading the writ of *certiorari* which had been issued herein, and the return thereto, the defendants obtained an order *nisi*, calling upon James Robb, Esquire, chairman of the Court of General Sessions of the Peace for the county of Norfolk, John H. Ansley, Esq., Clerk of the Peace, and John P. Redker, of the village of Waterford in the said county, the prosecutor, to shew cause why the said order of the 14th December should not be quashed with costs on the following among other grounds:

1st. That the Court of General Sessions had no jurisdiction to make the order.

2nd. That the said Court had no power to award costs.

At the General Sessions of the Peace in June, 1891, a bill of indictment was found against the defendants for having between the 15th September, 1890, and the other times between that day and the taking of the inquisition, on Main street, in the village of Waterford, being the Queen's common highway, unlawfully and injuriously put and placed certain brick and stone walls and wooden erections in and upon the Queen's common highway aforesaid, and which then and on the said other days and times, for and during all such time, was and now is obstructed and straitened, etc.

The defendants at the said General Sessions pleaded "guilty" to the said indictment, and judgment was pronounced on the 9th June, 1891, which judgment was endorsed on the indictment, and signed by the chairman of the Sessions, directing that the said nuisance be abated within three months.

The nuisance not having been abated, the clerk of the peace on the 2nd December, 1891, caused a notice to be served on the defendants, that at the next General Sessions of the Peace, to be holden at the town of Simcoe on the 8th day of December, the Crown would apply for a writ or order directed to the sheriff of said county, com-

Statement.

manding him to abate the nuisance of which the defendants were on the 9th day of June then last convicted; and for a direction or order that the defendants should pay the costs of such removal and all other costs occasioned by the defendants' contempt in not obeying the order of the said Court as to the abatement of the said nuisance.

On the 14th December, 1891,—and during the General Sessions—the order now sought to be set aside and quashed was made, wherein was recited the finding of the indictment against the defendants; their plea of "guilty"; the judgment of the court directing the abatement of the nuisance within three months; that such nuisance had not been abated by the judgment, etc. The said order of the court then directed the sheriff to abate the said nuisance of which the defendants had been convicted at the costs, charges and expenses of the defendants. The order further adjudged that the defendants should forthwith after taxation pay to the County Crown Attorney the cost of the application and order, and also upon taxation to pay all sheriff's fees, costs, and incidental expenses arising out of the execution of the said order.

In Easter Sitings, May 10, 1892, of a Divisional Court, composed of GALT, C. J., and MACMAHON, J.

Du Vernet supported the motion. There was no power to make the order. The power given to the Sessions to deal with nuisances is given by 1 Edward III., ch. 16, by which they are enabled to enquire into all public nuisances: *Regina* v. *Saintiff*, 6 Mod. 256. The Court can convict for a nuisance; but the only mode by which they can enforce a conviction is by fresh indictment and fine. Only the Superior Courts have power to issue a writ for removal. The proper writ is a writ *de nocumento amovendo*: *Regina* v. *Jackson*, 40 U. C. R. 293; Fitzherbert Natura Brevium, 9th ed., 234 (D.). In *King* v. *Betterton*, 5 Mod. 142, it is said: "Such a writ is a writ of extraordinary nature, and has not been granted these hundred years." But even in that writ the sheriff is

commanded to enquire by the oath of twelve men. We have no such provision as is contained in the Imperial Act 12 & 13 Vic., ch. 45, sec. 18, which provides for removing orders of the Session into the Queen's Bench: *Regina* v. *Bateman*, 8 A. & E. 584; Russell on Crimes, 5th ed., vol. 1, 443. If part of the order be wrong, the whole must go: *Ex p. Whitchurch*, 6 Q. B. D. 546. There was no power to award costs: *Regina* v. *Jackson*, 40 U. C. R. 293; Marshall on Costs, 2nd ed., 516. Argument.

J. M. Clark, contra. The proper proceedings have not been taken to test the order. The Court of Quarter Sessions is a Court of error, and the applicant should have proceeded by writ of error: *Regina* v. *Smith*, 8 B. & C. 341, 343; Dickenson's Quar. Sess., 6th ed., 63, 952-3; *Ovens* v. *Taylor*, 19 C. P. 49; Archbold's Crown Prac., 113; Archbold's Quar. Sess., 4th ed., 940; *Regina* v. *Powell*, 21 U. C. R. 215; *Regina* v. *Goodman*, 2 O. R. 468; 3 O. R. 18; Harris's Crim. Law, 5th ed., 557. The Sessions are not restricted to the statutory jurisdiction, but have common law jurisdiction. There is clearly power to direct the sheriff to abate the nuisance: Archbold's Quar. Sess., 4th ed., 910; *Regina* v. *Bateman*, 8 E. & B. 584, also reported in 27 L. J. N. S. Mag. Cas. 95; *Rex* v. *Jackson*, 6 T. R. 145; *Regina* v. *Stead*, 8 T. R. 142; Harrison's Mun. Man., 5th ed., p. 399. As to the costs, this cannot be questioned here. But in any event there is abundant authority to shew that costs were properly imposed: R. S. O. ch. 79. sec. 13. As to the forms of indictments and writs, see Glen on Highways, 180-2. See also *Regina* v. *Trustees of Westmoreland*, L. R. 3 Q. B. 457; *Rawnsley* v. *Hutchinson*, L. R. 6 Q. B. 305; *Regina* v. *Becker*, 20 O. R. 676.

Du Vernet, in reply. The conviction is not attacked, but the order of the Sessions, and the question is, had the Sessions jurisdiction to make the order. If they had, a writ of *certiorari* will not lie. If they had not, it will lie: *Overseers of Walsall* v. *London and North-Western R. W. Co.*, 3 Q. B. D. 457, 4 App. Cas. 30. The cases

Argument. referred to by the other side are all distinguishable, as they are all cases where the sessions had jurisdiction. The order was a judicial act, and can be removed by *certiorari*.

December 23, 1892. MACMAHON, J.:—

The indictment is in the usual form charging a nuisance by the obstruction of the Queen's highway: *Regina* v. *Botfield*, C. & M. 151; *Rex* v. *Pedly*, 1 A. & E. 822; *Regina* v. *Train*, 2 B. & S. 640; *Regina* v. *Jackson*, 40 U. C. R. 290; Archbold Cr. Pl. 20th ed., 1017.

The proper judgment was given, namely, that the nuisance be abated by the defendants within a time named in the judgment.

A record reciting the indictment and judgment of the Sessions, was made up and is returned with the other papers in answer to the writ of *certiorari*.

The present proceedings under a *certiorari* would have been ineffectual in attacking the judgment—the General Sessions being a court of record: *Ovens* v. *Taylor*, 19 C. P. 49. And a Superior Court will not grant a *certiorari* to the General Sessions to remove an indictment after a judgment given thereon: *Rex.* v. *Jackson*, 6 T. R. 145; *Regina* v. *Inhabitants of Penegoes*, 1 B. & C. 142. Even were the judgment erroneous it is only by means of a writ of error that it could be corrected: *Regina* v. *Papineau*, 2 Str. 686; *Rex* v. *Inhabitants of Seaton*, 7 T. R. 373; *Rex* v. *Justices of Yorkshire*, *ib.*, 467; *Rex* v. *Stead*, 8 T. R. 142; *Regina* v. *Powell*, 21 U. C. R. 215; *Regina* v. *Goodman*, 2 O. R. 468; Harris's Criminal Law, 5th ed., 557; Archbold's Qr. Sessions, 4th ed., 244. The defendants' motion is not, however, aimed against the judgment, but against the order of the sessions directing the sheriff to abate the nuisance, as it was urged the only authority on which the sheriff could act was a writ *de nocumento amovendo*.

"If upon an indictment for a nuisance upon a highway the court give judgment that the nuisance be abated, a

writ *de nocumento amovendo* may be sued out and delivered to the sheriff;" Glen on Highways, 182; Archbold's Crown Practice, 111. Judgment. MacMahon, J.

There being a judgment of the Court, the only way in which such judgment can be enforced, is by the proper writ founded upon the judgment and running in the Queen's name. See the form of writ in Glen on Highways, 182; Archbold's Crown Practice, 113.

As the only authority which could be given the sheriff commanding him to abate the nuisance under the judgment was by the writ *de nocumento amovendo*, the Sessions had no authority to make the order which it was thought could be substituted for the writ.

The order was a judicial act, and so removable from the Sessions by *certiorari*.

Robinson, C. J., in *Regina* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 165, at p. 167, pointed out that there might be great practical difficulties in the way of abating the nuisance in that case. And serious difficulties may, and doubtless will, present themselves in the sheriff's carrying out the command contained in a writ *de nocumento* for the abatement of the nuisance in the present case. We are, however, not now concerned with the difficulties that may thus have to be encountered.

The question as to the right of the General Sessions to award costs, was raised, and having considered the matter I think it advisable to express the opinion I have formed.

Where the indictment was removed by the prosecutor from the Sessions to the Queen's Bench, it was held that the defendant was not liable for costs: *Regina* v. *Jackson*, 40 U. C. R. 290. But where the prosecution of a misdemeanour is before the Sessions, the Sessions has a general jurisdiction over the costs. As to the cost of the removal of a nuisance from a highway, it is thus stated in Bacon's Abridg., vol. 5, (Nuisance D.), p. 798: "Also, a person convicted of a nuisance done to the King's highway, may be commanded by the judgment to remove the nuisance at his own costs; and per Hawkins, it is but reasonable

Judgment.

MacMahon, J.

that those who are convicted of any other common nuisance should also have the like judgment."

Our statute, R. S. O. ch. 84. sec. 4, provides, "In case a person is convicted before the Court of General Sessions of an assault and battery, *or other misdemeanour*, such person shall pay such cost as may be allowed and taxed by the Court": *Ovens* v. *Taylor*, 19 C. P., at p. 54. And by R. S. O., ch. 79, sec. 13, "in every case of misdemeanour tried at the Court of General Sessions in which costs are ordered to be paid by a defendant, the County Crown Attorney, shall be entitled to fees as solicitor and counsel for services rendered in the case to be taxed by the Court," etc.

As to how and when the costs so ordered to be paid should be taxed, will require consideration from the parties seeking to enforce the payment thereof. See *Ovens* v. *Taylor*, 19 C. P. at p. 54, per Hagarty, C. J.

The Sessions having no power to make the order complained of the *certiorari* must be superseded and the order quashed.

It is not a case for costs.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

CLOSE ET AL. V. THE CORPORATION OF THE TOWN OF WOODSTOCK.

Municipal corporations—Drain bringing down noxious matter—Use of drain by others—Excavations on plaintiff's land.

A municipal corporation having constructed a drain without a by-law for the particular portion passing through private property whereby noxious matter was brought down and deposited thereon, was held liable for damages sustained thereby, notwithstanding that there were excavations on the land but for which the noxious matter might have passed off; the owner not being bound to leave his land in a state of nature; nor was it any answer that the drain was used for similar purposes by others as well as the corporation. In such a case the remedy is by action and not by submission to arbitration.

Statement.

THIS was an action tried before FALCONBRIDGE, J., without a jury at Woodstock, on the 12th March, 1891, and was brought to recover damages by reason of noxious matter being brought down and deposited on the plaintiffs' land by means of a drain constructed through such land by the defendant corporation, and for an injunction or order for abatement.

The facts, so far as material, are set out in the judgments. The learned Judge found as follows:

"The evidence discloses the presence of more filth in the ponds than can be accounted for by the creation or deepening of the ponds and by the consequent stagnation of the water therein. Noxious matter has been brought down by the drain and deposited on the plaintiffs' lands, but not since the summer of 1890, when the drain was extended down Burtch street to the Grand Trunk Railway property. The claim in respect of filth and water being still forced into the southerly excavations on plaintiffs' land is trivial and was practically abandoned at the trial.

"The damages can therefore be assessed once for all, and no injunction or order for abatement need be granted for the present.

"There was no by-law for the construction of this part

Statement.

of the drain; and it is also, perhaps, a case of negligent construction, so the plaintiffs are not driven to arbitrate under section 591 of the Act.

"There will be a reference to ascertain damages. Further directions and costs reserved.

"The parties can no doubt agree on a referee. If they cannot I shall name one. He will understand that I find the present condition of affairs attributable partly to the wrongful act and neglect of defendant and partly to natural stagnation of water consequent on the lowering of the natural level of the surface by the plaintiffs' excavations. It is a case for a settlement.

"Should no settlement be affected and no arrangement made for the abatement of the nuisance, I reserve leave, if necessary, to either party to move on the report of the referee for such order as to said abatement and the expense attendant thereon as they may be advised.

"The reference may proceed *instanter*, notwithstanding the stay of proceedings as to entry of the judgment now pronounced."

The defendants moved on notice to set aside the judgment, and to enter the judgment in their favour.

In Easter sittings, February 10, 1892, before a Divisional Court composed of GALT, C. J., and ROSE, J., *G. T. Blackstock*, Q. C., supported the motion.

Osler, Q. C., contra.

December 23, 1892. ROSE, J.:—

The consideration of the argument was delayed, at the suggestion of counsel for the plaintiffs, until the decision of the case of *Corporation of New Westminster* v. *Brighouse*, now reported in 20 S. C. R. 520.

My learned brother Falconbridge found as a fact that the drain constructed by the defendant corporation brought down and deposited noxious matter upon the plaintiffs' land.

Judgment.
Rose, J.

With this finding, I think no quarrel can be had. We have not, on this motion, to determine what damages the plaintiffs may be entitled to as they are to be ascertained by a reference in the terms of the judgment. We have only to determine whether a cause of action has been established. If the defendant corporation by any act brought down and deposited upon the plaintiffs' land foreign matter to the injury of the plaintiffs, then on the facts of this case, the cause of action exists.

It is manifest upon the evidence that it was not necessary to deposit this matter upon the plaintiffs' land, even if that made any difference, for by the drain of 1890, it was carried past and deposited elsewhere.

The fact that the plaintiffs had made excavations upon their land into which water did run and stagnate, in no wise deprives them of a cause of action against the defendant for bringing down and depositing upon their land noxious matter, any more than if the land had been excavated for building purposes. The plaintiffs had a right to use their land as they pleased, and the defendant had no right, because of any particular mode of user to do that which would have been wrongful had the land not been excavated. See *Derinzy* v. *Corporation of Ottawa*, 15 A. R. 712.

It was urged that no more came down upon the plaintiffs' property than would have come down had the defendant not made the drain in question. That does not afford an answer, for assuming that the natural water fall or drainage was through the plaintiffs' property, that would not justify the defendant in making use of the water course for the purpose of sending down upon the plaintiffs' land noxious matter, nor were the plaintiffs bound to leave their lands in a state of nature so that the water fall might not be interfered with, and that this matter thus brought upon this property might be carried over and past the land.

There was evidence to show that the water course was not the way by which the drain entered the plaintiffs' pro-

Judgment.
Rose, J.

perty, but that by act of the defendant an entrance was made into one of the excavations called No. 1.

But I rest my opinion upon the broad ground that no user by the plaintiffs of their property, could justify the defendant in sending down upon that property refuse or noxious matter.

It was also pressed upon us that the use of this sewer or drain by householders and others for the purpose of carrying away excreta and other offensive matter, could not be laid to the charge of the defendant corporation. This is no answer to the action. The fact that others joined with the defendant in committing a trespass upon the plaintiffs, does not in any sense afford a defence for the defendant's trespass; nor does it afford any answer to say that by the by-laws of the corporation parties were prohibited from making connections with the drain or user without the consent of the corporation.

I will assume that a portion of the filth deposited upon the plaintiffs' property was by the unauthorized act and trespass of others; but, as I have said, this affords no answer to the plaintiffs' complaint against the defendant for committing a trespass; *Blair* v. *Deakin*, 57 L. T. N. S. 522; Smith on Negligence, Bl. ed., p. 265, and cases there cited.

If I am right in the opinions which I have expressed, it follows that the remedy was not by arbitration. It is not necessary to elaborate this point since the decisions in the Supreme Court of *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581, and the *Corporation of New Westminster* v. *Brighouse*, to which I have above referred.

I am, therefore, clearly of the opinion that upon the finding of our learned brother, supported by evidence, the defendant corporation did a wrong to the plaintiffs by bringing down and depositing upon their land, by means of the drain in question, refuse and noxious matter: that the plaintiffs were not guilty of any negligence or wrongful act in excavating their land or using it for the purposes of their

business; or in so using it as to prevent the foreign matter from being carried over their land and discharged elsewhere; and that the plaintiffs' remedy being by action, they are entitled to recover such damages as may, under the authorities, be lawfully awarded to them. Judgment. Rose, J.

I think this motion must be dismissed and with costs.

GALT, C. J., concurred.

[QUEEN'S BENCH DIVISION.]

MCNAMARA V. SKAIN ET AL.

Building contract—Action by contractor for price—Action brought before drawback due—Counter-claim for liquidated damages for delay—Reply of matters arising since action—Construction of contract—Extension of time—Necessity of application for—Enforcement of provision for liquidated damages.

Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, etc., should form part of the contract if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given to him to extend the time for completion in case of a strike.

The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract.

Although some extras were done and there was evidence as to delay by strikes, the architect was not asked for, and he did not grant, any extension of time:—

Held, that the contract must govern, and that the defendants were entitled to recover, by way of counter-claim, the sum provided by the contract as liquidated damages.

If a claim to liquidated damages by a defendant is pleaded by way of counter-claim, the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought.

Aliter, if pleaded by way of set-off.

Toke v. *Andrews*, 8 Q. B. D. 428, followed.

THIS was an action claiming a lien under a building contract tried before ROSE, J., at the Toronto Autumn Assizes, on 17th November, 1891, without a jury. Statement.

Statement.

A contract under seal between the plaintiff and defendant John Skain, dated on 13th May, 1890, was proved at the trial, and was held by the learned trial Judge to be that which must be treated as governing the rights of the parties, excepting as to a sum of $444, which was added to the consideration.

The contract price of the buildings was.....	$5,295 00
To which should be added as above	444 00
Making a total of	$5,739 00
Add extras found by the learned Judge and not since contested.....	464 70
Total payable to plaintiff for contract and extras	$6,203 70

The architect named in the contract was William Reaside. The plaintiff contracted with the defendant to complete the entire work, to the satisfaction and under the supervision of the architect, on or before 30th August, 1890. The defendant agreed to pay eighty per cent. of the contract price and extras, to be paid as the work progressed, upon the architect's certificates, and the remaining twenty per cent. within thirty days from the completion of the work. The final certificate of the architect was declared not to be a condition precedent to the plaintiff's right to recover the balance.

By the second paragraph in the contract it was provided that the plaintiff should "take effectual care that the" work "be carried on, executed, and performed with such expedition and dispatch to be in every respect completed by the day provided for the completion thereof; subject only to such provision for an extension of time as is herein provided."

By the third paragraph it was provided that "Should the proprietor or his architect, at any time during the progress of the work, require any alterations, etc., they shall have the right to make such changes, and the same shall in no wise affect or make void this contract * * And for additional work required in alterations the amount to

be paid therefor shall be agreed upon before commencing additions, and such agreement shall state also the extension of time (if any) which is to be granted by reason thereof." Statement.

"Eleventh. Should the contractor fail to finish the work at or before the time agreed upon, he shall pay to or allow the proprietor, by way of liquidated damages, the sum of fifty dollars per week for each and every week thereafter the said works shall remain incomplete; due allowance to be made for extension of time for additional work or alterations as laid down in clause number three of this agreement."

"Twelfth. Should any work be delayed beyond the time mentioned in this agreement by the inclemency of the weather, or by reason of general strikes of a particular trade, the architect shall have full power to extend the time for the completion of the works, making a just and reasonable extension for that purpose."

The extras allowed for were ordered at different dates, and in no case but one was any agreement made as to the amount to be paid for them, and in no case was any extension of time agreed upon in respect of them. The architect swore that he was never asked by the plaintiff to grant an extension of the time for completion of the work on this or any of the grounds mentioned in the twelfth paragraph of the agreement; that the delay caused by the extras was trifling; and that he would have extended the time for one week, and no more, on account of them.

The buildings were completed on the 17th December, 1890. The architect had repeatedly pressed the plaintiff to complete the work before it was actually completed. On 10th January, 1891, this action was brought against John Skain and others, owners of the property on which the buildings were erected, and against one Flanagan, a mortgagee of the property, claiming a balance as being due under the contract, and for extras, and claiming a mechanic's lien upon the property for the amount due.

The defendants, except Flanagan, who did not defend,

Statement.

by their statement of defence denied being indebted in the amount claimed, "or any such amount;" they set up that the work was done under the contract; that a great number of mechanics' liens were recorded against the lands of the defendants for claims against the plaintiff in respect of the work for which the plaintiff claimed to be paid, to an amount exceeding the balance payable on the contract; and they claimed by way of counter-claim that the plaintiff should procure these liens to be discharged; they also claimed $600 as the liquidated damages agreed on for twelve weeks' delay in the completion of the contract; and they put the plaintiff to the proof of the allegations contained in his statement of claim.

The plaintiff replied that the work was not done under the contract alleged by the defendants, but under a new verbal contract which was substituted for it; that, at all events, the clauses in the agreement relied on by the defendants were waived by mutual consent; that large sums due the plaintiff by the defendants were withheld from him by them; and that the liens registered were the consequence of the defendants' default; that the balance due the plaintiff was greater than the amount of the liens registered; and that he was not liable to pay the liquidated damages claimed, because he was delayed in his work by the extras and by the interference of the defendant John Skain, and that the defendants never complained of the delay.

At the trial the defendants contended that no part of the twenty per cent. which they were authorized to keep back under the terms of the contract was payable at the time of the commencement of the action.

The learned trial Judge found that the contract price and extras amounted to.....		$6,203 70
That the plaintiff had received before action.....	$4,718 40	
And after action by satisfying mechanics' liens against the property on the plaintiff's account	701 77	5,420 17
Leaving balance due		$783 53

Statement.

He disallowed the defendants' claim to liquidated damages upon the ground of the delay that had taken place, saying: "I cannot fix any time within which the contract ought to have been completed; and unless I can fix a day, I cannot measure damages from that day." He allowed the plaintiff to amend his pleadings by setting up as a defence to the defendants' claim to liquidated damages, that the twenty per cent. retained under the contract had become payable since the action was brought; he gave the costs of the action to the plaintiff and dismissed the counter-claim with costs.

At the Easter Sittings of the Divisional Court, 1892, the defendants other than Flanagan moved to set aside this judgment in whole or in part, and to enter a judgment for the defendants, upon the grounds: 1. That there was no satisfactory evidence to support the plaintiff's claim; 2. That no money was due the plaintiff at the time this action was brought; 3. That the amendment of the pleadings allowing the plaintiff to claim for moneys falling due after the commencement of the action should not have been allowed; 4. That the defendants were entitled to the liquidated damages claimed by them.

The motion came on for argument before the Divisional Court (FALCONBRIDGE and STREET, JJ.) on 20th May, 1892.

McMichael, Q. C., for the defendants. We say nothing was due when the action was brought, and an amendment should not be made to let in the plaintiff's claim now. *Toke* v. *Andrews*, 8 Q. B. D. 428, which was the learned trial Judge's authority, is not in point. The defendants' claim here is a set-off and not a counter-claim. Rule 435 is confined to the case of a counter-claim. As to the delay by strikes, I refer to *Budgett* v. *Binnington*, [1891] 1 Q. B. 35. The architect here had not extended the time under paragraph twelve of the contract.

J. A. Mills, on the same side. The defendants are en-

Argument

titled to the liquidated damages claimed for delay: *Duckworth* v. *Alison*, 1 M. & W. 412; *Fletcher* v. *Dyche*, 2 T. R. 32; *Legge* v. *Harlock*, 12 Q. B. 1015; *Chatterton* v. *Crothers*, 9 O. R. 683.

G. G. Mills, for the plaintiff. The defendants did not in pleading raise the point as to the action being prematurely brought; on the contrary, their statement of defence impliedly admitted that they were indebted to the plaintiff. The learned Judge was right in making the amendment, so as to permit all matters in controversy between the parties to be determined in this action. I refer to Rules 402 and 403; *Richardson* v. *Jenkin*, 10 P. R. 292; *Collette* v. *Goode*, 7 Ch. D. 842; *Gough* v. *Bench*, 6 O. R. 699, 706; O. J. Act, R. S. O. ch. 44, sec. 52, sub-secs. 7 and 12; Rules 435 to 440; *Hedley* v. *Bates*, 13 Ch. D. 501; *Re Tharp*, 3 P. D. 76, 81. The extras claimed do not come under the contract and may be recovered for, although the time under the contract had not expired when the action was begun: *Robson* v. *Godfrey*, 1 Stark. 275; *Melville* v. *Carpenter*, 11 U. C. R. 128; *Diamond* v. *McAnnany*, 16 C. P. 9; Emden on Building Contracts, pp. 219, 223, 224. The defendants' claim is a counter-claim, not a set-off: *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145, 151. The defendants are not entitled to the liquidated damages claimed. The delay was caused by their own acts and they acquiesced in it. I refer to *Holme* v. *Guppy*, 3 M. & W. 387; *Thornhill* v. *Neats*, 8 C. B. N. S. 831; *Westwood* v. *Secretary of State for India*, 7 L. T. N. S. 736; 11 W. R. 261; *Roberts* v. *Bury Commissioners*, L. R. 5 C. P. 310; *Doyle* v. *Halpin*, 33 N. Y. Superior Ct. 352; *Smith* v. *Gugerty*, 4 Barb. 614. At any rate the liquidated damages are in the nature of a penalty, and on that point the case is governed by the statute: sec. 52, sub-sec. 3, of the O. J. Act, R. S. O. ch. 44.

McMichael, in reply, referred on the question of damages for delay to *Jones* v. *President of St. John's College*, L. R. 6 Q. B. 115; on the question of set-off to *Chamberlain* v. *Chamberlin*, 11 P. R. 501; and on the question of costs to *Canadian Pacific R. W. Co.* v. *Grant*, 11 P. R. 208.

December 24, 1892. The judgment of the Court was delivered by Judgment. Street, J.

STREET, J.:—

I see no ground upon which the defendants can properly base an objection to the manner in which the learned trial Judge has dealt with the pleadings and the questions depending on them. The defendants sought to take the benefit of the provision in the contract which entitled them to retain twenty per cent. of the full amount of the contract price and the extras, but they did not in their statement of defence set up the clause in the agreement under which they were entitled to retain it, nor the facts entitling them to do so; notwithstanding these defects in their pleading they were allowed to set up the defence. They set up their claim to liquidated damages on their pleadings by way of set-off and counter-claim, and the learned Judge treating it as a counter-claim, and, following *Toke* v. *Andrews*, 8 Q. B. D. 428, held that the plaintiffs might reply matters of defence arising after action as an answer to the counter-claim. If the claim to liquidated damages had been pleaded merely as a set-off, as I think it might have been upon the authority of *Fletcher* v. *Dyche*, 2 T. R. 32, and several cases following it, there would have been no authority under the Rules for letting in the plaintiff's reply of matters arising subsequent to action brought. The defendants, however, cannot now be heard to complain, under all the circumstances, and after the evidence has been taken, that they were wrong in claiming the liquidated damages as a counter-claim, and should have claimed the benefit of them by way of set-off. It was not in the interest of any of the parties to this litigation that any part of the accounts or claims on either side should be left over to be disposed of in another action, and the amendments allowed have all been within the powers of the trial Judge, and in furtherance of the prompt disposition of the questions in dispute.

Judgment.
Street, J.

Upon the facts, I agree in the opinion expressed by my learned brother who tried the case, that the twenty per cent. which the defendants were authorized under the contract to retain for thirty days had not become due at the time when this action was begun. The agreement seems express upon this point, and there can be no question about the dates. The buildings were not completed until 17th December, 1890, and this action was begun on 10th January, 1891.

Upon the question as to the right of the defendants to recover the liquidated damages for the plaintiff's delay in the completion of the work, I am compelled, with great respect, to differ from the conclusion at which my learned brother has arrived, my view of the matter being largely based upon the terms of the contract.

The agreement was made on 13th May, 1890; by the terms of it the plaintiff promised that the buildings should be completed on 30th August following; that is to say, in about two months and a half; they were not finished until 17th December following; that is to say, for more than seven months after the date of the agreement.

The plaintiff bound himself to complete them by the day named, or to pay $50 for each week afterwards that they remained unfinished, by way of liquidated damages. The onus was clearly upon the plaintiff to excuse his delay. In his reply to the claim made for these damages he says that he "was delayed in the completion of his work by the extras and alterations made in the plans and specifications, and by the continual interference of the defendant John Skain, and that the progress of the construction of the said buildings was satisfactory to said defendants, and they so expressed themselves to the plaintiff from time to time, and on no occasion was complaint made to the plaintiff that the work was not progressing fast enough, or that the buildings would not be completed soon enough."

So far as any interference by the defendant John Skain is concerned, none was proved beyond the fact that he gave the plaintiff orders to do some extras. By the terms of

the contract, however, the plaintiff agreed to do extras and submit to alterations in the original plan, leaving the contract still subsisting; and provision is made in the contract for the granting to him of the extension of time which he is to have by reason thereof. It is clear that he never asked for any extension of time in consequence of the doing of any extras, and he does not himself state that he is able to say to what extent he was delayed by them. He merely says that they required more time than the original work would have taken. The architect says that the extra time required was very little, and that he would have allowed a week for it. Judgment. Street, J.

My construction of the agreement is that the plaintiff was bound to complete the work within the time specified, unless he could shew an extension of the time under the terms of the agreement.

I think the plaintiff has failed to shew that the time for completion was extended by reason of the ordering of any extras, and that the reply has not been proved. Evidence, however, was gone into on both sides upon the question as to whether the plaintiff had been delayed by strikes. He swore that he had been delayed five or six weeks by strikes amongst the stone masons and others. There was evidence to contradict this; but I think the question does not turn upon the question of fact at all, but upon the terms of the agreement. The twelfth paragraph of the contract provides that if the work be delayed by strikes, etc., the architect shall have full power to extend the time for completion. The architect was never asked to, and never did, extend the time, and that I think disposes of the matter.

When persons enter into written contracts, we must treat their contracts as meaning what they say. In this contract some pains have been taken by the draftsman to prevent questions as to the cause of a delay in the completion of the work from being left open to be decided by a Judge or jury long after the time at which the delay has occurred, and to have them decided upon the spot. See *Roberts* v. *Bury Commissioners*, L. R. 5 C. P. 310. I think he has

Judgment.

Street, J.

succeeded here in inserting stipulations throwing upon the contractor the onus of shewing that certain extensions of time had been actually determined upon before action brought. The contractor has failed in shewing any such thing, and it must be taken, therefore, that he is not entitled to any extension.

There is no reply set up that the plaintiff was prevented by any act or default of the defendants from completing the work by the time stipulated so as to bring the case within *Holme* v. *Guppy*, 3 M. & W. 387, and *Russell* v. *Sa da Bandiera*, 13 C. B. N. S. 149. There is, it is true, a suggestion made by the plaintiff in his evidence in reply that certain detail drawings of some doors were not furnished him in proper time, but it is not shewn that he was unable to make the doors, without these drawings, from the plans and specifications. This is a matter not raised upon the pleadings, and no application was made to amend them so as to raise it. If such an application had been made, the defendants would have been entitled to call witnesses in answer; it does not appear to have formed any part of the ground of the decision of the learned Judge; and I think effect should not be given to it.

No application was made for relief against these damages under sub-sec. 3 of sec. 52 of the Judicature Act, ch. 44, R. S. O., and no case was made upon which such relief could have been granted.

I think therefore, that the defendants are entitled to the sum they claim as liquidated damages, viz., for twelve weeks at fifty dollars a week. As a matter of fact, although the defendants have only claimed for twelve weeks' delay, the plaintiff was more than fifteen weeks behind the stipulated time in completing the work, so that he is allowed more than three weeks to cover any proper delay.

According to the figures, the account stands as follows:—

When the action was brought the defendants owed the plaintiff the contract price and extras.....	$6,203 70
Less twenty per cent.....	1,240 74
	$4,962 96

Less cash paid by defendants before action....	$4,718 20	Judgment.
Balance due	$244 76	Street, J.
And the plaintiff owed the defendants upon the damages mentioned in their counter-claim, $600.		
After action the twenty per cent. became payable	1,240 74	
Increasing the plaintiff's claim to	$1,485 50	
But after action the defendants paid the holders of mechanics' liens on the plaintiff's account	701 77	
	$783 73	

Against which the $600 for liquidated damages is to be charged.

I think the plaintiff should have judgment for $783.73, with interest from 18th May, 1891, when the last of the mechanics' liens was paid off, with full costs of the action; and that the defendants are entitled to judgment upon their counter-claim for $600, with costs of the counter-claim. The defendants should have the costs of the motion.

[QUEEN'S BENCH DIVISION.]

McLean v. City of St. Thomas.

Deed—Construction of—Municipal corporation—Conveyance of land to, for waterworks purposes—Power of corporation to sell land—R. S. O. ch. 192, sec. 29—Conditions in deed—Right of way—Construction of grant.

A deed of conveyance of land under the Short Forms Act from the plaintiff to the defendants recited that the latter had determined to construct waterworks in their municipality, and for that required the land for buildings and other purposes connected with the waterworks, and the plaintiff had agreed to sell them such land for such purposes for the consideration and subject to the conditions set forth. The consideration was a valuable one. The grant was to the defendants and their assigns for ever, for the purposes mentioned in the recital, of the land described, with full right of ingress and egress to and from the said lands for the defendants, their employees and others doing business on and about the said waterworks with teams and otherwise, from a certain street, etc., along a certain road, etc.; *habendum* to the defendants, their successors and assigns, for the purposes aforesaid to and for their sole and only use for ever, subject nevertheless to the following conditions. The first condition was that the defendants should fence and keep fenced at their own expense the land conveyed to them, and place an entrance and gate on the right of way at the north and south limits of the land conveyed, for the use of the plaintiff, his heirs and assigns, and all persons claiming under him or them, whenever he or they might require the same. The second condition was that the defendants should put and maintain the right of way in a reasonable state of repair until the happening of a certain event, and thereafter that the plaintiff and defendants should each bear a proportionate part of the repairs necessary according to their respective requirements. Certain other conditions were also made. There was a covenant for quiet possession for the purposes aforesaid, and subject to the conditions aforesaid. The plaintiff released to the defendants all his claim upon the land save as aforesaid, and for the purposes aforesaid. The conveyance contained no provision that the lands should not be put to any other use, and no condition making the grant void upon the happening of any event subsequent to the grant:—

Held, that under the terms of the conveyance the defendants acquired an absolute estate in fee simple, free from any condition of defeasance, and unincumbered by any trust restricting the use to which they should put it; and that under section 29 of the Municipal Water-Works Act, R. S. O. ch. 192, they had the right to dispose of the land when no longer required for waterworks purposes.

2. That the grant of the right of way gave to the defendants and their employees footway, carriage-way, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease the land.

Statement. THIS was a special case stated for the opinion of the Court, pursuant to Rule 554, in an action brought by John McLean against the corporation of the city of St. Thomas. The case stated was as follows:—

Statement.

1. The writ of summons was indorsed as follows: "The plaintiff's claim is for a declaration of the rights of the plaintiff and the defendants under a certain indenture by way of deed, dated the 17th day of July, 1874, and made between the plaintiff, of the one part, and the defendants, of the other part."

2. The deed referred to in the last preceding paragraph is in the words and figures following, that is to say:

"This indenture, made in triplicate the seventeenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, in pursuance of the Act respecting Short Forms of Conveyances.

"Between John McLean, of the city of St. Thomas, in the county of Elgin and province of Ontario, Barrister-at-Law, of the first part; Jane Ann McLean, wife of the said party of the first part, of the second part; and the corporation of the town of St. Thomas, of the third part.

"Whereas the said parties of the third part have determined to construct waterworks in the said town of St. Thomas as a protection against fire, for domestic and other uses of a like nature, and for that require the lands hereinafter described for buildings and other purposes connected with the said waterworks, and the said party of the first part has agreed to sell to them the said lands for the above mentioned purposes for the consideration and subject to the conditions hereinafter set forth.

"Now this indenture witnesseth that in pursuance of the premises and in consideration of the sum of one hundred and fifty-seven dollars and twenty cents now paid by the parties of the third part to the party of the first part (the receipt whereof is hereby acknowledged) the said party of the first part doth grant unto the said parties of the third part, their heirs and assigns for ever, for the purposes above mentioned

"All and singular that certain parcel or tract of land and premises forming part of lot number two in the ninth concession of the township of Yarmouth, within the town of St. Thomas, known and described as follows" [describing

Statement.

it], "with full right of ingress and egress to and from the said lands for the said parties of the third part, their employees and others doing business on and about the said waterworks with teams and otherwise, from New street northerly along the road now used by the party of the first part west of his orchard, but reserving to the party of the first part, his heirs or assigns, owners or occupiers of the adjoining lands, the free use of the continuation of the said roadway to the north limit of the lands hereby conveyed, with the right to the said parties of the third part to collect the waters coming from the adjoining lands into the reservoir to be by them erected; also the right to lay down pipes on the lands of the party of the first part from the west limit of the lands hereby conveyed to the dam to be erected on Kettle Creek for the said waterworks, and to go on to the said lands for the purpose of laying down or repairing the pipes laid down in connection with and for the purposes of the said works when and as they may require to do so, they doing no unnecessary damages in the premises.

"To have and to hold unto the said parties of the third part, their successors and assigns, for the purposes aforesaid, to and for their sole and only use for ever, subject nevertheless to the following conditions: First, That the said parties of the third part, their successors or assigns, shall forthwith put up a good and sufficient fence and keep well fenced at their own expense all the lands hereby conveyed to them, and place a good gateway or other entrance at all times properly closed with a good swing gate on said right of way at the north and south limits of the lands hereby conveyed for the use of the party of the first part, his heirs and assigns, and all persons claiming by, through, or under him or them whenever he or they may require the same.

"2. That the said parties of the third part shall put and maintain the said right of way in a reasonable state of repair till the party of the first part, his heirs or assigns, shall use the lands to and from which the said right of way

leads, otherwise than for the purpose of a pasture field or for farming purposes, and thereafter so long as the said lands shall be used for any other purpose, each party shall bear a proportionate part of the repairs necessary according to their respective requirements. Statement.

"3. That the party of the first part, his heirs and assigns, shall have the right to utilize for his and their own purposes all the water coming from the said reservoir as surplus or overflowing water.

"4. That the said parties of the third part will let the power of the steam engines used in their said works when not required by them, or so much thereof as they can spare, at a reasonable rate to such person or persons as may purchase or lease adjoining lands from the party of the first part, his heirs or assigns, for manufacturing purposes, and subject also to the reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the Crown.

"The said party of the first part covenants with the parties of the third part that he has the right to convey the said lands to the said parties of the third part notwithstanding any act of the said party of the first part; and that the said parties of the third part shall have quiet possession of the said lands for the purposes aforesaid, and subject to the conditions aforesaid, free from all incumbrances.

"And that the said party of the first part will execute such further assurance of the said lands as may be requisite.

"And that the said party of the first part hath done no act to incumber the said lands.

"And the said party of the first part releases to the parties of the third part all his claims upon the said lands save as aforesaid and for the purposes aforesaid.

"And the said party of the second part, the wife of the said party of the first part, hereby bars her dower in the said lands.

Statement.

"In witness whereof the said parties hereto have hereunto set their hands and seals.

"Signed, Sealed and Delivered in presence of (Sgd.) J. A. McLean. } (Sgd.) John McLean, (Seal). (Sgd.) Jane A. McLean, (Seal).

"Received from the parties of the third part one hundred and fifty-seven dollars and twenty cents, the full consideration in this deed mentioned.

"Witness: (Sgd.) John McLean."
(Sgd.) J. A. McLean.

3. The said defendants have ceased to use the property described in said deed for waterworks purposes, and have taken up the pipes leading thereto, and have removed all connections with the waterworks system now existing and used in the said city of St. Thomas.

4. The defendants claim that under said deed (*a*) they took and now hold an absolute estate in fee simple in said lands with the right to use the same for any purposes they may desire; (*b*) The right to use the right of way in said deed mentioned for ingress and egress to and from the said lands for the purpose of using and occupying the said lands for such purposes as they may desire.

5. The questions submitted for the opinion of this Honourable Court, are:—

(1). Whether the said defendants now hold an absolute estate in fee simple in said lands, and are now entitled to the possession thereof;

(2) Whether the said defendants now have the right to use the said right of way for the purposes they claim.

6. If the Court be of opinion either that the defendants are not entitled to the possession of the said lands or the use of said right of way, then judgment is to be entered for the plaintiff with the appropriate remedies; or if the Court be of the opinion that the defendants are entitled to the possession of said lands, and are entitled to the use of said right of way as claimed by them, then judgment is to entered for the defendants.

7. The parties agree that the costs of this action and special case shall be in the discretion of the Court.

The case was argued before the Divisional Court (FALCONBRIDGE and STREET, JJ.,) on the 20th May, 1892. Argument.

Hoyles, Q. C., for the plaintiff. Upon the defendants ceasing to use the lands for waterworks purposes, there is a reverter to the plaintiff, or, at least, the plaintiff has the right to restrain the defendants from using the land for any other purposes. The defendants' estate is a conditional one. Where the grant is expressed to be for a specific or limited purpose, the land cannot be appropriated to another purpose, and the grantor has such an interest as will entitle him to have the grantees restrained from so appropriating it: Washburn's Law of Real Property, 5th ed., vol. 2, sec. 446. But further, the condition here is a condition subsequent, and being broken, the estate is defeated: Kent Com., 12th ed., vol. 4, sec. 126; *Warren* v. *Mayor of Lyons*, 22 Iowa 351; *Board of Education of Van Wert* v. *Inhabitants of Van Wert*, 18 Ohio St. 221; *Jessup* v. *Grand Trunk R. W. Co.*, 7 A. R. 128. The Court will not construe an estate to be upon condition, if the language of the deed will admit of any other reasonable interpretation: Devlin on Deeds, vol. 2, sec. 978. But the deed here will not bear any other interpretation; so this is not against me. In *Kennedy* v. *City of Toronto*, 12 O. R. 211, which also appears to be against me, the habendum in the deed in question shewed an absolute gift to the city without restriction. This is either an estate subject to a condition subsequent, where upon breach there is a reverter; or else it is an estate in trust for particular uses. As to the right of way, I submit that it is an easement as much limited as an easement can be, and upon the rules applicable to easements can only be for that particular purpose for which it was granted. Even if the change were beneficial to the servient tenement, it could not be extended. I refer to Goddard on Easements, 4th ed., pp. 337, 338, 505, 508; *Clarke* v. *Somersetshire Drainage Commissioners*, 57 L. J. Mag. Cas. 96; *Corporation of London* v. *Riggs*, 13 Ch. D. 798, 807; *Wimbledon, etc., Conserva-*

Argument.

tors v. *Dixon*, 1 Ch. D. 362; *Wood* v. *Saunders*, L. R. 10 Ch. 582; *McMillan* v. *Hedge*, 14 S. C. R. 736. The right to the easement as a way of necessity cannot be supported; ways of necessity are presumed, not created.

James A. McLean, on the same side. The recitals govern where there is a conflict between them and the operative words of the deed: Deane's Principles of Conveyancing, 2nd ed., pp. 345, 357.

Doherty, for the defendants. There is nothing here to shew a breach of a condition. If this land had been designed only for waterworks, it would have been so stated in the conveyance. There is no covenant to build or maintain works. In *Warren* v. *Mayor of Lyons* and the other cases cited, the land was given freely and dedicated to the public use; but not so here. This is not a deed upon a condition. To work a forfeiture, the language must be unequivocal. There is not a word about reverter in the deed. It does not appear that the land will not again be used for waterworks purposes. There is no covenant for continuous use. I refer to *Board of Supervisors of Warren County* v. *Patterson*, 56 Ill. 111; *The State* v. *Woodward*, 23 Vt. 92; *Beach* v. *Haynes*, 12 Vt. 15; *Seebold* v. *Shitler*, 34 Pa. St. 133; Dillon on Municipal Corporations, 4th ed., p. 773, sec. 653. Here there was no dedication; it was a purchase just as if by an individual. The defendants, I submit, took an absolute fee simple in the land, and, even if they took an estate upon a condition, there is no breach of the condition. As to the easement, I refer to *Corporation of London* v. *Riggs*, 13 Ch. D. 798. If the land belongs to the defendants, they must have access to it, and a way of necessity must be presumed.

Hoyles, in reply, referred as to ways of necessity to *Wilkes* v. *Greenway*, 6 Times L. R. 290, 449; *McLaren* v. *Strachan* [not reported], a decision of BOYD, C., in an action in the Common Pleas Division, given on the 5th November, 1891.*

* In *McLaren* v. *Strachan*, the judgment was as follows:
BOYD, C.—The plaintiff claimed the land simply by length of posses-

December 24, 1892. The judgment of the Court was delivered by

Judgment.

Street, J.

STREET, J.:—

I am of opinion that under the terms of the conveyance set forth in the special case the grantees acquired an absolute estate in fee simple, free from any condition of defeasance and unincumbered by any trust respecting the use to which they should put it.

They are authorized by sec. 3 of ch. 192, R. S. O., to purchase such lands as they may require for waterworks purposes: this they have done by the conveyance in question, which specifies carefully and repeatedly that the lands are acquired for that purpose, and they have paid a valuable consideration to the plaintiff. The conveyance contains no provision that the lands shall not be put to any other use, and no condition making the grant void upon the happening of any event subsequent to the grant: Sheppard's Touchstone, 121; *Kennedy* v. *City of Toronto*, 12 O. R. 211. Sec. 29 of ch. 192, R. S. O., appears to provide for the case which has here arisen, and authorizes the corporation to dispose of property acquired by them for waterworks purposes when no longer required: *Rawson* v. *School District, etc.*, 7 Allen 125; *Board of Supervisors of Warren County* v. *Patterson*, 56 Ill. 111.

sion, the title of the plaintiff in other respects being admitted. The lot in dispute is No. 71, on the south side of Somerset street, in the city of Ottawa. It had been leased for a year to her husband, but he held on without paying rent, and then died. Since his death, which was some fifteen years ago, she has remained in possession of the small house and shed upon the lot. This lot was originally fenced all round, but she removed this enclosure for firewood fifteen years ago, and since then this lot has formed part of a larger enclosure embracing five other lots owned by the plaintiff, which he had yearly rented for purposes of pasture to two persons who occupied and paid rent regularly for the whole area enclosed for some fifteen years. The possession is that of a squatter, and it should be strictly limited to a *possessio pedis*. She has had undisturbed and visible possession and enjoyment of the buildings by her occupied, but outside of these her possession has been in common with that of the

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The grant is expressed to be made upon condition that the grantees shall fence and keep fenced the lands conveyed, etc.; and shall keep the right of way in a reasonable state of repair until the grantor shall use the lands to which it leads for purposes other than a pasture field, etc.; "and thereafter each party shall pay a proportionate part of the costs of the repairs necessary according to their respective requirements."

Although these and the stipulations which follow them are prefaced by the words appropriate to the grant of an estate upon condition, the grant is not necessarily to be treated as being conditional upon their performance: *Sohier* v. *Trinity Church*, 109 Mass. at p. 19; Sheppard's Touchstone, p. 121; *Kennedy* v. *City of Toronto*, 12 O. R. 211. The intention to be gathered from them is to be considered; and it cannot have been intended here that the estate of the grantees should terminate in case the grantor should not pay his proportionate part of the cost of the repairs. I think the intention here was to set forth in this part of the conveyance the agreement of the parties with regard to

plaintiff's lawful tenants. In other words, the possession of the lands enclosed—barring the buildings—was in the plaintiff, and she has no right to a foot or an inch outside the house and shed. The evidence is that she had hens occasionally who picked about the place enclosed; that she had wood on it occasionally, and that she used one part for the drying of clothes; but over the whole also roamed and grazed the cattle of the tenants, so that her user was not exclusive. No question arises on this record as to her having any right of way to get to the house. At present my opinion is she has no such right, as she has not had sufficient length of enjoyment to gain an easement; and a way of necessity, which would arise by implication upon a purchase, should not be attached by construction of law to a squatter's appropriation of another's property, though it may be dignified by the name of parliamentary conveyance.

Judgment will go for possession of all the lot except so much thereof as is covered by the cabin and shed; and, as success is divided, there will be no costs.

The only cases I have found approximating to the novel points above discussed are *Poignand* v. *Smith*, 8 Pick. 272, and *Corning* v. *Troy*, 34 Barb. 529.

Beside these, since writing the above, I am indebted to my brother Osler for a reference to *Wilkes* v. *Greenway*, 6 Times L. R. 290 and 449, the ultimate decision in which accords with my present judgment.

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the matters referred to in it, and not to make the estate of the grantees conditional. I may, however, properly quote here the remarks of the author of Sheppard's Touchstone, at p. 121: "Conditions annexed to estates are sometimes so placed and confounded amongst covenants; sometimes so ambiguously drawn; and at all times have in their drawing (when deeds, etc., are prepared by unskilful persons), so much affinity with limitations, that it is hard to discern and distinguish them."

The case does not call for an opinion from us as to whether these provisions are enforceable against the defendants as covenants.

Although, however, the title of the grantees to the land appears absolute and unconditional, their use of it, unless there be another way to it—as to which the case is silent—may be seriously hampered by the terms in which the grant of the right of way to it is couched. The right given by the grant is confined "to the parties of the third part, their employees and others doing business on and about the said waterworks, with teams and otherwise;" and it is clear that the grantees of the right of way are not entitled to burden the land of the grantor over which the way is granted to any greater extent than is warranted by the language of the grant. Taking this language most strongly against the grantor, the right of the grantees, in the absence of any waterworks upon the land, is limited to themselves and their employees with teams and otherwise; this, I think, would give them footway, carriage way, and way for horses, but would confer no right of way upon persons to whom the grantees might sell or lease the land: *Cousens* v. *Rose*, L. R. 12 Eq. 366.

In answer to the questions submitted, my opinion is, therefore, as follows:—

1. That the defendants now hold an absolute title in fee simple in the said lands, and are entitled to the possession thereof.

2. That the right of the grantees to use the right of way is limited to a right of way for themselves and their

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Street, J. carriages.

According to the terms of the special case, judgment is to be entered for the plaintiff upon these findings; and as the plaintiff has succeeded upon a material part of the case submitted, I think he is entitled to his costs against the defendants.

[QUEEN'S BENCH DIVISION.]

NIXON ET AL. v. GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railways—Absence of cattle-guards—Animals killed—Liability—"Place where they might properly be"—51 Vic. ch. 29, sec. 271 (D.).—53 Vic. ch. 28, sec. 2 (D.).

In an action for damages for the loss of horses killed on the defendants' railway, the statement of claim alleged that the horses "escaped" from the plaintiffs' farm, passed down a concession road to an allowance for road which was intersected by the railway "on the level," then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train. The only negligence charged was that the defendants had not constructed and maintained cattle-guards or fences. It was not alleged that the horses were in charge of any person :—

Held, upon demurrer, that the horses being, contrary to the provision of section 271 of the Railway Act of Canada, 51 Vic. ch. 28, within half a mile of the intersection and not in charge of any person, they did not get upon the railway from an adjoining place where, under the circumstances, they might properly be, within the meaning of 53 Vic. ch. 28, sec. 2 (D.); and therefore the defendants were not liable.

Statement. THIS action was brought by the executors of John Nixon, deceased, to recover $450 damages for the killing and injuring of certain horses on the defendants' railway by a train.

The statement of claim alleged :—

3. That the line of the defendants' railway crossed the allowance for road between the townships of Toronto and Chinguacousy, in the county of Peel, on the level, between

the third and fourth concession lines east of Hurontario street, in the said townships. Statement.

4. That the said allowance for road was, and for many years had been, the travelled public highway between and along the north and south sides respectively of the said townships.

5. That the defendants, contrary to and negligent of their statutory duty in that behalf, wrongfully and negligently omitted to construct, erect, and maintain any cattle-guard at the northern limit of said allowance for road where the said railway crosses the said allowance for road, and also wrongfully and negligently omitted to construct, erect, and maintain any fence or fences between the northern limit of the said allowance for road and the land of the defendants, by reason of which omission on the part of the defendants there were not, at the time of the committing of the injuries and grievances hereinafter complained of, any cattle-guards and fences, or either of them, on the northern side of the said highway, suitable and sufficient to prevent cattle and other animals from getting on the railway from the said allowance for road, but, on the contrary, there was at the said time free and uninterrupted means of ingress for any animal passing along the said highway into and upon the lands of the said defendants, through which the defendants' railway ran.

6. That on the night of the 16th day of October, 1890, four horses, the property of the plaintiffs, escaped from the farm of the plaintiffs, being the west half of lot 8 in the fifth concession east of the said township of Chinguacousy, and, passing along the fourth concession line east of the said township of Chinguacousy into its intersection with the said allowance for road, and along the said allowance for road into the place where the said railway crosses the said allowance for road, the said horses entered from the northern side of the said highway upon the said land of the defendants, and went westerly from the said allowance for road along the defendants' railway track until they were stopped by a bridge passing over a creek which flows

Statement.

across the land of the defendants, and which bridge is distant from the said allowance for road several hundred feet.

7. That the said horses, so being on the said railway and at the said bridge over the said creek, were struck by a passing train of the defendants, and three of the said horses were killed and one greatly injured, by reason of which the said horse so injured was greatly diminished in value.

8. That the said horses were not killed and injured at the point of intersection of the said highway and railway.

The defendants demurred to the statement of claim on the grounds:—

3. That the statement of claim, if true, does not negative want of care on the part of the plaintiffs, nor does it shew that any person was in charge of the said cattle or animals at the time they escaped from the public road mentioned in the statement of claim as that from which they escaped on to the railway.

4. That the said statement of claim does not allege any negligence on the part of those in charge of the said engine and train which, it is alleged, did the damage complained of.

5. That the animals being at the time straying upon the public highway as in the statement alleged, they escaped therefrom at the point where the railway was crossed by said highway, and were unlawfully on the railway when injured, and, on the facts stated, no liability rests on the defendants.

December 16, 1892. The demurrer was argued before ROSE, J., in Court.

H. S. Osler, for the defendants.

Watson, Q. C., for the plaintiffs.

The following authorities were referred to:—*Huist* v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 299; *Ferris* v. *Grand Trunk R. W. Co.*, *ib.* 474; *Cooley* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 96; *Duncan* v. *Can-*

adian Pacific R. W. Co., 21 O. R. 355; *McLennan* v. *Grand Trunk R. W. Co.*, 8 C. P. 411; *Simpson* v. *Great Western R. W. Co.*, 17 U. C. R. 57; *Charman* v. *South-Eastern R. W. Co.*, 21 Q. B. D. 524. Argument.

December 29, 1892. ROSE, J.:—

This demurrer raises the question of the proper construction of 53 Vic. ch. 28, sec. 2 (D.), repealing sub-sec. 3 of sec. 194 of the Railway Act, 51 Vic. ch. 29, and substituting a new section therefor. The 51 Vic. repealed ch. 109, R. S. C. 1886, sec. 13, which provided for the construction and maintenance of fences and cattle-guards.

Under sub-sec. 2 of sec. 13 the liability of a railway company for damages to animals on the railway, where fences or cattle-guards were not constructed or maintained, was absolute and unconditional: *Huist* v. *Buffalo and Lake Huron R. W. Co.*, 16 U. C. R. 299; *Daniels* v. *Grand Trunk R. W. Co.*, 11 A. R. at p. 474. By the 51 Vic. the liability was limited to damages done to animals "not wrongfully on the railway, and having got there in consequence of the omission to make, complete, and maintain such fences and cattle-guards as aforesaid."

The 53 Vic. introduced the following provision: "3. If the company omits to erect and complete as aforesaid any fence or cattle-guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

A perusal of the cases above referred to, as well as of *Ferris* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 474;

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McLennan v. *Grand Trunk R. W. Co.*, 8 C. P. 411; *Simpson* v. *Great Western R. W. Co.*, 17 U. C. R. 57; *Cooley* v. *Grand Trunk R. W. Co.*, 18 U. C. R. 96; *Conway* v. *Canadian Pacific R. W. Co.*, 12 A. R. 708; and *Duncan* v. *Canadian Pacific R. W. Co.*, 21 O. R. 355, will shew the history of the legislation, the construction put upon it by the Court, and the object and effect of the clause above set out.

The facts appearing upon the record shew that the horses in question "escaped" from the plaintiffs' farm—passed down a concession road to an allowance for road which was intersected by the railway—then along the allowance for road to the point of intersection—and thence along the railway to the place where they were struck by a passing train. No negligence is charged in the management of the train. The only negligence charged is in not constructing and maintaining cattle-guards or fences. I do not see why anything is said about fences, as no fence could have prevented the horses going from the highway on the railway. A cattle-guard would, no doubt, have kept the horses from travelling along the track of the railway, and it may properly be said that it was in consequence of the omission or neglect to construct and maintain a cattle-guard that the animals got upon the railway from the highway.

Then was the highway a place where, under the circumstances, the animals at the time when they went on the track "might properly be?" If they were animals "allowed by law to run at large," the fact that they were on the highway without the permission of the owners of the road, would not of itself be sufficient to warrant a holding that the animals were improperly on the highway.

Section 271 of 51 Vic. ch. 29 prohibits the permitting of horses, etc., to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in charge of some person or persons, to prevent their loitering or stopping on such

highway at such intersection. See *Simpson* v. *Great Western R. W. Co.*, *supra*. Judgment. Rose, J.

From the pleadings we learn that the line of the railway crosses the road allowance "on the level." It does not appear that the horses were in charge of any person. If not, they were not properly within half a mile of the point of intersection, and so did not get upon the railway from an adjoining place where, under the circumstances, they might properly be. The case of *Daniels* v. *Grand Trunk R. W. Co.*, above referred to, is much in point. See also *Cooley* v. *Grand Trunk R. W. Co.*, *supra*.

In my opinion, the defendant is entitled to judgment on the demurrer with costs.

[CHANCERY DIVISION.]

METCALF v. ROBERTS ET AL.

Husband and wife—Taking away wife from husband—Parents—Harbouring—Damages.

An action will lie by a husband against his father-in-law when the latter has, without sufficient cause, by a display of force taken the wife away from the house of her husband against his will, she continuing absent, whereby he has lost the comfort and help of her society; and substantial damages may be awarded in such a case.

The mere harbouring, by her parents, of a wife who has left her husband, without any evidence of influence or persuasion on their part, is not sufficient to sustain an action against the parents.

Review of English and American decisions.

Statement. THIS was an action brought by William Thomas Metcalf against Samuel Roberts and Martha Roberts, the father and mother of his wife, for having induced his wife to leave him and reside with them.

The plaintiff, by his statement of claim alleged that on the 30th of December, 1890, he was married to Levinia Roberts, daughter of the defendants; and that the plaintiff and his said wife lived happily together, as husband and wife, from that time until the 12th day of April, 1892; that between these two dates the defendant Martha Roberts made frequent visits to the plaintiff and his wife; and both defendants had frequent intercourse with the plaintiff's wife, and by misrepresentation, undue influence, duress, and threats they induced the plaintiff's wife to agree to leave him, and to cease cohabiting with him; and, previous to the said 12th of April, the female defendant came to the plaintiff's house and assisted the plaintiff's wife in making preparations for her departure; that on the said 12th of April, the male defendant, accompanied by two other men, who called themselves constables, and whose services the defendants had procured for the occasion, went to the plaintiff's house and informed the plaintiff that they had come to take away his wife, and threatened to use force if he offered any resistance; and the said Samuel Roberts and said alleged constables,

shortly after departed, taking with them the plaintiff's wife and child; and the defendants have since wrongfully harboured the plaintiff's wife. Statement.

The plaintiff further alleged that he never gave his wife any just cause to leave him, and that her action in so doing was wholly caused by the undue influence and duress of the defendants.

Allegations of deprivation of help, due assistance, etc.

The defendants, by their statement of defence, denied the allegations contained in the statement of claim; and further said that the plaintiff's wife had good cause for leaving her husband as she did, and for refusing to live with the said plaintiff; and that, owing to ill-treatment and bad conduct of the plaintiff, she left the home of her husband of her own freewill, and without any influence or persuasion to induce her so to do on the part of the defendants or either of them.

The material facts are stated in the judgment of the trial Judge.

The case was tried at the Autumn Assizes, at Barrie, on the 9th of September, 1892, before FALCONBRIDGE, J., who at a certain stage of the cross-examination of the plaintiff's wife, dispensed with the jury and proceeded with the trial *in camerâ*.

The trial was subsequently adjourned to Toronto, where further evidence was taken, and the case argued on October 1st, 1892.

McCarthy, Q. C., for the plaintiff. Even if there was no cruelty on the part of the husband, the evidence shows that the wife's determination to leave her husband was brought about by the interference of her mother. The father should be punished for going to the plaintiff's house and taking the wife away, even when willing to go. I refer to Addison on Torts, 6th ed., p. 591; English cases are clear on two heads: 1st. Harbouring; 2nd. Enticing; *a fortiori*, taking away; 3 Kerr's Blacsktone, 4th ed., 131; Eversley on

Argument.

Domestic Relations, 242; *Re Cochrane*, 8 Dowl. 630, 635, 636; *Winsmore*, v. *Greenback*, Willes, 577; *Philp* v. *Squire*, 1 Peake, 114; *Berthon* v. *Cartwright*, 2 Esp. 480; 7 Central L. J. 230.

C. C. Robinson, for the defendants. There is no evidence of enticement away or prevention from returning, but there was of cruelty by the husband. In the case of parents harbouring their daughter improper motive must be shown, and the onus is on the plaintiff to show it. It is necessary to shew malice even in the case of a stranger. If the wife is taken in and protected on account of her representations of ill-treatment, etc., it makes no difference whether her representations are true or not; Schouler on Domestic Relations, 4th ed., sec. 41, citing *Hutcheson* v. *Peck*, 5 Johns (N.Y.), 195; *Barnes* v. *Allen*, 1 Keyes, N. Y. 390; *Schuneman* v. *Palmer*, 4 Barb. 225; *Bennett* v. *Smith*, 21 Barb. 439; *Smith* v. *Lyke*, 20 N. Y. (S. C.) 204; *Payne* v. *Williams*, 4 Baxter, Tenn. 583; *Turner* v. *Estes*, 3 Mass. 316; *White* v. *Ross*, 47 Mich. 172; *Perry* v. *Lovejoy*, 49 Mich. 529.

McCarthy, Q. C., in reply. When the American cases differ from the English cases, they are not binding on our Courts.

January 28, 1893. FALCONBRIDGE, J.:—

At the trial I expressed the opinion that no case of cruelty, giving the wife good cause for leaving the plaintiff or refusing to live with him, had been proved. The acts complained of by her were of an extremely delicate nature; they were in some respects extremely improbable; and her manner of giving testimony with reference to those matters was, to say the least of it, very objectionable and unsatisfactory.

These acts were specifically denied by the plaintiff. I am therefore relieved—finding, as I do, that the allegations made by her are not proved, from the delicate or indelicate task of determining how far, if proved, they would have

amounted to such a case of cruelty as would have justified her in leaving him. Judgment Falconbridge, J.

The facts with reference to the rest of the case are not so much in dispute as might at first sight appear.

The plaintiff (who was then about twenty-one) married the defendants' daughter, who was five years his senior, in December, 1890. They lived with the defendants about six weeks on the defendants' farm. Then the plaintiff took a lease of the farm for five years, and the old people moved to Aurora. Mrs. Roberts paid her daughter occasional and not long visits up to the time the baby was born in October, 1891. There seems to have been no particular trouble up to this time, although the plaintiff says he and his wife were happy except when her mother was there; that there were disagreements between the mother and the daughter—the former was interfering about work on the farm, etc.

The mother stayed with the young people for about a month, from three days before the baby was born, (12th October, 1891): she says she asked the plaintiff during that visit if he did not know better than to use his wife that way, and that he said he did not know better, and that he would not do it again.

I shall hereafter advert to the fact that the mother did not then know what the actual or supposed grievance of her daughter was.

On the 6th March, 1892, there was an altercation between the plaintiff and Mrs. Roberts, which culminated in an assault by one on the other or by both. Mrs. Metcalf then put on her clothes and announced her intention of going to Aurora. The plaintiff picked the baby up from the cradle and took it out down the road to a neighbour's house, and then to his sister's place, with the declared or manifest intention of not letting his wife take it with her. I do not find Mrs. Metcalf's and Mrs. Roberts' statements of his alleged cruelty to the child on that occasion corroborated by the independent testimony.

The plaintiff admits that this was the only day on which

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he told his mother-in-law to go home, that he remembers; she would not go that day. The plaintiff and his wife returned home from his sister's house.

On the 12th April the male defendant came to the plaintiff's house, accompanied by two men, one of whom was a county constable, and the latter announced to the plaintiff that they had come to take his wife away, and she went away with them, taking the baby.

The constable denies that either he or the other man said they were constables; and says he went as "just a common man." But he was known to be a constable; says he was employed by Roberts to "go and do the talking for him," and admits having said to the plaintiff that he had once arrested a man and taken him away from his wife, and that on that occasion he had shewn a revolver.

The plaintiff was not allowed to go with his wife into another room or to converse with her apart, but it is fair to the other men to say that she and they swear that that was at her request, as she professed to be in fear of her husband.

Since that time she has remained with her parents, contrary to her husband's wish.

The English authorities bearing upon this subject are comparatively few in number. The first one is a judgment of the Court of Common Pleas, in an action of *Winsmore* v. *Greenbank*, reported in Willes, at p. 577. The head note bearing upon this point, is as follows: "In an action on the case for inducing the plaintiff's wife to continue absent, it is sufficient to state that the defendant unlawfully and unjustly persuaded, procured and enticed the wife to continue absent, etc., by means of which persuasion, etc., she did continue absent, etc., whereby the plaintiff lost the comfort and society of his wife without setting forth the means, etc., used by the defendant."

Willes, C. J., says, at p. 580: "The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie. * * But this

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general rule is not applicable to the present case; it would be if there had been *no special action on the case* before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be *new facts* in every special action on the case." The Court held in answer to the objection that procuring, enticing, and persuading are not sufficient, if no ill consequence flows from their doing that. Here is a consequence laid; that by means thereof the plaintiff lost the comfort and society of his wife, etc.

The next case is a *nisi prius* decision of Lord Kenyon, in the action of *Philp* v. *Squire*, reported in Peake, N. P., at page 114. This was in a case for harbouring the plaintiff's wife after notice from the plaintiff not to do so. The plaintiff's wife came to the house of the defendant (to whose wife she was related), and represented herself to have been very ill-used by her husband, who she said had turned her out of doors. Upon these representations the defendant received her into his house, and at her request suffered her to continue there after he had received notice from the husband not to harbour her. It was not proved that the husband had, in fact, ill-treated the wife. Lord Kenyon says at p. 115: " * * But where she is received from the principles of humanity, the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false."

In *Berthon* v. *Cartwright*, 2 Esp. 480, it was ruled by the same learned Judge that if a husband ill-treats his wife so that she is forced to leave his house through fear of bodily injury, any person may safely, nay honourably, receive and protect her; and that of course in such a case no action was maintainable.

I find in the Central Law Journal, vol. 7, p. 230, a quotation from the Solicitor's Journal referring to a case which recently came before the Preston Sheriff Court, where *Philp* v. *Squire* and *Berthon* v. *Cartwright* were fol-

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lowed. It was there held to be sufficient to prove that the wife represented she was ill-treated by her husband; it is of no consequence whether her representations were true or false.

The above comprise the only English authorities upon the subject. There are, however, the cases which have some relation to the point regarding the right of the husband to retain possession of his wife's person, and to restrain her of her liberty: *Re Cochrane*, 8 Dowl. 630, considered and not followed in *The Queen* v. *Jackson* [1891], 1 Q. B. D. 671, where other cases are cited.

The English text writers do not, of course, advance our information upon the subject beyond formulating the propositions contained above.—See Addison on Torts, 6th ed., sec. 591,—except Eversley on Domestic Relations, who adds the following at p. 242: "The parents of the wife have no more right to entice away and harbour her than a complete stranger, though where the husband is to blame, less misconduct on his part would justify a parent in receiving back a daughter than would justify a stranger." He cites no authority in support of this proposition.

The leading case in the United States is that of *Hutcheson* v. *Peck*, decided by the Supreme Court of the State of New York, in 1809, and reported in 5 Johnston, 195. It extends and gives more favourable consideration to the position of the parent to a wife than had been given by any former authority. It was held by a majority of the Court that an action brought by a husband against the father of his wife for enticing her away would lie, but that the jury to justify a verdict for the plaintiff, should have much stronger evidence of malicious and improper motives in the defendant than where the action was against a stranger; the presumption being in favour of the defendant, that he was actuated in his conduct in taking his daughter home by parental affection. That distinguished jurist, Chief Justice Kent, said at p. 210: "I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear

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either that he detains the wife against her will, or that he enticed her away from her husband, from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shewn or necessarily deduced from the facts and circumstances detailed."

Then Van Ness, J., the dissenting Judge, says at p. 205: "I agree that if the defendant had not been instrumental in *procuring* his daughter to live apart from her husband, and he had gone no further than to receive and support her, that this action could not be sustained; and then the case of *Philp* v. *Squire* would have been in point. Very different, however, will be the conclusion when the parent unlawfully *produces* the separation by sowing the seeds of discord and hatred; thereby poisoning the sources of domestic harmony and enjoyment."

Mr. Schouler, in his Treatise on the Law of the Domestic Relations, section 41, says: "The common law gives him (the husband) the right to sue for damages all persons who seek to entice her away, or induce her to live apart from him. But in such cases malice and improper motives are always to be considered; and parents and near relations stand on a different footing from strangers. * * It is one thing to actively promote domestic discord, but quite another to harbour, from motives of kindness and humanity, one who seeks shelter from the oppression of her own lawful protector." And further: "The legal doctrine seems to be this, that honest motives may shelter a parent from the consequences of indiscretion, while adding nothing to the right of actual control; the intent with which the parent acted being the material point, rather than the justice of the interference."

Barnes v. *Allen*, 1 Keyes, N. Y., page 390, was an action by a husband against a stranger; and it was held that aid, shelter, and protection may be lawfully rendered by a stranger upon the application and statement of the wife, although dishonest, when acted upon in good faith; and that the burden is upon the plaintiff to establish the unworthy motives which actuated the action taken by the

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defendant in extending aid, shelter, and protection to the wife of the plaintiff. In other words, that there is no legal presumption in favour of the husband that the wife's statements are untrue.

In *Schuneman* v. *Palmer*, 4 Barbour, Supreme Court of New York, 225, the head note is as follows: "In an action on the case for enticing away, and harbouring the plaintiff's wife, the material point of enquiry is the *intent* with which the defendant has acted. It is proper, therefore, to leave it to the jury to decide as to the defendant's motive, and to determine upon the facts proved whether the defendant has allowed the plaintiff's wife to go to his house and remain there with a view to deprive the plaintiff of her society; or whether it was a mere act of hospitality between the parties."

In *Bennett* v. *Smith*, 21 Barbour, 439, the head note is: "It is well settled that a husband may maintain an action for enticing away his wife, or inducing her to live apart from him; and this whether the wrongdoer be the father of the wife, or any other person. But merely allowing the wife to come and remain in his house, by a stranger, and much less her father, from good motives, will not give to the husband a right of action. Something further tending to prevent or dissuade the wife from living with her husband is requisite. In respect to what facts will support an action by a husband for depriving him of his wife, there is, in principle a clear distinction between the cases where the action is against a parent and those where it is against a stranger. Where the conduct of the husband is such as to endanger the personal safety of his wife, is so immoral and indecent as to render him unfit for her society, so much so that she would be justified in abandoning him, *it seems*, her parents have the right not only to receive her into, and allow her the comforts of their house, but also to advise her to come and remain there; and the common law will not hold them responsible to the husband in damages for so doing. And the same doctrine is applicable to a case where the advice

Judgment. Falconbridge, J.

is given by a parent, in the honest belief, justified by information received by him, that such circumstances exist, although the information may subsequently prove to have been unfounded. It is enough for his protection that he was warranted in such belief, and acted from pure motives. It is therefore erroneous, in an action against the father of a married woman for enticing her away to charge that the defendant is liable if he advised the wife to stay away from her husband, without regard to his motives."

In *Smith* v. *Lyke*, 20 New York Supreme Court, page 204, evidence was given at the trial, tending to shew that the wife, by reason of illness, was unable to leave her husband's house without assistance, and that her father, at her request, removed her to his own home. The trial Judge charged that even if the husband's treatment of the wife was not improper in fact, yet if such complaints were made to the defendant by the wife and others as induced him to believe that she was cruelly treated by her husband, and he acted in good faith in taking her to his house, the plaintiff cannot recover. It was held by the Supreme Court that the Judge was correct.

In *Payne* v. *Williams*, 4 Baxter, page 583. *Hutcheson* v. *Peck* and *Bennet* v. *Smith*, were followed by the Supreme Court of Tennessee.

In *Turner* v. *Estes*, 3 Mass., page 316, the defendant was charged with enticing away and harbouring the plaintiff's wife. No evidence was given of any enticing. As to the charge of harbouring, the sum of the evidence was that the defendant permitted his wife's mother to remain in his house, without using force to expel her. He was forbidden by the husband to harbour her, or maintain her; but there was no evidence that the defendant attempted, directly or indirectly, to influence or persuade her not to return to her husband; and the verdict found for the defendant by the jury was upheld.

In *White* v. *Ross*, 47 Mich., an action by a husband against the father and mother of his wife, for enticing

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Falconbridge, J.

and procuring the wife to abandon him, etc., the cases above cited were followed. There, after a clandestine marriage, the wife remained with her parents, who became greatly excited when they were made acquainted with the fact of the marriage (the antecedents of the man not having been reputable); and the father threatened violence if the daughter was taken away at once; but said that if, after a week's delay, she was still bound to go with the husband no obstacle would be interposed. Before the week expired, she expressed dislike and repugnance to the husband, and determined to stay with her parents. There was no evidence of compulsion or solicitation, or of utterances by the parents which the conduct of the son-in-law did not merit. It was held that on this evidence, the Court might well instruct the jury that there was no case for their consideration.

"The only manner in which an American case can be used as a guide is to consider it as the expression of the opinion of an able person acquainted with the general spirit of our law," per Bramwell, J., in *Bradlaugh* v. *The Queen*, 3 Q. B. D. 620, 621.

Under the circumstances of the case in hand I do not find myself bound to declare how far I should feel inclined to follow the decisions in the United States, which affirm the right of the parents not merely to receive their daughter under their roof, but to advise her to come and remain there.

No authority asserts the right of a father-in-law to come to the house of his son-in-law and take away the latter's wife by force or against her husband's will. The father says himself he had never heard that plaintiff had been guilty of any act of violence, so that defendant could not pretend that he was taking her away to save her from bodily injury. The ground of complaint which the wife now puts forward against her husband, viz., his insisting on having sexual intercourse with her at inordinately short intervals of time and at unreasonable and improper hours and places, was never disclosed by her

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Falconbridge, J.

to either of her parents, until after she was taken from her husband's house to that of her parents. The mother says she used to cry and complain sometimes, generally of the way in which she was treated. The wife's reason for leaving, as given on cross-examination, is, "I left for dirty actions of my husband."

Whatever be the amount of consideration to be extended to parents acting in good faith, one would think it fair and reasonable and a test of good faith that the mother at least should press her daughter as to the exact and specific grounds of complaint against the husband before the parents proceed to extreme and violent measures.

The result of all the authorities as applied to the present case is, that the plaintiff must fail as against both defendants, as far as regards the claim for harbouring the plaintiff's wife under her parents' roof. She swears that under no circumstances will she return to live with her husband, and she and both defendants all agree in swearing that no persuasion or coercion are practised to prevent her so returning.

But the coming of the male defendant to the plaintiff's house with two men, under the guise of constables, to take away the wife and child, if need be, by force, or at any rate to practise such physical and quasi-official intimidation as would prevent the husband's opposing her departure, was a gross wrong and outrage.

I doubt the good faith of the letter of the wife inviting her father to come and take her away—in fact I do not believe it was written and delivered to the father before she was taken away.

Nor under these circumstances was there any consent or acquiescence by the husband to the carrying away of his wife to be implied from what he said or did on that occasion.

I am not disposed to treat this invasion of the plaintiff's house, followed as it has been by the continued separation of the plaintiff and his wife (*post hoc*, if not certainly *propter hoc*) as a merely technical trespass calling for the

Judgment.

Falconbridge, J.

infliction of nominal damages only. I find a verdict in favour of the plaintiff as against the male defendant for $250 with full costs of suit, and I dismiss the action as against the female defendant without costs.

I find it abundantly proved that the male defendant had expressed his intention beforehand of taking his daughter away, and it is a fair conclusion from the evidence (although they all three deny it) that if persuasion was not actually used by the defendants to induce the wife to leave her husband, any influence which they possessed over her was not used in the direction of persuading her to try and live with him.

It is a pity that the plaintiff's wife cannot overcome her apparently invincible objection to return and live with her husband.

If I have the power to do so, I reserve for myself or for the Divisional Court, or for the Court of Appeal, power on her return with the *bonâ fide* intention of living with her husband to reduce the damages to a nominal sum, or to stay execution of the amount awarded, and the plaintiff must, of course, in any event, unless he chooses to forego them, get his costs.

G. A. B.

[CHANCERY DIVISION.]

RE LESLIE.

Redemption of mortgage—Decree for—Laches—Analogy of Statute of Limitations—Quieting title.

That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the Court to exercise its discretion by holding its hand when the laches occur in the prosecution of an action whether before or after judgment.

After the usual decree for redemption had been pronounced in favour of a mortgagor, who was at the time and continued afterwards to be a lunatic residing in Scotland, no proceedings were taken under it for over twenty years. Although several communications with reference to the suit passed between the mortgagor's solicitor and his *curator* the latter never intervened. For some years before, and during all the time after, the making of the decree, the mortgagee, or those claiming under him, had been in possession of the mortgaged premises; and the petitioner in this matter, claiming under the mortgagee, sought after notifying the *curator* of the facts and proceedings to quiet his title under the Quieting Titles Act, R. S. O. ch. 113:—

Held, that after the great and unexplained delay in the redemption suit, the decree made therein was no obstacle to the petitioner's obtaining a certificate of title.

Statement.

THIS was a petition by John Linderman Leslie presented under the Quieting Titles Act, R. S. O. ch. 113.

The petition was referred to the Referee of Titles at Hamilton, who certified that the petitioner was entitled to a certificate of title. But on the matter coming before the Inspector of Titles, that officer was of opinion that sufficient notice had not been given to the *curator bonis* of one David Buchan, formerly a mortgagor of the property. He therefore directed a notice to be served upon him specifically drawing his attention to the making of the decree for redemption hereinafter named. And no claim having been put in by the said curator or on behalf of the said David Buchan, he gave the following opinion:—

The petitioner claims title to the land in question under a conveyance in fee purporting to be made in consideration of $1,700, and dated November 20th, 1891.

Henry Leslie, the petitioner's grantor acquired title as assignee of a mortgage made by one David Buchan to D.

Statement.

& W. Anderson, dated July 3rd, 1848, to secure £52 and interest at six per cent. payable in one year from its date.

Henry Leslie in 1851 entered into and continued in possession until his conveyance to the petitioner, who has been in possession ever since.

The mortgagor, David Buchan, appears to be a lunatic, now, and for twenty years past, resident in Scotland. On September 5th, 1871, a bill for redemption was filed in the name of David Buchan against Henry Leslie, and on the 13th December, 1871, a decree for redemption was pronounced by Strong, V. C., in the usual terms. No proceedings whatever have been taken under this decree, and it could not now be prosecuted with effect without first reviving the suit and making the present petitioner a party, the legal title having now become vested in him.

The present *curator bonis* of the lunatic has been notified of the present application, and his attention drawn to the foregoing circumstances, and he has not seen fit to file any claim.

Under the Quieting Titles Act, however, the Court is only empowered to declare a petitioner to be entitled according to the evidence he adduces, and there is no power under that Act to declare a title, which is legally vested in one person, to be vested in some one else, merely because the former fails to come forward and assert his claim.

Notwithstanding therefore the fact that no claim is now made by the lunatic, it is necessary to consider whether on the facts disclosed the petitioner has proved himself absolutely entitled in fee, free from any right or equity of redemption in favour of the lunatic.

In considering this question I am deprived of the assistance of the argument of counsel, and shall have to dispose of it as best I may, upon an *ex parte* presentation of the case.

The point chiefly to be considered is this. Does the decree of 1871 for redemption preserve the rights of the

lunatic, notwithstanding the fact that it has never been acted upon? And could he now proceed with the accounts thereby directed, and carry the decree into execution? Statement.

I think both of these questions must be answered in the negative. No doubt the decree effectually stopped the running of the Statute of Limitations and gave a new starting point; but I do not think it enabled the plaintiff to lie by for an indefinite period before carrying it into execution.

The Court has always an inherent power to prevent its process from being used vexatiously or for unconscionable purposes, and it would at any time have power to stay proceedings even under its own decree, where circumstances have arisen which would make it inequitable that it should be further prosecuted by the party at whose instance it was pronounced.

Here it is quite true that it would have been competent for the defendant himself to have obtained the carriage of the decree, and procured the accounts thereby directed to be taken and a day fixed for redemption; and on failure to redeem he might have obtained the dismissal of the bill, which would have been equivalent to a foreclosure of the plaintiff's claim under the mortgage; but I do not think it was incumbent on him to do so. See per Lord Macclesfield, in *Hollinghead's Case*, 1 P. Wms. 743-4. He was a mortgagee in possession, and to have taken that course might have exposed him to serious expense, which he might never be able to reimburse himself. Whether at that time the equity of redemption was worth anything or not, I do not know; but if one may draw inferences from the evidence of the plaintiff one might almost assume that it was considered to be worthless, or the suit would have been prosecuted with effect. After the lapse of over twenty-one years, it does not seem possible that the plaintiff could now be permitted to proceed with the taking of the account, when the defendants' witnesses may have died, his proofs be lost, and he would be put to the utmost disadvantage.

Statement.

But in order to prosecute the suit with effect the plaintiff would, as I have said, have now to make the present applicant a party to the record; and any defence which would be open under a former bill of revivor and supplement would be equally available to this applicant.

Upon such proceedings the Court, though not absolutely bound by the Statute of Limitations nevertheless acts by analogy thereto, in the exercise of its discretion in granting equitable relief. In some cases it has seen fit to grant relief after even greater delay than has taken place here, but there have generally been circumstances which in the eyes of the Court excused the delay.

In *Gifford* v. *Hort*, 1 Sch. & L. 386, an attempt was made to get the benefit of a decree made forty years previously, but unsuccessfully. From the head note of that case it might be inferred that the relief was granted notwithstanding the delay, but the conclusion of the report at p. 411, shews that although the plaintiff obtained leave to file a supplemental bill, yet that he failed ultimately to obtain the relief he sought. And on p. 407 of the report there is a note of another phase of the litigation, from which it appears that the Court of Exchequer held that a delay of twenty-five years in the prosecution of a suit disentitled the plaintiff to relief, and the bill was dismissed. There the delay appears to have taken place before decree, here the delay is subsequent to it.

In *Egremont* v. *Hamilton*, 1 B. & B. at p. 531, Lord Chancellor Manners, says: "It does appear, that the Statute of Limitations cannot be pleaded *in bar*, to a bill of revivor, after a decree for account: but that it rests in the discretion of the Court, to be regulated by the circumstances of the case, whether relief shall be given; it was so decided by Lord King, *Hollingshead's Case*, 1 P. Wms. 742, who was an excellent lawyer; and that decision is referred to by Lord Redesdale, in the case of *Hovenden* v. *Lord Annesley*, 2 Sch. & L. 607."

And there are cases in which the Court has refused to allow its decree to be carried into execution after an un-

reasonable delay. *Pearson* v. *Belchier*, 4 Ves. 627, is an instance; there, a bill of revivor was filed in order to get the benefit of a decree for an account made twenty-seven years previously, and the Court refused relief on the ground of the delay. The principle which Lord Camden stated in *Smith* v. *Clay*, as reported in the note at p. 639, to *Deloraine* v. *Browne*, 3 Bro. C. C. 633, seems equally applicable both before and after decree. A Court of equity is not active in giving relief against conscience and public convenience. Nothing can call this Court into activity but conscience, good faith, and *reasonable diligence;* when these are wanting the Court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this Court. Argument.

But there is also the authority of the House of Lords in *Houlditch* v. *Wallace*, 5 Cl. & F. 629, for the proposition that the right under a decree to an account may be lost by laches in prosecuting the decree.

I am of opinion that there is ample ground for holding that after a delay of twenty-one years the plaintiff in the suit of *Buchan* v. *Leslie*, is practically out of Court, and could no longer be permitted to prosecute the decree pronounced at his instance, against the will of the present applicant.

There remains however to be considered, whether the fact that the plaintiff in that suit was a lunatic could make any exception in his favour. Of course it is well known that the Court is very careful in regard to the rights of lunatics, and will take care that their rights are protected; and it has occurred to me whether the question now under discussion can properly be disposed of without appointing the Official Guardian to represent the lunatic in these proceedings. If I were to appoint the Official Guardian *ad litem* to represent the lunatic, it would have to be done at the expense of the applicant, no matter what might be the result of any contention which he might see fit to raise; and although this alone ought not to deter

Statement.

one from adopting that course, yet it at all events is a reason for carefully considering whether it is absolutely necessary to be done; as it is obvious that the applicant has a right to be protected by the Court from any unnecessary expense in the prosecution of his claim.

If the lunatic were without any duly appointed committee or guardian, and his interests were wholly unprotected, I should have no hesitation in saying that a guardian *ad hoc* must be appointed for him; but here I find that he has a *curator bonis*, whose duties would appear to be similar to those of a committee under the English law. This curator has been fully notified; he has apparently deliberately determined that it is useless to contest the petitioner's claim, and as I think properly so, and under these circumstances I do not think I should now be justified in requiring the appointment of a guardian to the lunatic.

But there remains this point to which I have already adverted. Does the fact that the plaintiff was a lunatic excuse his laches? And I am of opinion that it does not.

In *Shipbrooke* v. *Hinchinbrook*, 13 Ves. at p. 396, Lord Chancellor Erskine said, in referring to an infant who had been guilty of similar laches: "The infant was made a party in 1789; and it is admitted, that an infant suitor is bound by laches in the suit."

Similar observations are to be found in other cases which I have referred to, and I think they establish the proposition that the fact that a suitor under disability cannot, because of his disability, excuse himself from the consequences of laches in the prosecution of the suit.

On the whole, therefore, I am of opinion that the petitioner is entitled to a certificate of title as prayed.

I also refer to *Doe Ausman* v. *Minthorne*, 3 U. C. R. 423; *Doe Perry* v. *Henderson*, *ib.* 486.

On the Inspector submitting the title, with his opinion thereon, to the Chancellor, he was unable to agree with the Inspector, and gave the following judgment:—

January 25th, 1893. BOYD, C.:—

Judgment.

Boyd, C.

A decree for accounts being made, the general rule is that time is no bar to the prosecution of that judgment; chiefly because each party is an actor and the one cannot impute laches to the other: *Onge* v. *Truelock*, 2 Moll. 31; *Higgins* v. *Shaw*, 2 Dr. & W. 356; *Moore* v. *Blake*, 4 Dow P. C. 230.

Here, as I understand, the plaintiff was incompetent to protect himself before decree obtained, and if so that is a material circumstance; and it is material to know when the foreign *curator* first became aware of the plaintiff Buchan's rights: *Alsop* v. *Bell*, 24 Beav. 459.

I do not see that the way is cleared to grant a certificate to the applicant. It is one thing to act after hearing the case of both; it is another to assume everything in favour of the applicant who seeks to quiet his title.

The following additional evidence was then adduced on the part of the petitioner, viz.:

An affidavit of the solicitor by whom the redemption suit had been instituted in 1871, from which it appeared:

That instructions for the suit had been given by Mrs. Buchan, of Mount Forest; that David Buchan did not communicate directly with him but only through a firm of Scotch solicitors who acted as solicitors for the *curator bonis* of David Buchan.

That on the 18th November, 1871, he wrote to that firm, advising of the particulars of the matter, the making of the mortgage, its assignment to Leslie, his going into possession, the commencement of a suit to redeem; that Leslie admitted the right to redeem on payment of the amount due, and he asked to be supplied with funds with which to continue the suit. That on the 28th December, 1871, he again wrote to them advising that a decree for redemption had been obtained, and asking for instructions for further proceedings, and to be placed in funds. That on the 18th June, 1872, and on 7th February, 1873, he again wrote that firm for instructions but received no further instructions to proceed with the suit.

Judgment.
Boyd, C.

The Chancellor, thereupon reconsidered the application and gave judgment as follows:

February 3, 1883. BOYD, C.:—

The mortgage, D. Buchan to David W. Anderson, was made on 3rd July, 1848, for £52 and interest, payable in a year from date. *Nothing has ever been paid.* That came by assignment to Henry Leslie in December, 1857, and he sold the land in November, 1890, to the applicant, John L. Leslie.

The bill to redeem was filed on behalf of Buchan, who was then in Scotland, and his affairs in the hands of a *curator*, Wilkie, on 5th September, 1871, on which a decree was obtained 13th December, 1871, which has never been prosecuted. The *curator*, Wilkie, died in 1871 before the decree was obtained. He was succeeded by David Lang (when, does not appear), who continued *curator* till his death in 1883. The next *curator* was W. Gordon, who was appointed in 1883, and is still in that office.

The petition to quiet the title was filed 10th February, 1892, by the purchaser, Leslie. A warrant to attend the proceedings was served on Gordon, the *curator*, on 16th July, 1892, and afterwards, in December, 1892 he was served with a notice setting forth the facts, by which he was fully informed of the nature and effect of this application and of the former proceedings in this court: to this the curator has not actively responded—so that the long delay has not been in any way explained. From the new materials, now supplied, it appears that the solicitors of the *curator*, in December, 1871, suggest that if no reasonable grounds for holding that the accounts would be in favour of the plaintiff, that matter should not be prosecuted. The Canadian solicitors responded, giving *data* on which a judgment might be formed, seemingly favourable to the plaintiff; but, no funds being supplied, nothing further was done. The Canadian solicitors again write for instructions on 18th June, 1872, and 7th February, 1873, but receive no answer.

Judgment.
Boyd, C.

The question is whether the great and unexplained delay from 13th December, 1871, till now—an interval of over twenty-one years—has precluded the plaintiff from prosecuting the reference as to the mortgage accounts. The enquiry could not be prosecuted without an order to continue the action, by bringing in the purchaser (the present applicant), as defendant, in whom has vested the legal estate.

The general rules to be considered are well expressed by Sugden, L. C., in two Irish cases: (1) An action properly instituted bars the operation of the Statute of Limitations, and during its pendency time does not run: *Wrioxn* v. *Vize*, 3 Dr. & W. at p. 123; (2) After decree the bar to the right of reviving the suit, which arises from delay in prosecution depends altogether on the discretion of the Court: *Higgins* v. *Shaw*, 2 Dr. & W. 356.

In the last case it was held that as the revivor was within twenty years after a decree for account, the Court would not withhold relief unless there was such a variation of rights as might work injustice.

Recently Fry, J., in *Curtis* v. *Sheffield*, 20 Ch. D. 398, gave leave to revive in an administration action after decree which had lain dormant for thirty-nine years, being of opinion that no person had altered his position or incurred any liability or suffered any loss in the interval. But the Judges in appeal do not appear to have been favourably impressed with the exercise of discretion, as appears in the further report of the case, 21 Ch. D. 1.

The decree to redeem in the present case was substantially an interlocutory decretal order referring it to the Master to take the mortgage account. It lay rather upon the plaintiff to prosecute that reference than the defendant. For the latter was in possession of the mortgaged premises after default made in payment, by which the legal rights of the mortgagor were at an end. The mortgagor had waited till the last minute of the eleventh hour before taking action, and has not excused his subsequent inaction. Regard must be had to the shortening

Judgment.

Boyd, C.

of the period for redemption by the Statute of Limitations from twenty years to ten, which imposed a further duty on the party seeking redemption to act promptly. That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the Court to hold its hand when the laches occur in the prosecution of a suit whether before or after decree: *Bland* v. *Davison*, 21 Beav. 312; *Lemesurier* v. *Macauley*, 22 O. R. 316.

That the trustee and curator, were nonresident is not a controlling circumstance, where the delay has been so great as here and remains unexplained: *Reimers* v. *Druce*, 23 Beav. 145.

There are old cases of redemption where the mortgagor has lost permission to redeem after decree to account by his laches: *St. John* v. *Turner*, 2 Vern. 417, and *Hartpoole* v. *Walsh*, 5 Bro. P. C. 267.

Under more modern practice as to prosecuting decrees, contrast *Parkinson* v. *Lucas*, 28 Beav. 627, with the expedition required under the amended Chancery procedure as laid down by Stuart, V. C., in *James* v. *Gwynne*, 2 Jur. N. S. 436, where he says the present state of the practice (1856) requires the rights of litigants to be adjusted speedily.

Since the order referring it to take accounts in 1871, twice ten years have elapsed, and the applicant purchasing in 1891 may well have considered that all proceedings to redeem had long been abandoned.

I proceed, therefore, as upon the default of the plaintiff in the redemption action, when summoned to present his claim and to explain his delay in this application, and come to the conclusion that the title should be cleared in favour of the purchaser Leslie.

See *Eaton* v. *Dorland*, 15 P. R. 138.—REP.

G. A. B.

[QUEEN'S BENCH DIVISION.]

CHATFIELD V. CUNNINGHAM ET AL.

Mortgage—Foreclosure—Action on covenant—Opening foreclosure—Sale after foreclosure—Validity of, as an exercise of the power of sale—Private sale—Inadequacy of price—Previous efforts to sell—Diligence—Judgment creditor—Status of, to attack sale—Judgment recovered after sale.

Mortgagees of a property, with a power of sale exercisable on default without notice, took foreclosure proceedings on their mortgage, and pending these obtained judgment in a separate action on the covenant against the executors of the mortgagor, and, after foreclosure of the mortgage, issued execution on the judgment, and sold thereunder other lands of the mortgagor, crediting the proceeds on the mortgage debt.

Previous to the foreclosure proceedings the mortgaged lands had been offered for sale by public auction under the power of sale and also privately, but without result.

About a year after the foreclosure the mortgagees sold the premises by private contract, conveying to the purchaser by ordinary short form deed without recitals, and the purchaser shortly afterwards sold again at a large advance, both purchaser and sub-purchasers being aware of the sale of the other lands under execution on the judgment on the covenant.

The plaintiff, a creditor of the mortgagor at the time of his death, did not recover a judgment for his debt until a year after the sale of the property by private contract, and subsequently purchased it at sheriff's sale under his own execution, and now claimed to be let in to redeem, or, in the alternative, that the mortgagees should account to him for the value of the property:—

Held, that the foreclosure was opened by the proceedings on the covenant, and any person entitled to redeem had a right to bring the action without first setting aside the final order; the right to redeem under such circumstances not being merely a personal equity in the mortgagor.

Held, however, that the sale by private contract and conveyance must be deemed an exercise of the power of sale, the equity of redemption then being at large.

Carver v. *Richards*, 27 Beav. 488, and *Kelly* v. *Imperial Loan Co.*, 11 A. R. 526; 11 S. C. R. 516, followed:—

Held, also, that the mortgagees had not acted negligently or carelessly in the sale, but had taken all reasonable care, and that they were not bound to offer the property a second time by public auction without some reasonable prospect of a sale:—

Held, lastly, that under any circumstances, the plaintiff not being an incumbrancer at the time of the sale, and the legal and equitable title having been vested in the purchaser before the sheriff's sale to the plaintiff, the latter was not entitled to an account from the mortgagees.

Statement.

THIS action was tried before ROBERTSON, J., without a jury, at St. Catharines, on 14th October, 1891, and afterwards came before the Divisional Court upon appeal from the judgment of the trial Judge.

Statement. The following statement is taken from the judgment of STREET, J., in the Divisional Court:—

The facts which appear to be material to the decision of the questions raised upon the motion before the Divisional Court are as follows:—

On 17th March, 1883, George N. Oille was the owner in fee simple of a machine-shop and premises in St. Catharines, the power for the machinery being derived from a water-wheel situated upon a small parcel of land immediately adjoining that upon which the machine-shop stood, but held under a separate conveyance. On 17th March, 1883, George N. Oille conveyed the property by way of mortgage to the defendants the Canadian Bank of Commerce, to secure a debt due that bank. The description in the mortgage did not in terms include the premises upon which the water-wheel stood, but it contained a general description under which the learned trial Judge held that the whole property passed, including the water-wheel, and his judgment in this respect is not attacked by either party.

On 28th March, 1883, George N. Oille died, leaving a will by which he appointed Lucius Oille and Jerome Oille his executors, and they duly proved it.

In 1886 the Canadian Bank of Commerce took proceedings against the executors and the owners of the equity of redemption of the premises covered by their mortgage, for foreclosure; and upon 8th June, 1886, obtained judgment ordering that the defendants should pay into Court $10,733.20 on 8th December, 1886, or be foreclosed.

Pending these proceedings, on 16th November, 1886, the bank, in separate proceedings, recovered a judgment against the executors of the mortgagor upon the covenant contained in the mortgage.

On the 10th December, 1886, the bank obtained a final order of foreclosure in their action to foreclose the mortgage.

On the 13th January, 1887, the bank placed in the sheriff's hands an execution upon their judgment of 16th November, 1886, against lands, and on 17th February,

Statement.

1888, the sheriff sold under this execution certain lands in Pelham; the bank purchased these lands at the sheriff's sale at $100, and subsequently, on 17th December, 1888, resold them to one Reynolds for a much larger sum: they have, however, credited the mortgagor's account with the larger sum.

On 21st December, 1887, the bank entered into a contract with the defendant Chaplin to sell to him the lands in St. Catharines, which they had foreclosed, for $9,000; and on 14th or 15th March, 1888, they received from him $2,000 in cash, and a mortgage for $7,000, and delivered to him a conveyance of the property bearing date 6th February, 1888. This sale was not made by public auction. Chaplin, shortly after he purchased, sold a portion of the property to the defendants Hough and Leggat for $6,000, and another portion to the defendant Wright for $5,000, and he retains a portion which he values at $2,000. The defendants Chaplin, Hough, Leggat, and Wright, when they purchased, were aware of the recovery by the bank of a judgment upon their covenant, and of their subsequent sale of the lands in Pelham.

The plaintiff was a creditor of George N. Oille at the time of the death of the latter, but he obtained no judgment until 19th March, 1889, upon which day, having obtained judgment against the executors of Oille, he placed an execution against lands in the sheriff's hands. Under this execution the sheriff advertised a sale of the fee simple of the water-wheel parcel, and of the equity of redemption of the machine-shop and premises. On the 12th April, 1890, the plaintiff became the purchaser at the sheriff's sale of the whole property, and received a conveyance from the sheriff, the purchase money being $10.

The mortgage from George N. Oille to the Canadian Bank of Commerce contained a power to the mortgagees to sell upon default without notice.

The plaintiff claimed possession of the water-wheel parcel, or, in the alternative, that he might be let in to redeem the premises covered by the mortgage to the bank; and if it

Statement. should be held that the persons who purchased from the bank were entitled to hold against the plaintiff, then that the bank might be ordered to account to the plaintiff for the value of the property.

Moss, Q. C., and *M. Brennan*, for the plaintiff.

S. H. Blake, Q. C., and *R. Gregory Cox*, for the defendants the Canadian Bank of Commerce.

Rykert, Q. C., for the other defendants.

November 2, 1891. ROBERTSON, J.:—

This action was tried before me at St. Catharines, at the last sittings, on the 14th October, 1891, and after the close of the plaintiff's case, I, for the reasons then given, ordered that the plaintiff's action, in so far as it relates to his claim to recover possession of the lands and premises mentioned and described in the first paragraph of his statement of claim, be dismissed with costs to be paid to the defendants. But in regard to the second branch of his claim, which is for an order and judgment allowing him to redeem the mortgaged premises mentioned in the sixth paragraph of his statement of claim, I reserved judgment.

[The learned Judge first stated his findings, which were substantially those facts set out in the statement *ante*, and continued]:

Having found these facts, the question arises, is the plaintiff entitled to be let in to redeem? I have already expressed my opinion in regard to the effect of the action taken by the bank on the covenant in the mortgage, and the judgment obtained by them, and it was admitted by Mr. Blake, of counsel for the defendants, that having received money on account of the mortgage debt after the final order of foreclosure absolute had been obtained by them, the effect would be the opening of the foreclosure; but he contended that there still existed the power of sale under the mortgage, and that the mortgagees having sold and conveyed the property—although nothing appeared in

the several conveyances thereof to shew under what power they intended to convey—having the power, that was all that was necessary. I agree with that contention, but I think it still open to the plaintiff to call upon the mortgagees to shew that they exercised that power in a reasonable way, and that they took all reasonable steps to obtain, and did obtain, a reasonable price, assuming that they conveyed under the power in the mortgage. Judgment. Robertson, J.

In my judgment, the effect of the manner in which the bank, as mortgagees, treated and dealt with the property was not such as to obtain the best price that could be obtained for the same. I think the onus was on the bank to shew that they had not sold at a greatly reduced value. They gave no evidence on this point, nor did the plaintiff; but the latter rested his case on what might be inferred from the fact that Chaplin, who purchased from the bank for $9,000, within five or six weeks thereafter, without advertising, sold a part of the property for $11,000, and he yet holds at least $2,000 worth unsold. I think this affords a strong presumption that due diligence was not exercised by the bank in obtaining the best price that could be got for the property. It was urged before me that a mortgagee is not a trustee, except for the surplus money, in case there is a surplus after paying the mortgage debt; that, no doubt, has been held; but I think the mortgagee is, nevertheless, bound to make the whole of his mortgage money out of the mortgaged premises, if he can, by using such diligence as any reasonably discreet man would in the disposition of his own property, and to that extent I think he is a trustee. Here the mortgaged property was disposed of for a sum much less than was due on the mortgage, and another property belonging to the mortgagor was also sacrificed; yet the full amount due to the mortgagees is not realized.

Then, again, it is contended that the plaintiff has no absolute rights here; that the mortgagor would have no such, and he has not; in fact the contention went so far as to lay it down that, while the Court might under certain

Judgment.
Robertson, J.

circumstances grant an indulgence to the mortgagor, that was personal to the mortgagor, and did not under any circumstances extend to his creditors. I cannot subscribe to this doctrine. Whatever rights the mortgagor had, became the rights of the plaintiff when he purchased at the sheriff's sale. It is absurd to suppose that the Court would not do all that was legal and just towards assisting a creditor to make the amount of a judgment which the Court had declared he was entitled to; in fact, to look at the real, true, and equitable position of the debtor and the creditor here, the former, until his debts are all paid, cannot be looked upon as entitled to say that he is really, truly, and equitably entitled to hold or enjoy any property whatever; so long as he owes a debt, his property is answerable for that debt, and the process of the Courts can be invoked in favour of the creditor to make it answerable for it. So that I do not think this contention should be allowed to interfere in the slightest with the disposition of this case. By force of the statute law of the land a judgment creditor has the right to sell the equity of redemption which the judgment debtor has in any lands or tenements; that being the case, the purchaser must have the right to stand in the place of the judgment debtor, and to come to the Court and ask its assistance to the same extent as the judgment debtor would; and it would be strange justice to say to a man, under such circumstances, that had his debtor come to the Court, he would have been vouchsafed an indulgence, but he, the creditor, had no *locus standi*.

I am, therefore, of opinion that had the mortgagor a right to redeem, this plaintiff has equally that right; and, after viewing the case from the different aspects presented, I have come to the conclusion that this is a case in which the plaintiff should be allowed to redeem. He has come promptly for relief; he has made out, I think, a strong case for relief; and I think if the Court should shut its ears to his supplication, he well might feel that strict justice had not been meted out.

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Robertson, J.

Now, let us look at the state of things as presented. The bank received this mortgage to secure a debt in preference to all other creditors, while a large debt was also due to this plaintiff's firm; the bank not only obtained this valuable security, but availed themselves of the right to make their money out of other property belonging to their debtor; they sacrifice that other property, thus depriving the plaintiff of any recourse he would have as a creditor against it; not being satisfied with that, they sell by private sale, without in any reasonable manner giving notice to the world or other creditors that they would do so, the mortgaged property over which they held complete control. Had this not been the case, and had this creditor known that the bank would sell at such a price, it would have suited his purpose, it may be, to have given a sum in advance of the amount paid for it by Mr. Chaplin; at least he should have had an opportunity of doing so.

In my judgment, there is a presumption, although not a strong one, nor have I allowed it to influence my mind in this matter, but it is this, that large corporations are not so likely to take the same care in the disposal of their mortgage securities as private individuals. The persons who have the management of such transactions are not personally interested; they do their duty from that point of view and nothing more; and while the bank's agent in this case stated that both he and his predecessor had endeavoured to sell the property for years and had never had an offer for it, one can easily understand why that was so—the public at large knew nothing of it—and the fact that the subject was spoken of whenever what was supposed to be an available opportunity presented itself, that was not what would be expected of a reasonably good business man, who might have his own interests to guard. When Mr. Chaplin made his offer, the bank officials should at once have said: we will advertise it for sale, so that you, Mr. Chaplin, will have the same chance that another may have; it is our duty to realize the very largest sum

Judgment. Robertson, J.

possible for this property; we are interested to the extent of $13,000, and there are other creditors; should we not realize more than you offer, or get any offer, then we shall be in a better position to treat with you. But that course was not pursued. The negotiations with Mr. Chaplin went on and culminated in a sale, out of which the purchaser cleared at least $4,000, nearly fifty per cent. on his purchase. I do not see how such a sale can be said to be one which the Court can sanction; and, as all the parties concerned had notice of the real state of affairs before they became purchasers, I do not think they can complain if the plaintiff is allowed to redeem.

There is a difficulty, however, in regard to the machinery which has been removed and scattered abroad; that will have to go, but I think the bank should account for it at the price obtained for it by Mr. Chaplin. And I think the plaintiff entitled to charge against the defendants Hough & Leggatt, and Chaplin, and the bank, all moneys which the bank, or any of the last mentioned defendants, have received or ought to have received on account of the mortgage debt.

Refer it to the Master at St. Catharines to take the usual accounts, and to make all necessary inquiries on the basis suggested, and to report. Further directions and costs reserved.

At the Easter Sittings, 1892, the defendants moved in the Divisional Court to set this judgment aside upon the following amongst other grounds:—

3. That there was no evidence that the foreclosure was opened up.

4. That no title passed to the plantiff under the conveyance from the sheriff, because the equity of redemption had been foreclosed, and the plaintiff's only right was to claim to open it, and because of the complicated character of the equity of redemption which he attempted to sell.

7. In any event there was a valid sale under the power of sale in the mortgage, and the validity of the sale was

not affected, so far as the purchasers were concerned, by the fact that the property was sold at an undervalue; and no right to claim damages against the bank for selling at an undervalue is vested in the plaintiff. Argument.

9. All that was vested in the executors of Oille at the time of the sheriff's sale was a supposed right to bring an action, and such right was not and could not be sold by the sheriff.

The motion was argued on 25th May, 1892, before the Divisional Court [FALCONBRIDGE and STREET, JJ.].

W. Cassels, Q. C., for the defendants. Sales of equities of redemption are governed by the statute which has been in force since 1849, 12 Vic. ch. 73, now R. S. O. ch. 64, sec. 21 *et seq.* No estate at law could pass under the sheriff's sale in the circumstances disclosed by the evidence. How could an execution creditor come in and sell when the equity of redemption was gone? The sale of an equity of redemption must be absolutely an equity; there can be no sale at law of an equity of redemption not appearing to be in existence: *McCabe* v. *Thompson*, 6 Gr. 175; *McDonald* v. *McDonell*, 2 E. & A. 393; *Fitzgibbon* v. *Duggan*, 11 Gr. 188; *Re Flatt and Prescott*, 18 A. R. 1. The power of sale in the bank's mortgage was exercised and the property sold a year before the plaintiff recovered his judgment. Both the final order of foreclosure and the deed were prior to the sheriff's sale. See *Prentice* v. *Consolidated Bank*, 13 A. R. 69. In *Kelly* v. *Imperial Loan Co.*, 11 A. R. 526; 11 S. C. R. 516, a deed by a mortgagee after a foreclosure was held good as an exercise of the power of sale; and this is a stronger case.

S. H. Blake, Q. C., on the same side. I did not admit in my argument at the trial that that foreclosure was opened. The learned trial Judge is mistaken as to that. The purchasers at the sheriff's sale were informed that the wheel was not and the rest of the property was covered by the mortgage. The potential equity was terminated by the sale by the bank to Chaplin: *Totten* v. *Douglas*, 16 Gr. 243; 18

Argument.

Gr. 341. The equity to open the foreclosure is a personal equity in the mortgagor, or a party to the action: *Paton* v. *Ontario Bank*, 13 Gr. 107; *McDonald* v. *Boice*, 12 Gr. 48; *Trinity College* v. *Hill*, 10 A. R. 99; *Campbell* v. *Holyland*, 7 Ch. D. 166; *Kerr* v. *Bain*, 11 Gr. 423; *Pegge* v. *Metcalfe*, 5 Gr. 628; *Parke* v. *Riley*, 3 E. & A. 215. The plaintiff's purchase was a mere purchase of a chance for $10: *Wigle* v. *Setterington*, 19 Gr. 512. Such a sale as this will be upheld, even if the price was inadequate, and here the price was the best that could be obtained. I refer to *Warner* v. *Jacob*, 20 Ch. D. 220; *Colson* v. *Williams*, 61 L. T. N. S. 71. The plaintiff was acting adversely to the mortgagees, and should not be allowed an indulgence.

Moss, Q. C., for the plaintiff. This was an interest that could be sold at the instance of an execution creditor. Under R. S. O. ch. 100, sec. 9, all sorts of interests may be sold and conveyed by deed. If the mortgagor had any right at all which he could convey under that section, it could be sold under execution by virtue of sec. 25 of R. S. O. ch. 64. The final order of foreclosure is for the benefit of the mortgagee, and he can put an end to that benefit by his own act. If he does so, the mortgagor or other person entitled has a right to come in; it is no indulgence. As to the effect of the final order of foreclosure, it never was an actual bar to the right of the mortgagor, but was subject to the discretion of the Court to allow him in: Coote on Mortgages, 4th ed., p. 1027; *Campbell* v. *Holyland*, 7 Ch. D., per Jessel, M. R., at p. 172; *Platt* v. *Ashbridge*, 12 Gr. 105; *Lockhart* v. *Hardy*, 9 Beav. 349, 355 *et seq.* The plaintiff has a right to claim both as a purchaser and judgment creditor: *Re Maughan*, 14 Q. B. D. 956; *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Furness* v. *Bond*, 4 Times L. R. 457; *Allhusen* v. *Brooking*, 26 Ch. D. 559. The sale having been a private one, the onus was upon the defendants to shew they got the proper price: *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Gr. 303; *Beaton* v. *Boulton*, W. N. 1891, p. 30.

Cassels, in reply. The plaintiff has no status to obtain an account without having the executors of Oille present. His remedy, if any, would be to set the executors in motion by an administration action. Argument.

December 24, 1892. The judgment of the Court was delivered by

STREET, J.:—

In *Dashwood* v. *Blythway*, 1 Eq. Cas. Abr. 317, decided in 1729, it is laid down "that if a mortgagee has a decree of foreclosure, though that decree be signed and enrolled, yet if he after brings an action of debt on the bond given at the same time for payment of the money and performance of the covenants in the mortgage deed, such action opens again the foreclosure, and lets in the equity of redemption of the mortgagor." The reason appearing in the subsequent cases for this rule is that the mortgagee cannot have both the land and the money; the foreclosure gives him the land in lieu of the money; if then he afterward sue for the money, he cannot retain the right which the foreclosure gave him.

In the present case the mortgagees brought their action upon the covenant pending the foreclosure proceedings, but before the final order was obtained. They proceeded to execution after the final order, and the same result must follow as if their action had not been begun until after the foreclosure was complete. The foreclosure being opened *ipso facto* by the proceedings taken upon the covenant, any person interested in the equity of redemption and entitled to redeem might bring a redemption action without first setting aside the final order; there appears to be no authority for the argument put forward by the defendants here that the right to redeem under such circumstances is a personal equity in the mortgagor, and is not one which may be exercised by derivative assignees of the equity of redemption.

Judgment.

Street, J.

As a judgment creditor of the executors of the mortgagor the plaintiff is entitled to redeem: *Greswold* v. *Marsham*, 2 Chan. Ca. 170; *Henry* v. *Smith*, 2 Dr. & War. at p. 390; unless his right has been put an end to by what took place after the foreclosure was opened.

The mortgage from Oille to the bank contains a power of sale in these words: "Provided that the said mortgagees may on default of payment for one month, etc., *without notice* enter on and lease or sell the said lands," etc. The foreclosure having been opened by the issue of execution upon the bank judgment on 13th January, 1888, the equity of redemption was as much at large as if no proceedings to foreclose had been taken, so far as the right to redeem was concerned, and so remained until 21st December, 1887, when the bank entered into a contract to sell the mortgaged premises to Chaplin for $9,000, which was carried out by two conveyances dated 6th February, 1888. Neither in the contract nor in the conveyances to the purchaser is there any recital of the title of the vendors; the conveyances are in the usual statutory form, with the usual covenants.

The principle, I think, here clearly applies which is thus stated in *Carver* v. *Richards*, 27 Beav. 488, and was acted on in *Kelly* v. *Imperial Loan Co.*, 11 A. R. 526; 11 S. C. R. 516: "That if the intention to pass the property subject to the power be clearly established, even though the intention to dispose of it under or by virtue of the power is not shewn, still that equity will give effect to the disposition and hold that the property passes under the power."

The present case is one in which the application of this principle is easier than it was thought to be in *Kelly* v. *Imperial Loan Co.*, where it was applied in the face of a recital in the conveyance of certain foreclosure proceedings upon which the vendor relied, but which were held to be invalid.

The sale by the bank to Chaplin was for $9,000; within a few months he resold one part of it at $6,000, and another

part for $5,000, and retained still a portion which he values at $2,000. In order to obtain these prices, however, he appears to have dismantled the machine-shop, and to have sold a large portion of the machinery apart from the rest of the property. Judgment. Street, J.

The property had been offered for sale at auction by the bank in 1884, under the power of sale in their mortgage, and the sale had been largely advertised in Toronto and Buffalo papers, as well as in the local paper; also by posters distributed in many places; but no bidders attended the sale, and it was abortive. Then the manager of the bank at St. Catharines, who was called as a witness, stated that he had placed it in the hands of a land agent in St. Catharines, and had himself, for two years before the sale, offered it to various persons, including the plaintiff, and had done his best to find a purchaser without success, until Mr. Chaplin decided to buy it. The sale was at a price which, according to the account produced by the manager of the bank, still left a balance of over $1,000 due the bank, after crediting the proceeds obtained by them of their sale of the Pelham lands.

No evidence of value was given by either party, but the learned trial Judge held that the fact of the resale of a portion at $11,000, whilst a part worth $2,000 still remained in the hands of the purchaser unsold, was evidence upon which he might properly find that the sale was at an undervalue. I am of opinion, with great respect, that the evidence did not justify the finding that the bank acted negligently or carelessly in the sale they made; on the contrary, I think it shewed that they took all the reasonable care and exercised all the diligence that a prudent owner would have used. They had offered the property for sale by auction, after giving wide notice of their intention to do so, and no bidders had appeared; they had offered the property for sale constantly by land agents, and through their own manager, without success. They were not bound again to offer it for sale by auction, unless some reasonable prospect of obtaining a purchaser appeared. I think,

Judgment.

Street, J.

under the circumstances, they were entirely justified in accepting the offer of the one purchaser whose business requirements happened to induce him to buy. Had the sale been for a price which covered their claim, it might have been more easy to impute to them a desire to realize their security without regard to the interests of any one but themselves; but this was not the case; the sale to Chaplin still left them creditors of the mortgagor to the amount of at least $1,000.

Even, however, if the conclusion at which the learned trial Judge arrived with regard to the sale was the correct one, and the property was sold at an undervalue, there was nothing in the circumstances of the sale which can lead to the conclusion that the inadequacy was so great as to lead to the presumption of fraud, and, in the absence of such a presumption, the sale to the purchaser must be held binding, even although the mortgagee may be held liable for a greater sum than the purchase money as between him and the owners of the equity of redemption: *Warner* v. *Jacob*, 20 Ch. D. 220; *Latch* v. *Furlong*, 12 Gr. 303. The sale then to Chaplin must be held good, and it remains to be considered whether, supposing that we are bound to hold the sale to have been at an undervalue, the plaintiff is entitled to an account from the bank of the price which they ought to have obtained. It is necessary to bear in mind that the sale to Chaplin was complete in March, 1888, and that the plaintiff did not recover judgment until March, 1889. He never, therefore, became an incumbrancer upon the property in question at all; he was never anything more than a simple creditor of the estate of George N. Oille. In that capacity no right of action against the bank vested in him; that right, if any, is vested only in the persons who were entitled to the equity of redemption, either as owners of it or as execution creditors at the time of the sale to Chaplin. Nor can the plaintiff claim such a right by virtue of any title arising from the conveyance to him by the sheriff, for at the time of the sheriff's sale there was nothing for the sheriff to sell, the title, legal and equi-

table, in the property which he purported to convey having been vested in Chaplin a year before the plaintiff's writ reached the sheriff's hands. Judgment. Street, J.

In my opinion, the motion should be allowed with costs, and the action should be dismissed with costs.

[CHANCERY DIVISION.]

MORSE V. LAMB.

Registry laws—Registrar's charges—Certified abstract—Abstract on township lots, subdivided by registered plans—R. S. O. ch. 114, sec. 95, sub-secs. 2 & 4.

A registrar's abstract having been demanded of all instruments registered upon two township lots comprised in a certain mortgage:—

Held that the registrar was entitled to charge two dollars on each general search of the township lots and twenty-five cents for the first hundred words, and fifteen cents for each additional hundred words of the abstract, as provided in R. S. O. ch. 114, sec. 95, sub-secs. 2 & 4; but the fact that the lots had subsequently to the mortgage been subdivided by the mortgagors without the assent of the mortgagee into a number of lots upon registered plans did not, under the said sub-section 2, justify him in charging also as for a separate search on each of the lots as shewn on the said plans.

THIS was an appeal by the plaintiff from the decision of the Inspector of Registry Offices as to the proper fees chargeable by the Registrar of the east and west ridings of York under the circumstances which are fully set out in the judgment of ROBERTSON, J. Statement.

The appeal was argued before ROBERTSON, J., in Chambers, on January 23rd, 1893.

Laidlaw, Q. C., for the plaintiff.
S. G. Wood, for the Registrar.

Judgment. January 28th, 1893. ROBERTSON, J.:—

Robertson, J.

This is an appeal under sec. 95 of the Registry Act as amended by sec. 8 of ch. 30, of 53 Vic. (O.), from the decision of the Inspector of Registry Offices, of a dispute between the plaintiffs by Bain Laidlaw & Co., their solicitors, and the said Registrar, in regard to the question of fees payable to the Registrar for an abstract of the lands and premises in question in this action, subsequent to the plaintiff's mortgage.

The Inspector decided that the Registrar is properly entitled to charge a fee of twenty-five cents on each lot for a search as marked on the plan of the said lands, which was made and filed after the plaintiff's mortgage, which was made and registered before the subdivision into smaller parcels or lots by the mortgagor, and the part of the decision of the said Inspector which is complained of, is as follows:—

"I do not think that a Registrar is confined to fees in case of plans, as he undoubtedly is, where no plan is filed, and where a number of smaller lots have been sold out of the original lot by metes and bounds. The words in subsection 2 are: 'Any lot or part of a lot of land as originally patented by the Crown, or as afterwards subdivided into smaller lots shewn by any registered map or plan thereof.' This language indicates that a lot for the purposes of the sub-section means a lot defined by any plan or map, whether a Crown survey or a smaller subdivision, and that the Registrar in such cases is entitled to a fee of twenty-five cents under that sub-section. Where small parcels are sold by metes and bounds off a township or other similarly defined lot, they are not separate lots for which the Registrar can charge separate fees. They are not shewn on a plan, and are at most 'part of a lot' without the qualification annexed by the statute. My finding is, that the Registrar is properly entitled to charge for searches a fee of twenty-five cents on each lot on the subdivisions."

The grounds of such appeal are that the plaintiff and the persons through whom he claims have not concurred in the said subdivision, and are not bound by any such plan: and they did not order an abstract according to a plan, but an abstract of subsequent registrations against the titles of the lots, included in the said mortgage; and the registrar complied with the request for the abstract according to its terms, and charged a fee of two dollars for a general search on each of the said lots mentioned in the mortgage; and the plaintiff claims that the statutory provision, that the Registrar is entitled to a fee of twenty-five cents for four references, and five cents, for every additional reference, does not in its terms authorize—and should not be extended to authorize—the Registrar to charge a fee of twenty-five cents for a search on each lot marked on the plan, but should be held to authorize the Registrar, in addition to the fee for general search of two dollars, to charge a fee of twenty-five cents for four references, and five cents for every additional reference, against the title of the lots, included in the plaintiffs' mortgage, and which were subdivided by the mortgagor as aforesaid. Judgment. Robertson, J.

The requisition is for "an abstract of all instruments which appear to have been registered in the Registry Office for the county of York upon lot No. 7, and that part of lot No. 6, in the first concession east of Yonge street in the township of York, described in mortgage No. 22992, Alfred B. Lambe, et ux., and Edward Gordon to George D. Morse, from and including said No. 22992." The mortgage bears date April 1st, 1887, and is registered on the same day; and the lands and premises are described therein by metes and bounds.

It appears that on August 20th, 1887, the mortgagors, Lambe and Gordon, registered a plan as No. 760, and subsequently two other plans, Nos. 870 and 896, shewing the subdivisions into which they had divided the property, and after that a great number of the smaller lots were conveyed; and registration of each conveyance was made. The mortgagors made default in payment of the mortgage

Judgment. Robertson, J.

money, and foreclosure proceedings having been taken, there was a reference to the Master as in an ordinary mortgage action; then it became necessary to furnish an abstract for the purpose of adding parties, who might be entitled to redeem, etc. The abstract furnished is such an one as was and is required; but the Registrar has charged more than the applicant thinks he is entitled to, under the Registry Act. The following is the Registrar's account:—

Preparing abstract of lands in mortgage registered No. 22992:	
General search on lots 6 and 7, in 1st concession east of Yonge street, township of York.....	$4 00
Search on plan 760.....173 lots.	
" " 870..... 30 "	
" " 896.....164 "	
367 "	
Charged in general search 2 " less.	
365 lots at twenty-five cents per lot.....	91 25
Writing—	
1 folio @ 25 cents....$0 25	
99 " @ 15 " 14 85	15 10
Making the total bill.....	$110 35

Sec. 95, sub-sec. 2 of the Registry Act (R. S. O. 1887, ch. 114) is in these words:—

"For searching the registry books and indexes relating to the title of any lot, or part of a lot of land as originally patented by the Crown, or as afterwards subdivided into smaller lots, shewn by any registered map or plan thereof, when not exceeding four references, twenty-five cents, and five cents for every additional reference; but in no case shall a general search into the title to any particular lot, piece or parcel of land exceed the sum of two dollars."

The Registrar concedes that if the mortgagor had laid off 365 parcels of the mortgaged premises, and conveyed

Judgment. Robertson, J.

each by a separate conveyance, no charge, such as is made here for searches, would be warranted; but he says, having subdivided the property into 365 lots, according to several plans, and having registered the plans, the mortgagee of the whole, as an original township lot or lots, wanting such an abstract as is here called for, he, the Registrar, is entitled to a search for ascertaining whether any one of the subdivisions has, subsequent to the plan, been conveyed, or otherwise disposed of or incumbered; and that being the case, it follows that the Registrar is legally entitled to charge for a "general search" on each lot. So that if it so happened that one or more of these subdivisions were affected by at least thirty-nine registrations, a charge of two dollars for a general search could be made, and it is upon this principle that he has made out his bill.

The abstract does not shew what part of the property is subdivided according to plan number 760, nor the number of subdivisions. But the Registrar's account charges for 173 lots, presumably these are the whole number of subdivisions on this plan.

The second plan, number 870, was registered on January 21st, 1889; nor is there anything to indicate the particular part of the property, which is subdivided according to it. The account, however, charges for searches in regard to thirty lots.

The third plan, number 896, was registered on April 17th, 1889, and the abstract is silent as to the particular part of the property which is subdivided according to it. The account charges for searches in regard to 164 lots.

The abstract shews that 364 of these subdivisions have, in one way or another, changed hands since the registration or filing of the respective plans; and the registrations against each, are set forth in the required manner—ground, number of instrument, nature of its date, date of registry, names of grantors and grantees, consideration and quantity of land affected by each conveyance or instrument. And it appears as well as I can make out, that if the Registrar is right in his contention, the charge of twenty-five cents for

Judgment. Robertson, J.

searches on each subdivision, is rather under than over what he is entitled to.

Unfortunately this is a case of first instance, and therefore must be decided, so far as I am concerned, according to the view I take of the statute, not overlooking of course the conclusion arrived at by the Inspector of Registry Offices, whose decision is appealed from, which decision, and the reasons given therefor, by the learned Inspector, I have read and considered in connection with the second sub-section of section 95 of the Act in question, with great care.

I do not think that the fact of the requisitionist in this case being a mortgagee prior to the subdivision of the property into smaller sections affects the question, and the legality of the filing of the plan is of no moment in considering the matter. The whole thing depends upon what is required of the Registrar. Here it is an abstract of all instruments which appear to have been registered, affecting lot No. 7 and part of lot No. 6, in the 1st concession of a township, as described in a mortgage duly registered. He does not require to know whether the mortgaged properties have been subdivided or not; it may be that they are; but if that has been subsequent to his mortgage it only concerns him to the extent of knowing who the parties are. It is of no consequence to the mortgagee whether there are 365 subdivisions or 965, and it makes no difference to him what particular subdivision each of such parties may have acquired an interest in; he does not deal with the subdivisions, he deals with and is concerned in the *whole* as one piece of mortgaged property as it stood at the time or date of the registration of his mortgage, and it is not necessary that the Registrar should ignore the subdivision, but he certainly cannot ignore the original lot as existing for registration purposes. If that was so, what would be the result of such a state of things? Take the case in hand, here foreclosure proceedings are being taken; granted that these culminate in reinstating the mortgagee and in foreclosing the equity of redemption

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of all parties subsequently interested in the land or any part thereof, is the mortgagee obliged to recognize these subdivisions? Is his property to remain an open common? Is he, after foreclosure, obliged to recognize the streets and lanes which have been laid out on it in accordance with these registered plans? The learned Inspector says not, and I agree with him. That being the case, his final order of foreclosure will, when carried into the Registry Office, annihilate the subdivisions and plans, and the mortgagee can then close up all streets and wholly enclose the property. His mortgage would be a poor security if he could not.

In this case, it is true, it becomes necessary to examine or search as to every subdivided lot, but not more so than would be necessary if a great number of small parcels had been conveyed off by metes and bounds, without there having been any subdivision according to a plan; and although the lots according to the plans may be legally there as distinct parcels, they are not more so than when similar parcels have been described by metes and bounds, and conveyed by such; and I cannot see anything in the statute that would warrant him, the Registrar, more in the one case, than in the other, in charging for each separate lot or parcel, as if an abstract was required of it separately. I do not think this abstract can be treated or looked upon as containing 365 abstracts; if it could, then the Registrar could have charged as for that number, which would make the charges, I should think, quite double, what they are. I grant that the Registrar is entitled to charge a fee of twenty-five cents under the sub-section in cases where there is a subdivision, if the party required an abstract of title as to one or more of these subdivisions; but it is quite another thing, if it is an abstract of the original township lot that is required. I fail to see the nice distinction that the learned Inspector draws between small parcels sold by metes and bounds off a township lot, and small parcels being subdivisions of the same lot, according to a plan. I cannot understand

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that the one should be a "lot" and the other only "part of a lot."

What difference is there in regard to the liability of the Registrar making an abstract of the one description of property than of the other? he has to or is entitled to examine every instrument in the one case as well as in the other; he is not bound to do so, it is true; he can rely on the correctness of his abstract index if he so pleases, as decided in *Macnamara* v. *McLay*, 8 A. R. 319; but that has nothing to do with the point here; if it has, one would think it would operate against the necessity of making this charge of twenty-five cents for every subdivided lot; in that case these lots are all entered in an index, numerically, and it may be, merely turning over blank pages in a great number of cases, although in this it appears, that 364 subdivisions have one or more entries in regard to them. From the abstract I am not able to say how many smaller parcels the mortgaged premises have been divided into, although I presume, from the fact of a search being charged on each of 365, that is the whole number; and if the Registrar is correct in his contention, he could legally charge for a search, whether the subdivided lot had been affected by any instrument registered against it or not. And that is one reason why in my judgment, the principle contended for by the Registrar is erroneous; for instance, if no instrument had been registered against any one of the subdivisions, the Registrar could, nevertheless, charge twenty-five cents for a search, for being able to say, nothing appeared in the abstract index in regard to any of the subdivisions The learned Inspector, in his reasons for his decision, makes the following statement:

"In making such an abstract which is certified as containing extracts from all instruments affecting a particular parcel of land, a Registrar renders himself liable for any defect or omission in the abstract. He is compelled to see that he gives all the instruments, if he desires to protect himself against loss. For this purpose he must make

the references to satisfy himself that the abstract is correct. If he does not do this it is his own look out. He may, as was pointed out in *Macnamara* v. *McLay*, 8 A. R. 319, merely copy the abstract index, or he may copy another abstract of the same title made the day previous for another person, and charge the same price for it. Patterson, J., says in that case, he sees no reason why this should not be done, and that no one would be injured or defrauded by it. The test is the responsibility of the Registrar for the truth of what is contained in the abstract and certificate. Applying this principle to the present case, I am unable to say that the Registrar could have given an abstract of title to the lands in question without searching each lot on the subdivision, and ascertaining firstly, that he had included all the lots which made up the whole parcel or parcels comprised in the mortgage, and secondly, that he had put in his abstract extracts of all instruments affecting the title to the land in question, which would, of course, include the instruments on all lots shewn on the subdivision. Whether he actually made these searches or not does not appear to me to be material. He assumed the responsibility of certifying that his abstract gave the information required, and rendered himself liable for the correctness of it.

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My finding is that the Registrar is properly entitled to charge for searches a fee of twenty-five cents on each lot on the subdivisions."

With great respect for this opinion, I find it impossible to arrive at the same conclusion.

The meaning of the sub-section, it appears to me, can be arrived at by taking for illustration the present case, and another which I will put. Here the applicant has a mortgage on two township lots; default is made in payment; he takes foreclosure proceedings, and is sent to the Master's office for the purpose of making certain enquiries *inter alia* whether any person, and whom, is entitled to redeem. Now every individual or corporation who, since the date and registration of his mortgage may have become entitled

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to an equity of redemption by reason of a purchase or otherwise from the mortgagor, is entitled to redeem, and it matters not how small or insignificant a piece of the original property as described in the mortgage may have been conveyed to him. In order to ascertain this fact he is obliged to go to the Registrar and make a requisition as to those instruments which have been registered in the meantime against the whole or any part of his mortgaged security. Full particulars can be affixed by the Registrar, who refers first to the index in which the original lots are entered. There he finds the applicant's mortgage. All entries then made are on the abstract. In the course of his search he finds that a plan of a part, or perhaps the whole, of his property has been filed under the provisions of section 84 of the Act. Having ascertained this fact, he knows that by section 32 an "abstract index" is kept, in which is entered under a separate head each separate lot, as defined by the plan of the subdivision of such land into smaller sections or lots, and all the particulars in relation to any transfer or incumbrance which may be at any time thereafter entered of record against or affecting any of these subdivided or smaller sections will be found in that abstract index. The Registrar there finds the names of all parties interested or who may have been interested in any part of the original mortgage premises. Now, how can it be said that on turning up that index because he finds that thirty or forty different parties have become interested in some one or more of the several subdivisions of the mortgaged property he is entitled to treat each of those subdivisions as a separate lot or part of the lot for which he is entitled to charge for searching, as if the applicant was looking for information against one or more of the subdivisions in particular.

It might so happen that not one of those subdivisions had been affected by registrations against them, and consequently nothing would appear in the abstract index, except the number of the lot, range, or street, according to the plan, and this would be written at the head of the

page for each lot. Now, these separate indices are required to be kept for the benefit and information of those who are, or may afterwards become, interested in the particular subdivision, but the original mortgagee is not so interested; if the plan had not been filed, the whole of the entries against the original township lot, or any part of it, would appear in the original abstract index where the mortgage first was entered. Judgment. Robertson, J.

Then again supposing that the great bulk of the subdivisions had been disposed of, or changed hands, time and again, so that against each subdivision there were at least a sufficient number of entries which, under ordinary circumstances, would entitle the Registrar to charge as for a general search on each subdivision that had registered against it the number of instruments entitling him to make such a charge: I do not think that the sub-section can be read so as to warrant any such construction.

In my judgment the Registrar is entitled to make a charge for a general search only, on the lot or lots, in regard to which the abstract is required; and he has made a charge for two such; one in regard to the original lot 7, and another in regard to the original lot 6, and I think it follows: that if he has no right to make a charge for the general search, he can have no right to make the charge of twenty-five cents on each subdivided lot; if he has, then what I have already pointed out would be the result; it would only be a question of the number of searches which would be necessary in regard to each subdivision. Otherwise it might prove a most disastrous matter for any one to take a mortgage on another's farm, or township lot. Take the case, for example, of a 200 acre farm being subdivided into 1,200 subdivisions. The least in such a case that the Registrar would be entitled to charge for searches alone in preparing an abstract required by the mortgagee would be $300, and not a single entry need appear against a subdivision to enable him to do so, and it might amount to three times that sum.

It would be quite another matter if this mortgage had

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been given after the subdivision, and the filing of the plan; then it would be subject to the plan and all its consequences; then the subdivisions would each stand on a separate footing in regard to the mortgage, and the Registrar in such a case would have the right to charge as he has done in this case.

After much consideration, therefore, I have come to the conclusion,—and although in this as in the great majority of cases which I am called upon to decide I do not feel too confident in my own opinion. I am always impressed with the idea that I may be wrong; but I cannot in this case arrive at any other conclusion than that the Registrar is entitled only to charge for preparing this abstract—*First*, for a *general search* of two dollars on each lot mentioned in the mortgages; *Second*, for the abstract twenty-five cents for the first one hundred words, and fifteen cents for every additional hundred words, as provided in sub-sections 2 and 4, of section 95 of the Act; and as he has only charged for 100 folios of 100 words each, and as I think there are double that number, I will allow him to amend his charges in that respect; but in regard to the particular question submitted to me, as before stated, I think he is in error in charging twenty-five cents for a search in each of the subdivision lots.

I therefore allow the appeal, but I do not think it is a case for costs, it being one of first instance, and the question involved being one of considerable difficulty.

A. H. F. L.

[CHANCERY DIVISION.]

JOHNSTON V. BURNS.

Assignments and Preferences—Sale of debts—Action by purchaser—Set-off of barred claim—R. S. O. ch. 124, sec. 20, sub-sec. 5—Sec. 23.

R. S. O. ch. 124, sec. 20, sub-sec. 5, which provides that where a claim against the estate is contested by the assignee the same shall be for ever barred of any right to rank thereon if an action is not brought against the assignee to establish the claim within a limited time, only applies to the right to rank on the estate, and does not affect the right to set-off the claim so barred in an action against the claimant by the assignee of the estate, or any one claiming through him.

Statement.

THIS was an action brought by one Follis Johnston as purchaser from one Harry Vigeon, assignee for creditors, under R. S. O. ch. 124, the Assignment and Preference Act, of W. F. Johnston & Company, of the book debts of the said insolvents to recover a sum of $300.50 alleged by him to be due from the defendant to the said W. F. Johnston & Company for coal and wood sold and delivered to him. By his statement of defence the defendant alleged that the plaintiff was himself a creditor of the said firm of W. F. Johnston & Company, and could not by law purchase the assets and book debts of the estate of the insolvents from the assignee, and also claimed a set-off in respect of goods sold and delivered, and services rendered by him to the insolvents, to the amount of $358.50, making a balance in his favour of $58, in respect to which he filed with the assignee a claim against the estate.

By way of reply the plaintiff set up the fact that pursuant to the directions of the inspectors of the estate a notice of contestation of his alleged claim against the insolvents had been served upon the defendant on December 7th, 1891, but that the latter did not bring action against the assignee to establish his claim within the thirty days mentioned in sec. 20, sub-sec. 5, of R. S. O. ch. 124, and that his claim in consequence was wholly barred, as had been held by MacDougall, Co. J., upon the application made before him by the defendant on February 2nd, 1892, for an order to extend the time of service of a

Statement. writ of summons against the assignee in respect to his alleged claim; and the plaintiff therefore denied that the defendant had any claim against the assets and book debts assigned by the insolvents to Vigeon, and by Vigeon to him, and submitted that the defendant was estopped from setting up his alleged claim against the plaintiff.

The action came on for trial before MEREDITH, J., at the Assizes at Toronto, on December 21st, A.D. 1892.

J. M. Clark, for the plaintiff.
Frank Denton, for the defendant.

January 10th, 1893. MEREDITH, J.:—

Admittedly the case, if between the original parties to the transactions in question, would be one of mutual debts, the subject of set-off at common law.

The one question is, whether the defendant has lost that right under any of the admitted facts of the case.

Unless the Act R. S. O. ch. 124 deprive him of it he has not, for it is obvious, if not also admitted, that under a simple assignment of the *chose in action* the right would remain unaffected.

But what is there in that Act, or any of its amendments, in any way indicating any intention to interfere with this right.

In section 23 the law of set-off is expressly declared to be applicable to claims against the estate, and to actions brought by the assignee for the recovery of debts due to the assignor; whilst section 20 provides only that a person in the position of this defendant, upon the admitted facts, "shall no longer be deemed a creditor of the estate, and shall be wholly barred of any right to share in the proceeds thereof, * * * and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claims existed, but without prejudice to the liability of the debtor therefor."

The defendant's claim thus barred was only "to rank upon the estate assigned" for the balance of the debt due

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Meredith, J.

from the assignor to him after giving credit for the full amount due by him to the assignor; a claim to something affecting the equal distribution of the proceeds of the estate provided for by the Act. What need for any greater bar than of any right to share in such proceeds, leaving all other rights unaffected?

This legislation cannot be considered a bankruptcy or insolvency law, though it go as far as possible in that direction, for such legislation is beyond the power of the Provincial Legislature; even if under such a law a different result would follow in the absence of a sufficient saving clause respecting the right of set-off.

There is very little provision made in the Act, or any of its amendments, respecting the sale, or other disposal of the estate. Section 16 provides for convening a meeting of creditors for the appointment of inspectors, and the giving of directions with reference to the disposal of the estate; and section 11, ch. 19, of 50 Vic. (O.), provides for the giving of all necessary directions in that behalf by the Judge of the County Court in case a sufficient number of creditors do not attend such meeting, or fail to give directions with reference to the disposal of the estate.

What then is there warranting the claim that a purchaser of "book debts," from an assignee appointed and acting under the provisions of the Act, acquires a higher or greater right than either the original creditor had, or the assignee, if suing for the recovery of such debts, would have? I am quite unable to find anything expressly giving such a right, or indeed giving countenance to such a claim; or to perceive anything in the objects or purposes of the Act making it necessary or expedient that the right of set-off should stand upon any footing different, in such a case as this, from the ordinary case of an assignment of such a *chose in action*.

The plaintiff's claim therefore fails, and the action must be dismissed, with costs, upon this issue (*a*).

A. H. F. L.

(*a*) This case is now standing for judgment before the Divisional Court.—REP.

[CHANCERY DIVISION.]

IN RE THE HESS MANUFACTURING COMPANY.

SLOAN'S CASE.

Company—Purchase by promoter—Sale to company by—Paid-up stock—Contributory—R. S. C. ch. 129.

The appellant, intending to promote a joint stock company for manufacturing furniture, procured the conveyance to himself of certain lands, free of charge, in consideration of the factory being erected upon them, which was done, he contributing $7,300 for that purpose. $7,000 of this he repaid himself by mortgaging the land.

The company was incorporated under R. S. O. (1887) ch. 157, the appellant being one of the directors and appearing as a subscriber for 150 shares. At a shareholders' meeting, after he had ceased to be a director, but at which he was present by agent, it was agreed that the company should purchase the land and factory from him for $25,000, payable by the assumption of the $7,000 mortgage and the issue to him of $18,000 of paid-up shares, which were accordingly allotted to him. Subsequently he transferred 234 of the 360 shares so allotted. A winding-up order having been made under R. S. C. ch. 129:—

Held, affirming the decision of the Master in Ordinary, that the appellant, as a promoter of the company, held a fiduciary position towards the company which precluded him from making a profit on his dealings with the company, and that he was liable as a contributory in respect to the 126 shares still held by him, but not in respect of the shares transferred, the same having been taken by him as trustee for those to whom he afterwards transferred them.

Statement. THIS was an appeal and cross-appeal from the order of the Master in Ordinary dated November 21st, A.D. 1892, made in the course of the winding-up proceedings of the above company, under R. S. C. ch. 129, whereby he ordered that William Sloan should be settled on the list of contributories of the above company, and declared him a contributory in respect to 126 shares of the capital stock of the company of the par value of $6,300. The company was incorporated under R. S. O. (1887) ch. 157.

The circumstances of the case are fully set out in the judgments.

THE MASTER IN ORDINARY:—

Judgment.

Master in Ordinary.

In this case the liquidator applies to have the name of Dr. William Sloan placed on the list of contributories for 360 shares, representing $18,000 of the capital stock of the company, or for so much thereof as remains unpaid.

The evidence proves that Dr. Sloan was one of the original promoters of the company, and that he gave his son-in-law, Emil George Hess, another promoter of the company, a power of attorney authorizing him to act as his agent in the transactions disclosed in the evidence, under which Hess procured from certain vendors, Mr. Cormack and others an agreement for the purchase of certain land in Toronto Junction as a site for a furniture factory, and on which a factory was erected by moneys furnished by Dr. Sloan and others. The evidence also proves that Dr. Sloan did not intend to acquire the land, or to pay for the building of the factory, with a view to his owning and operating a furniture factory, but that his intention and that of all the other parties was that the factory property should be handed over to a joint stock company for the purpose of operating a furniture manufactory. Dr. Sloan, in his evidence, states that he allowed his name to be used on condition that a joint stock company was to be formed as he did not want to run a furniture factory.

With this intention, Dr. Sloan's agent entered into an agreement with the vendors for the purchase of a site for the factory at the price of $3,000; which was not to be payable if a factory was built thereon "with a capacity for employing thirty hands;" the agreement providing that "the building and completion of the said factory being hereby intended to wholly satisfy said purchase money of $3,000." The factory was built at a cost to Dr. Sloan of about $7,300, to which further sums were contributed by members of the Hess family, and the land was thereupon conveyed to Dr. Sloan free of the charge of $3,000. Dr. Sloan then mortgaged the property for $7,000, which repaid all his advances except about the sum of $300.

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While the factory was being erected, Dr. Sloan and others applied for a charter of incorporation for the "Hess Manufacturing Company of West Toronto Junction, Limited," and in November, 1889, letters patent were issued incorporating the company, and constituting Dr. Sloan one of the directors. He appears to have held office as such director up to January 27th, 1890, when a new board was elected at a meeting of the shareholders. At the same meeting, at which he is stated to have been represented by his proxy, the following agreement is recited in one of the resolutions entered in the minute book (p. 401): "Whereas arrangements have been made with Dr. William Sloan of the village of Blyth in the county of Huron, for the purchase, for the purposes of the company, of part of lot one in the town of West Toronto Junction (describing it). And whereas the said Dr. Sloan has agreed to sell such land and buildings to the company for the sum of $25,000, payable as follows: The company to assume a mortgage of $7,000 on the said lands, and to issue to the said Dr. Sloan $18,000 of paid up capital stock of the company; the subscription of $7,500 of the said capital stock by Dr. Sloan to be included in such issue of paid up stock for $18,000, and such subscription of $7,500 be merged therein. Resolved that the shareholders accept the terms of sale as herein stated with the said Dr. Sloan, and the directors of the company are hereby empowered and authorized to carry out such purchase, and pass any necessary by-laws, and execute all documents, and make such entries in the books as are necessary to effectuate the same." A by-law was subsequently passed in the terms of this resolution, and $18,000 worth of paid up shares in the capital stock of the company were entered in the books to the credit of Dr. Sloan. There were four persons present at the meeting of January 27th, 1890, viz., H. B. Morphy, E. G. Hess, Wm. Hess and Elizabeth Hess, and E. G. Hess as proxy for four others. Dr. Sloan states that he did not know how these figures were arrived at.

With the exception of the sum of about $300, all

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advances by Dr. Sloan for the building of the factory, had then been repaid by the mortgage loan of $7,000 assumed by the company. The liquidator contends that Dr. Sloan gave no consideration for the $18,000 worth of paid up shares in the capital stock of the company, and that he is now liable to pay that amount as a shareholder in the company.

The first question to be considered is, whether a promoter, as well as a director of a company, stands in such a fiduciary relation to the company as debars him from making any personal profit out of his dealings with the company. The law appears to be well settled as regards directors. See *In re Iron Clay Brick Manufacturing Co.*, 19 O. R. 113. The case of the *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73, is one of a series of cases establishing the rule that the promoters of a joint stock company stand in a fiduciary relation to their company—which is their creation—although at the time there may not be a single *bonâ fide* shareholder.

That case has much in it which is applicable to the one now being considered. There a property was purchased by an agent of one of the promoters for £60,000, who went through the form of selling it to another agent of one of the promoters who purchased it on behalf of the intended company for £110,000, of which £80,000 was to be cash, and £30,000 paid up shares. The Court held that the promoters stood in a fiduciary relation to the company; that, as they gave only one-half what the company was going to give, and had obtained the acceptance of the contract from such a board as they had created, the contract was not binding, and the promoters were thereupon ordered to repay the moneys obtained by them from the company. Sir W. James, L. J., said, at p. 118: "I can see no difference between a promoter and a trustee, steward, or agent." And Sir Geo. Jessel, M. R., pointed out the duty owing to future shareholders, in these words, at p. 113: "These gentlemen, who were nominated as directors, had a duty to perform—not to the then nominal shareholders,

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who were nobodies; there were really none, although there were persons who had agreed to take shares but—to the future shareholders who were to form the company."

The case was appealed to the House of Lords (3 App. Cas. 1218) and affirmed, Lord Cairns, L. C., thus referring to the position of promoters of a company: "They stand," he said, at p. 1236, "undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation."

A similar view was taken of the position of promoters in *Bagnall* v. *Carlton*, 6 Ch. D. 371, where Bacon, V. C., held them to be agents, "self-appointed, but none the less agents of the company," (at p. 384.) Cotton, L.J., on appeal, concurred, and held that such persons could not secretly make to themselves a profit in a transaction with their company. A new company represents future shareholders, so that a fraud committed by all the persons then interested in the company will not bind the future shareholders. See further on this point, Lindley's Law of Companies, pp. 351 and 370.

Not only does the evidence establish that Dr. Sloan was one of the original promoters and one of the first directors of the company, but in a letter to the municipal clerk of West Toronto Junction about hydrants, dated October 14th, 1889, his name appears signed as "Dr. Sloan, agent for the Hess Manufacturing Co., of West Toronto Junction (Limited)."

In *Parker* v. *McKenna*, L. R. 10 Ch. 96, it was held that if a person is an agent of a company at the time the profit is bargained for, or at the time the profit is received, such profit must be accounted for to the company. And the Court intimated (at p. 124), that the rule is "an inflexible rule, and must be applied inexorably by the Court, which is not entitled to receive evidence or suggestion or argument, as to whether the principal did or did not suffer

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any injury in fact by reason of the agent;" "for," said one of the learned Judges, "the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."

On the evidence in this case, I must hold that Dr. Sloan held a fiduciary relation to the company at the time the profit was bargained for. But it is contended that the only remedy the liquidator is entitled to, is to have the contract rescinded, and the shares retransferred to the company; and this brings up the second question to be considered. The contract cannot be rescinded as to the conveyance of the land, for it was acquired by Dr. Sloan as a trustee for the company, and the company are entitled to their property.

In Buckley's Companies' Acts, 6th ed., p. 409, the cases are discussed which illustrate the jurisdiction of the Court in cases like the present, whether the proceedings should be taken under the Companies' Act, 1862, sec. 165, (our Act R. S. C. ch. 129, sec. 83) as for a breach of trust, or under the proceedings against contributories. The result of cases seems to be that, if the party has parted with the shares, the proceeding should be as for a breach of trust; but that if the party is holder of any of the shares, and that the payment has been made by a fictitious proceeding, or one under which the company has really never received the amount payable on the shares, the proceeding may be against him as a contributory in respect of the shares which he has not transferred.

Daniell's Case, 22 Beav. 43, S. C. 1 DeG. & J., 372, shows how a promoter and director obtaining paid up shares without consideration, may be dealt with. Dr. Daniell was allotted 200 paid up shares in consideration of his services as a promoter. He subsequently transferred all his shares, but such transfer was held to be invalid. And on the winding up of the company, he was placed on the list as a contributory. In giving judgment, Turner, L. J., said (1 DeG. & J., at p. 378): "These shares were assets of the company; Dr. Daniell appropriated 200 of them to himself. By that

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appropriation they were prevented from being disposed of for the benefit of the company. Can trustees (and directors of companies are trustees or quasi trustees) appropriate the trust property to themselves, and then say to their *cestuis que trust*, 'we took this property upon the terms that we should not be liable for any loss which might arise upon it.' I think a Court of Equity would not permit this, but would view the matter in this light,—there is a double breach of trust—in taking the property at all; and a further breach of trust in introducing this stipulation into the contract, and the *cestuis que trust*, must have the option of affirming the one breach of trust and disaffirming the other." See also *Nickoll's Case*, 24 Beav. 639.

This doctrine of equity may be further illustrated by the case of *Preston* v. *Cincinnatti, etc., Co.*, 36 Fed. Rep. 54, where it was held that if the payment of shares accepted by a director or promoter is shown to be fictitious, or by a proceeding under which the company never receives the amount payable on the shares, the director or promoter may be rendered liable as a contributory.

The rule therefore is clear that where a party contracts to take shares in a company which he intends shall be paid up shares, he contracts to take them and to pay for them; and that if he obtains an allotment of shares which the law renders unpaid, or paid for in an illegal manner, the proceedings of the liquidator against him may be in the nature of an action seeking the specific performance of his part of the contract, by compelling payment for the shares; for having procured a title to a portion of the capital stock of the company, he thereby became a member of the company, and was in consequence bound to pay for the property he had obtained in the capital of the company, and such which payment must be in cash or its equivalent. See *Pagin and Gill's Case*, 6 Ch. D. 681.

In this case Dr. Sloan held the title to the factory property, not in his personal right but, as trustee for the new company. He and his co-promoters were creating the owners or buyers of the property. He was

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Master in Ordinary.

therefore disqualified from making any profit on his transferring that property to the company which he had assisted in creating for the purpose of using the property; and his obtaining $18,000 worth of the capital stock of the company without paying or giving any consideration in money or property, was a breach of trust, as well as a breach of his contract to pay the value or price of those shares into the capital of the company.

The Ontario Act R. S. O. ch. 157, sec. 61, provides that each "shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon." The English Act of 1867, although not identical, is substantially the same. And in *White's Case*, 12 Ch. D. at p. 517, Cotton, L. J., said: "There must be money due from one to the other on both sides, and the parties must agree to set one demand of money against the other demand of money." In this case the company were not owing to Dr. Sloan the $18,000 for the land and factory—(except perhaps as to the extent of $300)—and there was not therefore a money demand by Dr. Sloan against the company to be set off against the money demand by the company against Dr. Sloan for the $18,000; and it has not been shewn that Dr. Sloan has satisfied in a legal way that money demand.

But as Dr. Sloan has transferred all but 126 of these shares to other parties, the remedy of the liquidator against him under this proceeding must be limited to the value of the shares which he held at the time of the commencement of these winding up proceedings, less the amount due him in respect of the $300. Any question of his liability in respect of the transferred shares cannot be considered on the proceedings against him as a contributory.

This appeal was by the said William Sloan upon the following grounds:—

1. The learned Master found that in acquiring the lands

Statement.

sold to the company and in erecting the factory thereon, the said William Sloan did so as a trustee for the company, and his whole judgment is based upon this, whereas at the time of the acquisition of the said lands, September 23rd, 1889, the company was not in existence, nor had a charter been applied for.

2. If Sloan at any time was a trustee for any one, it was for the various members of the Hess family who contributed to the building of the factory by their money, labour and material, and in this proceeding it is not sought to render him liable to them.

3. At any time prior to his conveyance to the company Sloan (it may be requiring the consent of the members of the Hess family who had contributed as aforesaid), could have disposed of the lands and factory, or retained them as he saw fit.

4. Sloan was never a promoter of the company.

5. Emil G. Hess was not the agent of Sloan with reference to the company. He acted as his agent duly authorized in the purchase of the lands and the erection of the factory.

6. If Sloan was a trustee for the company (which is denied), he was bound to convey to it without consideration, but no reason can be suggested why he should have made a gift to the company.

7. The learned Master, holding that Sloan was a promoter of the company, held that he could not make a profit in the sale of the lands and factory to the company. In the first place, there was no evidence to show that a profit was made, but if a profit had been shewn, Sloan was at liberty to make such profit so long as the sale was a proper one in which no advantage was taken of the company, and the evidence shows that the company knew all the circumstances in connection with such sale as well as Sloan, there was no concealment on Sloan's part, and no advantage was taken of the company by him.

8. If a profit had improperly been made to which the company was entitled, the remedy would be that Sloan should account for the same, not that he should be placed

on the list of contributories as not having paid for shares. This proceeding is not to account for profit; in fact, it is admitted he made none, but lost. Statement.

9. If an advantage had been taken of the company by Sloan, the remedy is rescission of the contract, but from the time of the sale, January 27th, 1890, to the winding up of the company, no step was taken in this direction, but on the contrary the transaction was endorsed by the company mortgaging the property for $12,000 instead of $7,000, and otherwise.

10. In case of rescission Sloan would be entitled to a reconveyance of the lands and factory, and the company to get back the consideration, the stock, the shares still being held by Sloan, and an account of those disposed of by him.

11. The learned Master treated the 360 shares held by Sloan as if he had subscribed for them and agreed to pay for them in cash. No such agreement was proved or even suggested.

12. The learned Master held that R. S. O. ch. 157, section 61, was equivalent to the Imperial Statute, 30-31 Vic. chapter 131, section 25, and applied the decisions thereunder to this case.

13. Should it be held that Sloan was in the position of a trustee as regards the Hess family, then he was a trustee for the shares he held, and as such trustee is not liable as a contributory.

14. The shares for which the said Sloan is held liable were transferred by him and with the consent of the learned Master.

15. The evidence taken before the learned Master discloses no reason why Sloan should be placed on the list of contributories.

16. The order or report of the Master is against law and the evidence.

The cross appeal was on behalf of the liquidator and asked for an order varying the order of the Master in Ordinary by settling Sloan upon the list of contributories

Statement. for 360 shares of the capital stock of the company on the ground that the learned Master erred in holding that the question of the liability of the said Sloan in respect of the shares (being part of the said 360 shares), transferred by him prior to the commencement of the winding up proceedings herein could not be considered on the proceedings against him as a contributory.

The appeal and cross appeal came up for hearing before MEREDITH, J., upon December 16th, A. D. 1892.

Haverson, for the appeal, cited *Ladywell Mining Co.* v. *Brookes*, 34 Ch. D. 398, 35 Ch. D. 400; *Erlanger* v. *The New Sombrero Phosphate Co.*, 3 App. Cas. 1218.

[MEREDITH, J., referred to *Newbigging* v. *Adam*, 13 App. Cas. 308.]

Hellmuth and *Raney*, contra. From the outset Dr. Sloan came into the matter as an agent and trustee for the company which was subsequently formed. Dr. Sloan neither gave money nor money's worth for his shares, and can be made a contributory: Buckley's Companies Acts, 6th ed., p. 558; *Spargo's Case*, L. R. 8 Ch. 407, at p. 410. He cannot say that when he bought the property he was not acting for us. This distinguishes this case from the *Ladywell Case*. The fact that he has parted with his shares does not release him: *Daniell's Case*, 22 Beav. 43, 1 DeG. J. & Sm. 372; *Carling's Case*, 1 Ch. D. 115. It is true that Lindley's Law of Companies, 5th ed., at pp. 788-790, says that when shares have been issued to promoters under circumstances of breach of trust, they cannot be held as contributories. But this is not borne out by the *Carling* and *Hespeler Cases*, which he cites, see 1 Ch. D., at p. 126. We are in the position of *Daniell's Case*, *supra*; and of *Nickoll's Case*, 24 Beav. 639; and *Dent's Case*, 15 Eq. 407, 8 Ch. 768. What Lindley says is not warranted in cases where the bargain is made directly between the party sought to be made liable and the company: *Pagin & Gill's Case*, 6 Ch. D. 681; *Andress' Case*, 8 Ch. D. 126. The principle of these three cases is applicable here.

[MEREDITH, J.—Assuming a man takes unpaid shares in good faith, but illegally, why should he do more than make good the loss sustained ?] Argument.

We answer by referring to Buckley's Companies' Acts, 6th ed., at p. 49. The question is not, could the shareholders compel payment up, but could the creditors do so ? If so, the liquidator, as representing the creditors can do so. See R. S. O. ch. 129, sec. 49; and *Christopher* v. *Noxon*, 4 O. R. 672, where the section was treated as absolutely prohibitory. Section 61 should be construed just as strictly. R. S. C. ch. 129, sec. 45, is more far reaching than any of the provisions in the present English Winding-up Act. I also refer to Buckley's Companies' Acts, 6th ed., p. 409, note; *Davidson's Case*, 3 DeG. & Sm. 21; *Potter Brown's Case*, 26 W. R. 839.

Haverson, in reply. There is no pretence here that any one has been deceived; *Ladywell Mining Co.* v. *Brookes*, 34 Ch. D. 398, 35 Ch. D. 400, and *In re Cape Breton Co.*, 29 Ch. D. 795, are in our favour. If it had been shewn Dr. Sloan made a profit, it might be he could be held accountable for that. But he certainly is not liable to be placed on the list of contributories. If the contract for the sale to the company was a good contract, why hold him liable as contributory; if bad, why call him to pay for what he has not got ? The company ratified the transaction and cannot rescind, and are without remedy now: Lindley's Law of Companies, 8th ed., p. 357-8, and the cases cited; *Pell's Case*, L. R. 5 Ch. 11. It may be contended that Dr. Sloan was trustee for the Hess family. If so, he is not personally liable. He never agreed to pay cash for his shares, and it would be very hard to make a new contract for him: *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73, 3 App. Cas. 1218.

January 10th, 1893. MEREDITH, J.:—

The proper determination of the questions in issue depends very largely, if not altogether, upon a correct finding of the facts in controversy.

Judgment.
Meredith, J.

No difficulty arises from a conflict of testimony; indeed the liquidator seems to have been content to rest his case almost, if not entirely, upon such evidence as could be obtained from those opposed to his claim and contentions.

This is to be borne in mind throughout, though it must be added that the appellant Dr. Sloan seems to have given his testimony in a franker and less biased manner than experience teaches is usual in such cases from one so deeply interested in the result; and though one may feel that some other material evidences might have been adduced which would have made the case clearer than it is.

But looking at the whole testimony and having regard to all the surrounding circumstances there seems to be but one conclusion that can reasonably be reached, which is, that Dr. Sloan from the beginning was acting for a company to be incorporated, and not until the creation of the company, and whilst he was a director, was there any intention, or thought, to obtain any gain or advantage to himself or any other person out of the property conveyed by him to the company.

The Hesses had failed in business, and their factory had been destroyed by fire; but they were practical and energetic men confident of their ability to carry on a large business successfully, if they had the necessary capital and credit; a very favourable opportunity presented itself for attaining that which was plainly their object and hope, the establishment and control of a large factory carried on by a company bearing their name. It was useless for them to look for the fulfilment of their desires except by the formation of a public company. They were without means or credit; their wives could not assist them much with one or the other; the son's wife's father was anxious and willing to help his daughter in helping her husband, but in a limited way only; he was both unwilling and unable to embark in the business himself; there was but the one possible means—a joint stock company.

Then, too, the municipality which, and the owners of the land who, were so largely to assist in the way of an

indirect bonus of the concern, discountenanced any idea of attempting to carry out the scheme in the name of the Hesses or their wives, and required a factory of such capacity that looking even at Dr. Sloan's own testimony in the light of all these circumstances it must have been obvious to all that by means of a joint stock company, and by that means alone, could the undertaking be accomplished, the benefit of the opportunities offered and the desire of the Hesses, obtained, and such assistance as Dr. Sloan was willing to give on his daughter's account be made of any substantial avail. And it is very important here to observe that there could, at the inception, have been no thought of speculation, no notion of buying to sell again at a profit; that was not what the Hesses desired, it was the contrary of it; their ambition, their hope for success, financially as well as in reputation, was in acquiring the factory at the least possible cost and carrying on as great, successful and profitable a business, in their trade, as possible, having, as the prospectus of the company shows, a high opinion and some pride of William Hess's knowledge and skill in that trade, and ability to carry on a successful business in it, capital and credit being supplied. Whilst Dr. Sloan's object was to enable them, if possible, to do that with as little risk and outlay on his part as he could or would incur.

Judgment. Meredith, J.

Under the agreement with the landowners, dated 23rd of September, 1889, Dr. Sloan was to "erect and complete upon the lands a factory for furniture manufacture with a capacity for employing not less than thirty hands." This was not for himself, he decidedly repudiates any such intention; nor for the Hesses, for they could not hold it; nor for their wives, for that was not satisfactory to the municipal council or the vendors, nor indeed to anyone concerned. It was for the joint stock company to be formed; from the first the company was the thing.

I cannot consider that there was any thought by Dr. Sloan to speculate, to buy and sell again, or to make any profit out of the proposed company for anyone, until the

Judgment.
Meredith, J.

extraordinary, but fleeting, apparent increase in value of the property after he became a director, tempted the Hesses to devise and him to be a party to the transaction under which he now endeavours to avoid liability as a contributory.

The notice of intention to apply for incorporation—which on the argument before me was put in as additional evidence—is dated 30th of September, 1889, and was first published in the *Ontario Gazette* on the 5th day of October following. And the company's prospectus informs the public that the company erected the buildings. Then it is a significant fact, worthy of consideration upon this appeal as well as upon the cross-appeal, that Dr. Sloan, before the Master, admitted, and in his testimony took the ground, that he was not personally entitled to any benefit out of the transaction in question, but was a trustee for the wives of the Hesses. To the extent that they were rightfully entitled to paid up stock in consideration for moneys advanced and services rendered he may well be treated as such a trustee, but not in respect of any profit out of the transaction which neither he was nor they were entitled in law to take from the company.

All this, taken in connection with such testimony as was adduced and all the circumstances of the case, makes it plain to my mind that from the very beginning the design and intention was a joint stock company of which Dr. Sloan was—to adopt the language of his son-in-law in acting for him under power of attorney—to be an "agent," in so far as that word is applicable to anything yet a nonentity, but which in the eyes of the law has some recognition, as for instance, in the case of a bequest to a corporation to be created.

Then according to the cases it is plain that Dr. Sloan's position was like unto that of a trustee, he could not lawfully assume the position of a mere vendor to the company; he could not make a profit, as he has sought to, out of the property which as a promoter he had acquired, and as a director he held, for the company.

Judgment. Meredith, J.

I use the word "promoter" in the absence of a more suitable one, preferring it to the word "agent" or the word "trustee," each of which in law has a well understood meaning not applicable to the case of a person prospectively incurring responsibility towards a body not yet having acquired a legal existence; it seems to me better to adopt a new name than to give a new meaning or extended application to an old one: but it is not the name, but the facts of the case, which give rise to the liability.

Then thus viewed how does the matter stand? Dr. Sloan was originally a subscriber for 150 shares of the capital stock of the company. These, according to the evidence, as I view it, were to be paid for in the way of advances made in the building of the factory. In that way he advanced, or procured advances upon his credit, to the amount of $7,300, which he was, or would have become, entitled to have applied upon the price of his stock—$7,500. But instead of so applying it, $7,000 was raised, by way of a loan upon the security of a mortgage of the property made by him; and thus the sums advanced by him, and obtained upon his credit, were paid practically out of the property of the company, except $300, which, it is said, were overlooked, and by mistake not taken into account; and thus Dr. Sloan was left with his 150 shares of unpaid stock, and was entitled to be credited with the $300 as a payment on account thereof: see *Inglis* v. *Wellington Stone Co.*, 29 C. P. 387.

Calling to mind some of the methods common in trade and business by which profits are unscrupulously made, and yet the arm of the law is not long enough to prevent, Dr. Sloan cannot, perhaps, be charged with any absolute intention to do any wrong or injustice; but, having acquired the property for the company, not for himself, and occupying a fiduciary position towards it, in the sale to the company of that which, in the eyes of equity, really belonged to it, he has brought himself plainly within the reach of the law, even taking that reach to be as short as the most favourable case from his point of view, that I have been able to find, would make it.

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Meredith, J.

But it is asked, could not Dr. Sloan, with the assent of the Hesses, have retained the property himself or have sold it to others, or dealt with it as he pleased; and if so, might he not sell to the company?

And it may be answered that until the company was formed, that might in fact well be; but it was not done. The company was formed, and such a course, as I have already stated, was not their purpose, it would have defeated their object. But, after the launching of the company as a public concern, in no sense confined to these persons, but one in which it was necessary, in order to carry out their purpose and attain their object, that other persons should become, as they were publicly solicited to, shareholders and contribute to its capital, the answer must be "no."

Again, it is urged that there was such a ratification of the transaction, by all the persons concerned at the time, that it cannot be questioned now. And it must be admitted that so far as the Sloans and Hesses were concerned, there was as complete a ratification as possible, with a full knowledge of all the facts, so as to finally bind them; but they were not the company; and I am unable to find any sufficient evidence that there was on the part of the other shareholders any knowledge of the true relationship of Dr. Sloan to the company in respect of this property, or of the company's right in equity to it, upon allowing him his outlay upon it towards payment of his stock; and even had there been, I would be sorry to think that—in the circumstances of this case, and having regard particularly to the fact that on the same day (March 21st, 1890) when the by-law (No. 1), providing for the purchase in question, was passed, another by-law (No. 2) was also passed, creating preference stock, for which the public, through the prospectus dated the 15th of March, were invited to subscribe, such is the law; it is not, in my opinion, and therefore I do not give effect to this contention: see *The Society for the Illustration of Practical Knowledge* v. *Abbott*, 2 Beav. 559; *In re Exchange Banking Co., Flitcroft's Case*, 21

Ch. D. 519; *In re British Seamless Paper Box Co.*, 17 Ch. D. 467; and *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589. Judgment. Meredith, J.

Then upon the cross-appeal it is urged that Dr. Sloan is liable also for the payment of the amount of the additional stock allotted to him, as if fully paid up, for part of the purchase money which, as a promoter of the company upon the facts as I find them, he was not in law entitled to receive.

What was intended to be done by the invalid transaction, practically and in form according to the company's books but not the resolution or by-law, was to pay up the unpaid 150 shares, and to allot 210 new shares as if fully paid up, making, together with the $7,000 mortgage debt which the company were to and did assume, the purchase money of $25,000; and the stock appears to have been dealt with and allotted accordingly. But it is said the $18,000 was not all profit; that indeed all but $7,000 was covered by moneys paid and services rendered by the Hesses for the company, and for which they were entitled to paid up stock; and of the 360 shares in his name, Dr. Sloan had transferred 214 to Mrs. William Hess, and 20 to Hoover and Jackson for services alleged to have been rendered to the company, and, at the date of the winding-up order, held but 126 shares himself.

It was never intended that Dr. Sloan should subscribe or become liable for any unpaid stock other than the original 150 shares; there was no contract that he should; those which he did take were intended to be, and were, subscribed for and allotted as fully paid up stock; they were really taken for the persons for whose benefit they were afterwards transferred—the Hesses—and not himself; the transfer was accepted with full knowledge by them of all the facts, and unless paid for in the moneys advanced and services rendered by them, would appear to be unpaid stock, for which they, not he, should be charged. He has gained nothing nor has the company lost anything by anything done by him in the transaction. So too, as

Judgment
Meredith, J.

to the 24 shares of the 150 originally subscribed for by him, if Hoover and Jackson and the Hesses have not given value for them to the company, they would appear to be unpaid stock in their hands in respect of which the transferees are liable: see *In re New Club, etc., Co., (limited)*, W. N. 1892, p. 193.

I am unable to perceive how he can be held liable as a contributory, upon the evidence before me, in respect of these 210 and 24 shares.

It was said in argument that since the winding-up order Dr. Sloan has, with the consent of the Master in Ordinary, transferred to his son the remaining 126 shares, and therefore is not chargeable in respect of them, and there seems to be some evidence of it, but no such contention was made in the Master's Office; if it had been, and were considered of any weight, no doubt an application would have been made to rescind the order giving leave, on the ground that it was improperly sought and improvidently granted. I do not think it needful to consider the question further.

The result in the Master's Office was, therefore, right, and the appeal and the cross-appeal both, must be dismissed; and there will be no order as to costs, for such disposition of this question will be very much, if not quite, the same, in effect, as if costs were given to each successful party, in so far as he has succeeded; and it is better to save further costs by, in effect, setting off the costs of the one party against those of the other now.

Appeal and cross-appeal dismissed, without costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE QUEEN V. JOHN R. ARNOLDI.

Criminal law—Public officer—Misbehaviour in office—Audit department—Pecuniary damage.

An officer in the public service of Canada having charge of the public dredging and whose duty it was to audit the expenditure therefor, used property of his own in connection with the dredging, having first placed it in the name of a third party, in whose name also he made out the accounts. No undue gains were made by him, but as such public officer he certified to the correctness of the accounts respecting the use of his said property as though for services rendered by contractors with the Government, and thereby received for himself a payment for those services :—

Held, that he had been guilty of misbehaviour in office, which is an indictable offence at common law, and that to constitute the offence it was not essential that pecuniary damage should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives.

Statement.

THIS was a case reserved by Chief Justice ARMOUR, at the sittings of the Court of Oyer and Terminer and General Gaol Delivery holden at Ottawa on December 15th, 1892, on the trial of the defendant, who was the chief mechanical engineer of the Department of Public Works of Canada, upon an indictment containing several counts, to all of which he had pleaded "not guilty."

At the close of the proceedings the Chief Justice addressed the jury as follows :—

"In this case the defendant was charged in three counts with misbehaviour in office, and in three other counts with obtaining money under false pretences. You have heard the discussion, and I have ruled there is no evidence to go to you upon the counts charging false pretences. I expressed the opinion that there was misbehaviour in office by reason of the conduct of the defendant in connection with the tug * * . Upon my expressing that opinion, counsel agreed that I should direct you to find the defendant guilty upon the first three counts, and I direct the jury that you should find him not guilty on the counts charging false pretences."

Statement.

The Chief Justice then stated the case reserved, as follows:—

"1. At the close of the case for the Crown, and after hearing arguments of counsel, and counsel consenting thereto, I directed the jury that they should find and return a verdict of not guilty in favour of the defendant on the counts in the indictment charging him with obtaining money under false pretences, and that they should find and return a verdict of guilty against the defendant on the counts in the indictment charging him with misbehaviour in office, which was accordingly done by the jury, and their verdict as found was recorded by me on the indictment.

"I then postponed passing sentence upon the defendant in respect to the verdict of guilty so returned by the jury, and I placed the defendant under recognizance of bail to appear and receive sentence when called upon, and I reserved for the opinion of the Justices of the Chancery Division of the High Court of Justice for Ontario in the meantime the following question:—

"2. The question will be reserved by me upon your finding upon the first three counts whether in point of law under the evidence given as above, the conviction can be sustained."

The first count of the indictment for misbehaviour in office was as follows, the other two being in effect similar:

COUNTY OF CARLETON, } The jurors of our Lady the Queen
To wit:— } upon their oath present that John R. Arnoldi on, to wit: the first day of June, in the year of our Lord, 1885, and hence continuously up to the first day of July, in the year of our Lord, 1891, held the office of and was employed by Her Majesty the Queen as Chief Mechanical Engineer of the Department of Public Works of Canada, at Ottawa, in the County of Carleton.

That it was part of the duties of the said John R. Arnoldi, in the execution and discharge of his said office of Chief Mechanical Engineer of the Department of Public Works aforesaid to superintend the operation of certain

dredges, the property of the government of Canada in the performance of dredging work in certain of the harbours and rivers of Canada, and it was also part of the duties of the said John R. Arnoldi to superintend the repairs and maintenance of the public buildings of the Dominion of Canada at Ottawa aforesaid, and to take charge and care of all the plant, machinery and other material required in connection with the works over which he had the control and superintendence as such Chief Mechanical Engineer as aforesaid. Statement.

That the said office was of great trust and confidence concerning the providing of material and supplies and the employment of workmen and the expenditure of money in carrying on the said work of dredging in certain of the rivers and harbours in Canada and about the maintenance and repairs of the public buildings of the Dominion of Canada at Ottawa aforesaid.

That it was also part of the duties of the said John R. Arnoldi to audit for payment by Her Majesty the Queen all accounts for expenditure of moneys in connection with the several works and public services which he superintended in the execution of his said office.

That in respect of the execution of the duties of his said office certain reasonable salaries and pay were payable and paid to the said John R. Arnoldi by Her Majesty the Queen.

That it was the duty of the said John R. Arnoldi to execute and carry out the duties and requirements of his said office in the most economical manner and at the least expense to Her Majesty the Queen and not to have or receive to himself any part or share of any gains or profits made by any person employed by him as such Chief Mechanical Engineer as aforesaid, or in connection with the execution and exercise of his said office.

That a certain steamboat known and designated as the "Joe" was used and employed by the said John R. Arnoldi in the execution of part of the duties of his said office and the said steamboat "Joe" was during the period it was

Statement.

so used the property of and was owned by the said John R. Arnoldi.

That the said John R. Arnoldi was from the first day of May, in the year of our Lord, 1889, and thence continuously up to the first day of July, in the year of our Lord, 1891, the owner and in possession of lot No. 18 on the south side of Vittoria street, sometimes called Victoria street, in the city of Ottawa, in the county of Carleton, upon which lot there was erected a shed or building.

And the jurors aforesaid upon their oath aforesaid do further present, that the said John R. Arnoldi, disregarding the duties of his said office, and unlawfully intending to make an unlawful profit and advantage to himself in the execution and exercise of his said office and in breach of the trust reposed in him by Her Majesty the Queen, in appointing the said John R. Arnoldi to the said office, did, while in the execution and exercise of his said office heretofore, to wit: on the sixth day of July, in the year one thousand eight hundred and eighty-five, to wit: at Ottawa, in the county of Carleton, unlawfully and corruptly bargain and agree with one William A. Allan, of the said city of Ottawa, that he, the said John R. Arnoldi, should register the said steamboat "Joe" in the name of the said William A. Allan and that the said John R. Arnoldi should hire and engage nominally from the said William A. Allan, but actually from himself, the said John R. Arnoldi, the said steamboat "Joe" for the service of Her Majesty in the department of public works in the charge and management of the said John R. Arnoldi and that the accounts for work and services so to be performed by the said steamboat "Joe" in connection with the dredging work for the government of Canada aforesaid should be made out and furnished to the department of public works of Canada aforesaid in the name of the said William A. Allan so that the ownership of the said steamboat should be concealed from Her Majesty and that the said accounts should be audited by the said John R. Arnoldi for payment by the said department of public works, and that the gains, moneys

Statement.

and profits to be derived from the payment of such accounts should be received and retained by the said John R. Arnoldi for his own use as the true owner of the said steamboat.

And that the said John R. Arnoldi as such Chief Mechanical Engineer as aforesaid did, to wit: on the sixth day of July, in the year one thousand eight hundred and eighty-five and on divers days and times after the making of the said corrupt and unlawful bargain and in pursuance thereof, employ and use the said steamboat "Joe" in connection with the said dredging work in certain of the harbours and rivers of Canada, and accounts for such services were from time to time made out by the said John R. Arnoldi and furnished by him to the Department of Public Works of Canada at Ottawa aforesaid, in the name of the said William A. Allan, and the said accounts were audited and certified to by the said John R. Arnoldi as such Chief Mechanical Engineer as aforesaid for payment by the said Department of Public Works, and were from time to time paid to the said John R. Arnoldi whereby and by reason whereof the said John R. Arnoldi at Ottawa, in the county of Carleton, did thereby and in his said office unlawfully make for himself divers large gains and profits, to wit: On the fourth day of August, A.D. 1885, the sum of eighty dollars; on the twenty-second day of August, A.D. 1885, the sum of eighty dollars; on the second day of September, A.D. 1885, the sum of eighty dollars, and on days and times to the jurors unknown the further sums of eighty dollars and eighty dollars, which said sums the said John R. Arnoldi did have and receive and did keep and retain to his own use, contrary to his duty as such Chief Mechanical Engineer, as aforesaid; to the great damage and deceit of Her Majesty the Queen, and against the peace of our Lady the Queen, Her Crown and dignity.

The reserved case was argued before BOYD, C., and MEREDITH, J., on December 10th, 1892.

Argument.

G. T. Blackstock, Q.C., for the defendant. There is no proof of any duty resting on the defendant of which his conduct is any contravention; and if there is, then the defendant cannot be found guilty of this misdemeanour unless the Crown has suffered damage. R. S. C. ch. 29, sec. 42, shews the duties of the defendant. Stress was laid on the fact that the defendant audited his own accounts.

[MEREDITH, J.—But is it proper to ask this Court whether the defendant is, on the whole evidence, guilty. Is it proper matter for a reserved case?]

[*B. B. Osler*, Q.C. It is a thing constantly done to send the evidence before the Court and ask whether on that evidence a misdemeanour has been developed.]

We shewed that every one in the department knew what was being done, so as to shew that our intent was fair and honest. His Lordship held that the intent had nothing to do with it. Apart from the account being in the names of other parties, the correctness of the account is not disputed. The law applicable to the subject is to be found in the old cases. The law of misfeasance in office has never been invoked except where some pecuniary damage has been suffered: Anon. 5 Mod. R. 96; *Rex* v. *Holland*, 5 T. R. 607; *Rex* v. *Pinney*, 5 C. & P. 254; *Rex* v. *Kennet*, *ib.*, p. 282*n*; *Rex* v. *Antrobus*, 2 A. & E. 788; *Regina* v. *Wyatt*, 1 Salk. 381; *Regina* v. *James*, 2 Den. C. C. 1; *In re Ward*, 30 L. J. Ch. 775. But the two cases which alone I think can be considered as valuable expositions of the law on this subject, are *Rex* v. *Bembridge*, 22 St. T. 1, *S. C.* 3 Doug. 327; *Rex* v. *Valentine Jones*, 31 St. T. 251.

[BOYD, C.—But if profits were made by Mr. Arnoldi in these transactions, he could not retain them, on the same principle that a trustee cannot retain profits as against his *cestui que trust*. Was there not here pecuniary damage to the Crown?]

But the damage suffered, to constitute the crime cannot be of that kind,—it must be a real damage. Even if the legitimate reward of Arnoldi did contain a profit, you cannot impute to him a fraud on that account.

Argument

[BOYD, C.—I suppose not.]

B. B. Osler, Q. C., for the Crown. There was a statutory duty on the defendant: R. S. C. ch. 29, sec. 42. The primary responsibility of these accounts is, under this section, on him. Without his signature the money could not be procured. If the signature had certified to an amount in favour of himself according to the evidence he could not have got the money. The question does not turn on the knowledge of the other officials of Arnoldi's department; the question is, how did he get the money from the Public Treasury? R. S. C. ch. 17, sec. 51, amended by 51 Vic. ch. 12, sec. 12, has been thought to bear on this matter. The damage suffered by the Crown lies in this that they have lost their check on officers concerned in the public service. Whether Arnoldi made gain or not there was a detriment to the public service. It is not merely financial damages but misbehaviour in office to the detriment of the public which is the foundation of this matter. If there is an injury which would be a breach of trust, or an injury of a private nature—if it concerns the king, and is of public evil example, it is indictable. The registering of the tug in the name of Wilson was a misdemeanour: 17 & 18 Vic. ch. 104, sec. 103, sub-sec. 4. Thus there was a misdemeanour at the basis of this matter. It is not necessary that the Crown should be injured. It is only necessary to shew that a gain was made. The defendant here did gain, it is admitted, but did not make undue gains. Any wilful irregularity in office is sufficient: per Lord Mansfield in *Rex* v. *Bembridge*, 22 St. T., at p. 77, 3 Doug. at p. 331; Waterman's Notes to Archbold's Criminal Practice, 6th ed., vol. 3, p. 463 (13); *State of Maine* v. *Leach*, 60 Maine 58. Can a man in Arnoldi's position say: What I charged was fair, therefore I have not been guilty of misfeasance. It is a matter of public evil example.

Kerr, Q. C., on the same side. There was here not merely an offence at common law, but also an offence under the statute. The audit officers say that if Mr. Arnoldi's name had appeared as the recipient of the money, it would not

Argument. have been paid. Can it be said that a deceit practised on the government of the country is not a misfeasance in office. Arnoldi got the advantage of having his boat employed which otherwise might have been idle: Burbidge's Digest of Criminal Law, Art. 149; Russ. on Crimes, 5th ed.. vol. 1, pp. 194, 297; *Regina* v. *Parkinson*, 41 U. C. R. 545.

Hogg, Q. C., also for the Crown.

Blackstock, in reply. His Lordship ruled that the allegation of fraudulent intent had nothing to do with the matter. In the *Bembridge Case* Lord Mansfield certainly says, the jury must be satisfied of the fraudulent intent. Again, for the offence to be indictable, there must be a civil remedy applicable to the matter, but what civil remedy was there applicable here? No case has been produced where this law of misfeasance in office has been evoked, where there has not been some actual damage done, not necessarily of a sentimental character.

January 16th, 1893. BOYD, C.:—

The main facts on which the reserved question of law arises, may be briefly abstracted: An officer in the public service of Canada, charged with the expenditure and audit of public moneys, certifies to the justness and accuracy of a series of accounts as for services rendered by contractors with the government, and thereby receives for himself payment for these services. The defendant having charge of public dredging in Quebec and Ontario, used his own steam yacht for the purpose of towing the dredges from place to place, and of furnishing them with supplies during the working season, and also used a storehouse of his own in Ottawa for the purpose of housing plant and machinery connected with the dredges during the winter. The steam yacht, a tug, was registered in the name of first one and then another of the defendant's friends, and accounts were made out in their names for the use of the steam yacht (not including fuel and wages, which were paid in a manner not complained of or objectionable).

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Boyd, C.

Accounts for the storage were sent out in the name of a third friend of the defendant. These names were used in order that "newspaper notoriety" might be avoided, and not with a view of making any dishonest gains out of the department. The services were rendered, and no undue gains were made by the defendant.

Upon this statement of facts, it is urged that no criminal offence exists, because it is essential that pecuniary damage should result to the public by reason of the irregular conduct of the officer. But in my opinion the gravity of this administrative transgression is not to be measured by mere ascertained pecuniary results. The defendant was tempted to do what he did by the prospect of gain,—he profited by his own dereliction of duty, and to accomplish his purpose it was necessary to conceal the actual transaction. This was misbehaviour in office, which is an indictable offence at common law.

The duty of the defendant was to audit the special accounts, of which he had personal cognizance as a government official, and to verify their propriety and correctness. He was placed between the contractors and the public represented by the government, in order that the claims of the one might be checked and the rights of the other protected. This work of public audit (not less, if not more, than that of private audit), must be a real service in which no concealed pecuniary self-interest should bias the judgment of the officer, and in which the substantial truth of every transaction should be made to appear. Publicity is the preservative of free institutions; any scheme which is devised to keep from the public information to which the public is entitled, in so far as it succeeds, is prejudicial to the well-being of the community. Let the defendant's example be followed so that each trusted officer might work for himself and for private ends, then the whole public service would be honeycombed with corruption. Had the truth been manifested on the face of the defendant's certificates, it would have been disclosed that he was assuming to audit his own accounts—an illusory thing—

Judgment.

Boyd, C.

and steps would have been taken to have had the accounts properly investigated, and (I doubt not) to have had the practice stopped. In the present case no contract was made for the services, no consideration was possible as to whether the government could not have been served or better served by other means (which need not be now detailed), and the whole object of the statute as to the audit of public accounts was subverted. The intent of the legislature as worked out in practice, is to have the audit made by the officer who best knows all the details connected with the work done. See section 33 of the Audit Act, R. S. C. ch. 29. This primary safeguard is removed when that officer himself has to be watched and checked. The defendant's disclosure to other officers of what he was doing, would not therefore have remedied the matter; it would merely have imposed additional difficulties in getting an independent audit, and have increased the expense of the department, if indeed any government cared to risk its existence by condoning such conduct. But all such considerations point to the one and only sound conclusion that public officers must not conduct themselves so that their duty and their interest conflict.

The statute provides that officers charged with the expenditure of public moneys, shall respectively audit the details of the accounts of the several services in the first instance, and be responsible for the correctness of such audit: R. S. C. ch. 29, sec. 42. This, by the Interpretation Act, is intended to provide for the doing of that which Parliament deems to be for the public good, and to prevent the doing of that which it deems contrary to the public good: R. S. C. ch. 1, sec. 7, sub-sec. 56. The audit by the defendant, while ostensibly on its face in pursuance of this statute, was really an evasion of its true intent and purpose. The accounts as audited, were to the knowledge of the defendant *incorrect*, because the claims were not made by or payable to the persons named on the face of the certificate. As I view the case, the defendant has been guilty of a breach of duty or trust in a public office,

and has also violated the terms of the statute. The language of Lord Mansfield in *Rex* v. *Bembridge*, 22 St. T. at p. 154, is appropriate to this case: "This is not an omission, it is not a neglect, but a gross and actual *deceit*, if the defendant knew the truth." The certificate was a deliberate averment that the moneys were payable for services rendered to the parties named, which was a *deceitful* statement, *i. e.*, meant to disguise the truth though not necessarily to defraud. (See per Pollock, C. B., in *Regina* v. *Ingham*, in Bell's Crown Cases, at p. 185.)

I think the law is correctly summarized by Lee, C. J., *arguendo* in *Rex* v. *Bembridge*, in these words: "Where a man misbehaves—does that which he ought not to do, or omits to do that which he ought to do, in any public station, in which the public is concerned, the proper remedy is by indictment or information:" 22 St. T. at p. 119. Now when the act done or omitted to be done, is clearly illegal, it is not needful in order to constitute a criminal offence to show that it was done with corrupt motives. As said by Ashhurst, J., and affirmed by Buller, J., in *Rex* v. *Sainsbury*, 4 T. R. at p. 457, (S. C. 2 Rev. Rep. at p. 438): "What the law says shall not be done, it becomes illegal to do, and is therefore the subject matter of an indictment, without the addition of any corrupt motives." As argued by Wood, of counsel for the Crown, in *King* v. *Holland*, 5 T. R. at p. 617, where duties are annexed to any public office and the officer wilfully neglects the performance of them, he is indictable for the neglect, though he be not guilty of corruption, and he cited *Kennett's Case*. The subsequent report of the case as found in *Rex* v. *Kennett*, 5 C. & P. 282, confirms his position; and I refer to the language of Lord Mansfield, in his charge to the jury as there reported. Nowhere are the principles of law applicable to this class of cases more clearly expounded than by Lord Mansfield, in *Rex* v. *Bembridge*, 3 Doug. 327, and he ranges them under two heads thus: 1. A man accepting an office of trust concerning the public, especially if attended with profit, is answerable

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Boyd, C.

criminally to the King for misbehaviour in his office; 2. Where there is a breach of trust, fraud, or imposition in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject, it is indictable. That such should be the rule, he adds, is essential to the existence of the country. (This case is more fully and elaborately reported in 22 St. Tr. pp. 1-115).

I take the other case cited from the State trials, *Rex* v. *Valentine Jones*, 31 St. Tr. 257, (1807) to be in principle a decision on all fours with the case in hand. The gist of the complaint was, that the defendant being the Commissary General of stores, colluded with one Higgins for the supply of public stores so that he, the defendant, might share the profits with Higgins. There was no charge of exorbitant profit. The only provision made was for sharing a fair mercantile profit. The fact that the scheme was so worked as to result in abnormal profits was treated as only an aggravation of the offence. (See pages 283, 289, 299, 313, 334.)

Therefore I conclude that the element of profit more than ordinary is immaterial, except as a circumstance to be regarded in mitigation of the defendant's conduct, to which due weight will be given when judgment is pronounced against him.

The gravity of the matter is not so much in its merely profitable aspect as in the misuse of power entrusted to the defendant for the public benefit, for the furtherance of personal ends. Public example requires the infliction of punishment when public confidence has thus been abused, and my judgment is, that the conviction should be sustained.

MEREDITH, J.:—

The only difficulties which this case, at any time, presented to my mind, were removed by Mr. Blackstock's statement, concurred in by counsel for the Crown, that the only

purposes for which the case was reserved for determination here, and the only points upon which the consideration of the Court are sought, are substantially: (1) whether proof of undue gain is necessary to support the conviction; and (2) whether proof of a knowledge of the whole facts by the defendant's superior officers would be any defence to the indictment.

Judgment
Meredith, J.

In the circumstances of this case, I am yet quite unable to perceive why the former should be necessary or the latter material; and I have been unable to find anything in the authorities sustaining the contention, very ably made by Mr. Blackstock, that they are, though doubtless the whole facts will be taken into consideration by the Court in passing sentence upon the defendant for the misdemeanour of which it must now be said he was rightly convicted.

A. H. F. L.

[CHANCERY DIVISION.]

ARCHER v. URQUHART ET AL.

Estate—Conveyance by deed—Habendum—Fee tail—Separate estate—Tenant by the curtesy—Power of appointment—Invalid exercise of.

A father conveyed lands to his daughter by deed with *habendum* "To have and to hold the same unto * * and the heirs of her body lawfully begotten to and for their sole and only use for ever * * to and for the sole and separate use and benefit of (grantor) for and during the term of her natural life, and after her death then to the heirs of her body lawfully begotten for ever. Provided always, however, that it shall and may be lawful for (grantor) to direct and appoint either by deed or her last will and testament which or in what manner her said heirs shall have the lands and premises hereby granted should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge." She died leaving her husband and several children surviving her, and by her will devised and appointed the lands to her eldest son with instructions to dispose of the same between her husband and children in the proportions mentioned in her will:—

Held, that the daughter took an estate in fee tail general, and that her husband was tenant by the curtesy:—

Held, also, that the provisions of the will were not a valid exercise of the power.

Statement. THIS was a special case stated between Henry Ross Archer, a lunatic, by the Toronto General Trusts Company, his committee, and Wilfred Henry Angus Urquhart and others, who were the children of Henrietta Augusta Susannah Urquhart, a deceased daughter of the plaintiff, and the executors of her will.

The case set out the granting by the plaintiff to his daughter the said Henrietta Urquhart, before her marriage to Donald Ross Urquhart, of certain lands by deed, with the *habendum* in the words following:—

"To have and to hold the same unto the said party of the second part, and the heirs of her body lawfully begotten to and for their sole and only use for ever, in manner following, that is to say:—to and for the sole and separate use and benefit of the party of the second part, for and during the term of her natural life, and after her death, then to the use of the heirs of her body lawfully begotten for ever. Provided always, however, that it shall and may be lawful for the said party of the second part to direct

and appoint, either by deed or by her last will and testament, which or in what manner her said heirs shall have the lands and premises hereby granted, should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge. Statement.

Provided always, however, and this indenture is made upon this express condition, that if the said party of the second part shall at any time during the term of her natural life, grant or mortgage the said lands, or any part thereof, or her interest therein, or alienate, convey or encumber the same in any way, except by lease from year to year, the said lands and premises hereby granted shall immediately and from thenceforth revert back to, and become the estate of the party of the first part, to be held, used and enjoyed by him, his heirs or assigns for ever."

The said Henrietta Urquhart died leaving children and Donald Ross Urquhart, her husband, surviving, having made her will by which she devised and appointed the lands to her eldest son, with instructions to him to dispose of the same, and to divide the proceeds among her children and husband in the proportions mentioned in her will, and with directions to her executors to join in the conveyance of the same if necessary.

The husband Donald Ross Urquhart sold and conveyed all his interest either as tenant by the curtesy or under his wife's will, to one John J. Archer, who afterwards conveyed the same to the plaintiff, Henry Ross Archer, before he was declared a lunatic.

The questions submitted were:

1. Was the said Donald Ross Urquhart entitled as tenant by the curtesy or under said will of the said Henrietta Augusta Susannah Urquhart or otherwise to any, and if so, to what estate, share, or interest in said lands or to the proceeds thereof; and is the plaintiff as his assignee or grantee or otherwise, entitled to any, and if so, to what share, estate, or interest therein?

2. Assuming that the said Donald Ross Urquhart did not take any estate in said lands as tenant by the curtesy,

Statement. did he become entitled to any, and if so, to what, estate or interest therein, or to the proceeds thereof under the will of his wife, the said Henrietta Augusta Susannah Urquhart? *

The case was argued on January 18th, 1893, before MEREDITH, J.

M. D. Fraser, for the plaintiff. The plaintiff's daughter (the grantee under the deed), married and died, leaving her husband surviving as well as children, and the question is: Is the husband entitled as tenant by the curtesy? The deed to the daughter passes an estate tail, and thus the husband is entitled as such tenant. The intention of the grantee is clear, and shews that a mere life estate was not contemplated. [MEREDITH, J.—But here there is a power of appointment added to the technical words.] That makes no difference. I refer to *Meyers* v. *The Hamilton Provident and Loan Co.*, 19 O. R. 358. There is tenancy by the curtesy in separate estate: *Cooper* v. *Macdonald* 7 Ch. D. 288.

W. M. Davidson, for the infant defendants. The whole conveyance must be looked at to gather the intention. It gives a power of appointment among her heirs. That power controls the former gift, and leaves her a life interest only: *Bradley* v. *Cartwright*, L. R. 2 C. P. 511. "Heirs of her body" will be construed here as children: Elphinstone, Norton and Clark on the Interpretation of Deeds Bl. ed. 256, 257. The restraint on alienation is inconsistent with a tenancy in tail to the daughter: *The Peterborough etc. Co.* v. *Patterson*, 13 O. R. 142; *Hamilton* v. *West*, 10 Ir. Eq. 75; *Dodds* v. *Dodds*, 10 Ir. Chy. 476.

N. W. Rowell, for the adult defendants. By the power of appointment the heirs are not ascertained, but must mean children, and the words "which or in what manner," directs how it was to go among them. The power when executed relates back to the deed, and cuts out the tenancy

* There were other questions submitted not necessary to set out, as Donald Ross Urquhart was held entitled as a tenant by the curtesy, and so rendered the answers to them needless.—REP.

by the curtesy. The daughter can dispose of the property so that the husband takes no interest. *Cooper* v. *Macdonald*, 7 Ch. D. 288, only applies to cases where the property is undisposed of. No estate vested in the husband at all. He did not take as tenant by the curtesy, and the appointment as to his share is void, and he cannot take under the will: *Bristow* v. *Ward*, 2 Ves. Jr. 336; *In re Fowler's Trusts*, 27 Beav. 362. Argument.

Fraser, in reply.

February 9, 1893. MEREDITH, J.:—

The deed in question is in the handwriting of the grantor, and is of a quite formal character, and expressed in technical language, bearing internal evidence of his considerable legal knowledge.

In these circumstances, the defendants urge that effect should not be given to the technically accurate words creating an estate in fee tail general, and that it should be considered that this, to some extent at all events, skilled grantor, intended to grant an estate for life only to the grantee, his daughter.

But, if he had so intended, what good reason can be suggested for his not so expressing it? He doubtless knew how to do so with a very considerable degree of accuracy. Is it reasonable, is it possible, that he would have, in the proper technical words, created an estate in fee tail, to have it cut down to a less estate, by implication from the other provisions respecting it, to which I shall presently more fully refer?

In every case technical legal words are to be taken according to their proper legal meaning, unless the context forbids.

In regard even to wills, it is said in the leading case of *Roddy* v. *Fitzgerald*, 6 H. L. C. 823, at p. 877, that "It is another and most important rule in the construction of the words used in a will that technical terms, or words of known legal import, must have their proper legal effect attributed to

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Meredith, J.

them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is": and in *Ralph* v. *Carrick*, 11 Ch. D. 873, at p. 878, that it is a fallacy to suppose that Courts are at liberty to construe wills as ordinary intelligent persons would; that in fact regard must be had to any established rules of construction, and subject to that the construction must be that of trained legal minds: and again in *Leach* v. *Jay*, 6 Ch. D. 496, and *Smith* v. *Butcher*, 10 Ch. D. 113, at p. 114, that "The rule is to adopt the legal and technical meaning of the word unless it is controlled by the context": see also *Smith* v. *Lucas*, 18 Ch. D. 531, at p. 142.

Effect is to be given to the meaning of the words, not what may be thought was the probable intention of the parties, much less what any one may, in the after light, think they ought to have intended and said.

There is no doubt room for argument, grounded upon some of the terms of the deed, that the grantor intended the grantee to take an estate for life only; a contention not without favour here, where the law of primogeniture has been so long abolished; but is there enough to control the plain technical words accurately granting to the daughter an estate in fee tail? I think not.

Why should the words which virtually cause a restraint upon anticipation, by this married woman, of the property granted, as it was, for her separate use, have that effect? See *Cooper* v. *Macdonald*, 7 Ch. D. 288, a case in several respects like this; where there was a restraint upon alienation by the grantee in fee tail, she being a married woman.

In *The Peterborough, etc., Co.* v. *Patterson*, 13 O. R. 142, at p. 155, the observation is made that "an estate in tail on the parents with a restraint upon their alienation of that estate cannot stand together." That was

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Meredith, J.

a case of a legal, not an equitable estate, if that make any difference. I do not at present perceive the reason of it. Whatever knowledge the grantor may have had, it is not to be presumed that all the rights and powers of a tenant in tail would be present to his mind; or, if they were, that he knew whether or not he could prevent an exercise of the statutable power to bar the entail.

Then the words "to and for the sole and separate use and benefit of the party of the second part, for and during the term of her natural life, and upon her death, then to the use of the heirs of her body, lawfully begotten, for ever," indicate the intention to make her interest in the lands her separate property; not to cut down the effect of the prior grant "to her and the heirs of her body lawfully begotten": they do but express what is the ordinary scope of the enjoyment of the property by the tenant in tail, apart from the extraordinary power given by statute to bar the entail.

Nor does the power of appointment seem to me to be inconsistent with an intention that the grantee should take an estate in fee tail, whether it be as large as contended for by the defendants, or restricted so as to prevent any appointment being made of any greater estate than that which she, in my opinion, took herself. I shall presently deal with the effect of it, and the will purporting to exercise it.

Again, that construction is to be adopted which will give effect to all the words, if that be possible.

To adopt the construction contended for by the defendants, is, substantially, to eliminate the grant "unto the said party of the second part and the heirs of her body lawfully begotten," and the like words, twice used, in the habendum, having regard to the whole instrument and all the circumstances of the case.

Effect may be given to all, in holding that the grantee took an estate in fee tail general, for her separate use, without power of anticipation, but with power to limit the generality of the entail, and to impose some restric-

Judgment.

Meredith, J.

tion, for instance, such as were imposed upon her, but only should circumstances render it necessary, of which she was to be the sole judge.

Throughout the words are technical; "the heirs of her body lawfully begotten," twice repeated, followed by "her said heirs," being the only words employed throughout the whole document touching the nature of the estate granted; the main object of the grantor's bounty, it being a deed of gift, was obviously his daughter, the grantee; then there is the condition that the lands shall revert to the grantor, if the grantee grant or mortgage them, in words looking like something more than a mere restraint upon anticipation of only a life interest; all pointing to a grant of some larger interest than a mere life estate to her.

The power of appointment does not give power to enlarge the estate. Even if the words "of" and punctuation be added, so that the reading will be "which of, or in what manner, her said heirs shall have the lands * * should circumstances at any time render it necessary" to make any appointment, yet they are satisfied by the limit and restriction before referred to, according better with the grounds on which only the power is to be exercised, than the claimed unlimited power to deal with the lands in this manner, even to the entire obliteration of the dominant idea of the grantor—an entail.

But, whatever power of appointment the grantee took, as to the devolution of the estate or the restriction of the benefit of it, it was to be just the same estate, an estate in fee tail, of which she was the tenant in tail in possession; and it accordingly follows that the provisions of her will respecting the land are altogether beyond the scope of her power, and are not in any sense a valid exercise of it: see *Porterfield* v. *Fairs*, Ont. Q. B., last sittings, 1893.

The grantee, therefore, took under the deed in question an estate in fee tail general, for her separate use, with a limited restraint upon power of alienation; and having died so seized, her husband, surviving her, became entitled

to an estate for life in the lands in question as tenant by the curtesy of England: see *Cooper* v. *Macdonald*, 7 Ch. D. 288. Judgment. Meredith, J.

This conclusion effectually disposes of all the questions properly in issue between the parties, and from it the formal judgment can readily be framed.

As to the costs: the defendants have failed and, under ordinary circumstances, those of the plaintiff ought to be paid out of the grantee's estate; but there is enough in the difficulty created by the wording of the plaintiff's own deed, prepared by himself, to take the case out of the ordinary course and leave his estate to bear his costs: but according to *Westgate* v. *Westgate*, 11 P. R. 62, the Official Guardian of the infant defendants must have his costs and the plaintiff must pay them and have recourse over against the grantee's estate for the amount.

There will be no order as to costs in any other respect.

G. A. B.

[CHANCERY DIVISION.]

BROWN v. MOYER.

Defamation—Libel—"Fair comment"—Evidence of truth of facts—Justification—Pleading.

In an action for libel in which the defence is that of "fair comment," and in which the facts, the subject matter of the comment, are pleaded generally, evidence may be given in detail of the truth of the facts commented on, even though justification be not pleaded.

Per BOYD, C.—"Justification" technically is not pertinent in such a case unless the statements of facts as published are themselves libellous; but if the commentary on certain facts is complained of, then under "fair comment" may be proved the actuality of the occurrences alleged in order that the jury may pass upon the comment.

Under the present rules of pleading the details of the conduct animadverted upon should properly be spread upon the record either by pleading or by particulars.

Statement. THIS was an action of libel, and was brought against the editor and proprietor of *The Berlin Daily News* in respect of the following article published in that paper on July 7th, 1892:—

"A PUBLIC DISGRACE.

"A town which does not keep faith with its public promises will soon become a byword of disgrace, and the injury prove unspeakable. For some time there have been threats and mutterings which have boded anything but good for the town. We purposely abstained from making any remarks on the subject, as we hoped that after all reason and common justice might in the end prevail. From the vote on Monday night, however, we are forced to conclude that Berlin is to receive a stab which will prove a lasting disgrace and dishonour, and likely result in the town having some thousands of dollars law costs to pay. Councillor C. F. Brown is no doubt a remarkably clever man. He has been singularly fortunate in business and business partners, but there are a few things which he does not appear to know, and one of those is, that 'Honesty is the best policy,' even in public matters. If this town has been noted for any one thing during the last twelve or fifteen years, it was that all new factories could

Statement.

secure exemption from taxation, and that appears to be the case still, for only last fall Messrs. Brown and Erb petitioned successfully for exemption for a little tannery they put up. No one found fault. On the contrary, all were glad to see a new factory up even if it is only small, employing comparatively few hands. It is hoped it may grow in future and increase in usefulness. Only on Monday night a by-law was passed to exempt an addition to a furniture factory, and a few weeks ago a new felt factory was exempted. Why, therefore, an onslaught should be made on the piano company and Jackson & Cochrane, because of an oversight on the part of the council two years ago in neglecting to pass the exemption by-law as was plainly understood would be the case, is inexplicable. All parties interested supposed it had been attended to, and when mention was made this spring of collecting taxes from these parties, nearly every one was amazed. We supposed when it was discovered that the by-laws had not been passed, it would only be a matter of form, and the whole question put in proper shape. But for some inexplicable reason a number of men who hold seats in the council, have allowed themselves to do a most disreputable act through the bidding of an illiterate half-baked crank. The records of the council of 1890, prove that exemption from taxation was one of the distinct conditions on which these parties agreed to put up their factories, and we have hopes even yet that a sober second thought will convince some of the parties who voted as they did, that it is of more importance for a town to keep public faith, than by a mean and dishonest trick to gain ten times as much as the taxes in question would amount to. We are told as an excuse for this action, that one of the firms does not employ as many hands as they promised; but, if in that respect they fail, a claim against them can be made. It can be done in another way. But we think an energetic, pushing, hard-working young firm should not be crushed because through stringency of the times they had to work with a smaller force than they expected—the experience

Statement. of nearly all similar and much larger concerns. They have been gradually increasing their force, and we are quite certain will continue to do so till their employees far exceed the number put in the by-law. We hope, therefore, that even yet what would prove, not only an everlasting disgrace, but even a calamity, will be averted, and that the matter will be reconsidered and faith kept with the parties interested. Why not call a public meeting to discuss this matter in all its bearings."

The action was tried on October 24th, 1892, at Berlin, before STREET, J., and a jury, and resulted in a verdict for the defendant.

The plaintiff now moved before the Divisional Court to set aside the verdict and for a new trial upon the ground, amongst others, that evidence of the truth of the facts commented on had been wrongfully admitted under the defence of fair comment, and although justification was not pleaded.

The circumstances of the case and the pleadings are sufficiently set out in the judgments.

The motion was argued before BOYD, C., and ROBERTSON, J., on December 3rd, 1892.

W. H. P. Clement, for the plaintiff. The comment must be strictly confined to the matters set out in the libel, and it is only as to the truth of such matters that evidence of facts can be admitted: Fisher & Strahan's Laws of the Press, at pp. 130-31. The evidence of the plaintiff's conduct should not have been admitted. The province of the Judge is to define what is a libel, the jury are to say whether there is a libel. The Judge here did intimate his opinion that there was a libel, and though the jury found against the libel, the Court will send the case back for a new trial. It is libellous to say that a man is illiterate. *Tuson* v. *Evans*, 12 Ad. & E. 733, shews that the Court is not precluded by the finding of the jury: *Parmiter* v. *Coupland*, 4 Jur. 701, 6 M. & W. 105; and *Baylis* v.

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Lawrence, 11 Ad. & E. 920, 3 P. & D. 526; *Reeves* v. *Templar*, 2 Jur. 137; *Levi* v. *Milne*, 4 Bing. 195; *Hakewell* v. *Ingram*, 2 C. L. 1397; *Grant* v. *Yates*, 2 T. L. R. 368; *Broome* v. *Gosden*, 1 C. B. 728; *The Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741. There is certainly nothing in evidence to justify finding the words used a fair comment, and if the jury's verdict is to be so interpreted they are clearly wrong there also: *Lefroy* v. *Burnside*, 4 L. R. Ir. 340.

Johnston, Q. C., for the defendant. In *Walker* v. *Tribune Co.*, 29 Fed. R. 827, it was held that the word "crank" has no necessary defamatory meaning. The expression merely means that a person is "odd." "Illiterate" is not libellous unless spoken of a man in reference to his special calling: Odger's Law of Libel and Slander (Bl. ed.), at p. 54. *Odger* v. *Mortimer*, 28 L. T. N. S. 472, shews that in the case of a public man considerable freedom of comment is permissible and mere ridicule is not actionable. The jury are not only the guardians of the rights of individuals but also of the right of free discussion. *Wills* v. *Carman*, 17 O. R. 223, was well decided, and shews that it is not necessary to plead justification in order to entitle a defendant to give evidence of the truth, in order to shew that the statement objected to was "fair comment." As to the extent to which comment on a public man may be allowed, see *Seymour* v. *Butterworth*, 3 F. & F. 372, cited in Fisher & Strahan's Law of the Press, at p. 131. As to the verdict being perverse, if there was any reasonable ground for it, it will not be disturbed: *Metropolitan R. W. Co.* v. *Wright*, 11 App. Cas. 152; *Webster* v. *Friedeberg*, 17 Q. B. D. 736. As to the duty of the jury in such cases as this, we refer to Odger's Law of Libel and Slander (Bl. ed.), at pp. 356, 449, 450; *Cockayne* v. *Hodgkisson*, 5 C. & P. 543.

Clement, in reply. The evidence to shew that the statement was fair comment must be confined to the facts stated in the article complained of: *Lefroy* v. *Burnside*, (No. 2) 4 Ir. L. R. 556. The defendant had no right to go into collateral matters. In *Wills* v. *Carman*, 17 O. R. 223, the

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facts were set out or referred to in the article complained of and set out in the pleadings. *Odger* v. *Mortimer*, 28 L. T. N. S. 472, is certainly a strong case upholding the right of newspaper comment; but then justification was pleaded, and all the facts were set out in the article.

January 16th, 1893. BOYD, C.:—

The subject of this action is with reference to the conduct of the plaintiff as a municipal councillor of the town of Berlin in connection with the refusal of the council to exempt a manufactory from taxation. That is of public concern and is open to newspaper criticism. The jury are to say whether the defendant's comment on the public conduct of the plaintiff was fair and *bonâ fide*. The statement of claim sets out two matters of alleged injurious comment and the defence describes these as part of an article published in *The Berlin Daily News*. The whole article was put in at the trial and under the plea of "fair comment" evidence was given shewing how the plaintiff had acted in the committee of the council upon the consideration of this application for exemption. *Wills* v. *Carman*, 17 O. R. 223, was taken as authorizing this evidence at the trial. That case went this far, that the truth of matters of fact set forth in the article (being the subject of injurious comment) may be substantiated without any plea of justification. "Justification" technically is not pertinent in such a case, unless the statements of fact as published are themselves libellous; but if the commentary on certain facts is what is complained of then under "fair comment" may be proved the actuality of the occurrences alleged in order that the jury may pass upon the comment.

If, however (which is the present case), the matters commented on are not explicitly set forth on the face of the article then what is the scope of proof? That depends upon the pleading. Under the old system all the public conduct of the plaintiff on the given occasion or pertinent thereto would have been open for proof under "not guilty."

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But now as the material facts have to appear (Rule 399) the details of the conduct animadverted upon should properly have been spread upon the record either by pleading or by particulars. In the present case the defendant has pleaded compendiously that the article was a comment on the "action of the plaintiff and a member of the municipal council," etc., and upon this particulars might have been obtained to point or to limit the scope of the inquiry. That, however, was not done by the plaintiff. A form applicable to such a defence so as to introduce the matters of fact relied upon as justifying the comment is to be found in the special plea in *Lucan* v. *Smith*, 1 H. & N. 481, which was at that date disallowed (1856) because not pleadable with the general issue. The truth of these may be proved not as a matter of justification but as supplying the substratum of actuality upon which the comment is based. In other words you have under "fair comment" to ascertain the facts in order to judge of the fairness of the criticism and inference.

There was not a mistrial, nor a reception of incompetent evidence in detailing what took place in the council chamber, but the plaintiff may have been taken by surprise because of the imperfect pleading and of the extension of *Wills* v. *Carman*, 17 O. R. 223, to this case. I would therefore approve of letting him have a new trial on payment of costs.

ROBERTSON, J.:—

At the time of the publication of the libel complained of, the plaintiff was a member of the town council of Berlin and the article in question reflected on his conduct as such, when a matter of public interest was before that body for consideration. The article in question is headed "A Public Disgrace," and the language used by the journalist is unmistakable as to his opinion of the conduct of the plaintiff as a councilman, and other members who were influenced by him. It appears the council, as constituted in 1892,

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was not keeping faith in regard to a promise made in 1890 by the council of that year, in reference to exemption from taxation of a new manufacturing business, since established on the faith of it, in the town. This policy of offering exemption from taxation to new industries had prevailed for twelve or fifteen years, and was one of great public interest and created considerable discussion, and was taken up by the Board of Trade. The matter was again brought up before the council of 1892, and was referred to a committee, of which the plaintiff was one. The committee met, plaintiff being present, and on the subject being brought up for consideration the plaintiff used most indecorous language and refused absolutely to act on the committee; and as his presence was necessary to form a quorum, the business of the committee could not be proceeded with. The plaintiff left the committee; that is, he got up from the table and went to the door of the room and stood there, refusing to perform his duty as a committee man. The matter consequently was not, as it could not be, proceeded with unless he joined the other members of the committee in forming a quorum. He, however, returned to the committee for the purpose of considering other matters which had also been referred to that committee. By this kind of conduct the plaintiff was able to frustrate the object which the council had as a body in referring the question of taxation or no taxation to the committee. According to the evidence, the conduct of the plaintiff was most reprehensible; he not only used disgraceful language, so disgraceful that the witness called to prove it refused to repeat it in court, but he thwarted the working of the committee in the discharge of its legitimate duty—not by argument, nor by voting against the proposed measure, but by obstruction—by leaving the table, around which the members were assembled, so as to prevent the views of the majority being reported, as it was instructed by the council; thus leaving the committee without a quorum. The matter had therefore to be dealt with by the council without the aid of the report, and that

body threw out the measure. This was characterized by the defendant in the article complained of as "a most disreputable act," carried through the bidding of "an illiterate half-baked crank," and in referring by name to the plaintiff, the article says: "Councillor C. F. Brown is no doubt a remarkably clever man. He has been singularly fortunate in business and business partners, but there are a few things which he does not appear to know, and one of those is that 'honesty is the best policy,' even in public matters." And these were the words complained of in the statement of claim. Judgment. Robertson, J.

The defence: 1st, denied all the allegations of the statement of claim; 2nd, the alleged libel was part of an article in *The Berlin News*, commenting on a matter of public and general interest to the inhabitants of the town of Berlin, viz., the exemption from municipal taxation of certain manufactories in the town, and the action of the plaintiff as a member of the municipal council upon the said matter, and was published by the defendant *bonâ fide* for the public benefit and without malice; 3rd, That the plaintiff has suffered no actual damage by said publication, and the said article was published in good faith and with reasonable grounds to believe that the same was for the public benefit, and a fair and full retraction of any and all statements therein alleged by plaintiff to be erroneous, viz., those set out in the statement of claim, was published in the issue of said newspaper of the 11th of July, being within three days after the receipt of the notice of action, in as conspicuous a place and type as the said statement complained of, setting forth the retraction, etc.

At the trial the defence was, on the authority of *Wills* v. *Carman*, 17 O. R. 223, allowed to give evidence of the conduct of the plaintiff at the meetings of the committee referred to in regard to the question of exemption from taxation, on the ground that the matters upon which he commented were true, and that without doing so he could not establish his plea of fair comment. The jury found a verdict for the defendant, and the plaintiff now moves

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against the verdict and for a new trial, on the ground: 1st, improper reception of evidence; 2nd, improper rejection of evidence; 3rd, verdict perverse and clearly wrong; 4th, perverse as being an unfair comment.

It is contended that *Wills* v. *Carman* 17 O. R. 223, does not warrant the reception of this evidence.

In order to come to a proper conclusion as to these objections, it is necessary to consider what that evidence was, as well as that which was rejected, and generally as to whether the evidence, whether properly received or not, was such as to enable the Court to say the verdict was perverse.

[The learned Judge then referred in detail to the evidence, of which a summary has been already given, and continued.]

No objection is made to the charge of the learned Judge, nor do I see how any could be sustained by the plaintiff. The charge places the matter fully and properly before the jury, who are instructed as to their duty and province in the case; they are told it is for them to say under the circumstances whether the words charged are libellous or not, and as to what constitutes libel is fully explained; and they were told that they were at liberty to consider it a libel, that is to say, to consider that the words are words which are calculated to bring the plaintiff into ridicule and contempt, "because," as the learned Judge said, "it is clearly a matter which may very properly and reasonably be expected to bring a man into ridicule and contempt, to publish of him in a widely circulated newspaper that he is illiterate and that he is a crank. With regard to the words 'half-baked,' I do not know what it means at all in this case. That is a matter which you can consider for yourselves. It seems to me to be simply a vulgar use of an unmeaning word which is added without, perhaps, the writer of it attaching any meaning to it himself. However, you are the judges of that, and you will perhaps be able to understand better than I can what is meant by it. The other two words are words which are well understood,

I suppose, and they are, undoubtedly, words which you may, if you choose, hold to be libellous." Judgment. Robertson, J.

Then the learned Judge refers to the defence in these words: "But, he says that he was justified in using the words which he did as a fair comment and proper language in which to discuss a matter which was a matter of public concern, and it is for you to say whether that is your opinion. Do you consider that that is the way in which controversies over public matters should be discussed or not? Is it likely, for instance, to move any person to the side which was advocated by Mr. Moyer, to dismiss any objections which they may have had against his side, that he should hold up Mr. Brown, who led the opposition, as an illiterate half-baked crank? Was that the proper language to use in a discussion of a public question or was it not?

"Was it properly used and reasonably used by a person who was discussing a public question or was it simply something that was thrown into the article by way of a vulgar abuse of a person who was opposed to the views held by the person writing the article?"

The charge was certainly most favourable to the plaintiff, but after all it was for the jury to say whether the words were libellous or not, and if the evidence was properly received, there is no reason for disturbing the verdict.

It should be observed, however, that there is really no evidence as to the meaning of the words "half-baked crank." It certainly does not impute anything of a criminal character, and may or may not be words of derision, as the circumstances under which they are applied may suggest; and it was therefore necessary and allowable, I think, at the trial, to show how the plaintiff conducted himself as a municipal councillor in regard to questions which properly came before the council of which he was a member, for the purpose of making out the defence pleaded. It is not a defence of justification; but what the defendant says is, the question which was properly before the committee of the council was one of great public interest, and

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should have been treated by that committee in a decorous and becoming manner. The plaintiff being a member of the committee, by virtue of his public position as a representative of the public or the ratepayers of Berlin, it behoved him to conduct himself in a way befitting that position; he was at liberty to oppose or support the question, as his conscience dictated, and so long as he did that according to the rules of the body to which he belonged no one has a right to complain; but when he thought proper to act the part which the evidence details, he subjected himself, as a public man, to unfavourable criticism. The conduct of the plaintiff cannot, on any pretext whatever, be justified; his action was that of an obstructionist solely; it was the only means at his disposal by which he could disregard the order of the council to consider and report upon the matter referred to them; his legitimate action by voting would not prevent the committee reporting, so he adopted the unparliamentary and unbusinesslike conduct of leaving the committee without a quorum. That was not legitimate; it was not the act of a reasonable, respectable, or responsible representative of the ratepayers, and if extended or encouraged, or in fact passed over without comment or notice, would bring the whole municipal machinery into contempt. Now, in order to shew that, the defendant, who was discussing in the article in question, from a public point of view, the way in which the good faith of the town had been broken by the plaintiff and others whom he influenced in the council, said, "But for some inexplicable reason a number of men who hold seats in the council have allowed themselves to do a most disreputable act through the bidding of an 'illiterate half-baked crank.'"

Now, did the learned Judge err in allowing evidence of the conduct of the plaintiff to shew the truth of the commenting of the defendant in the alleged defamatory remarks, there being no plea justifying the publication of the alleged defamatory matter by reason of its truth. As in *Wills* v. *Carman*, 17 O. R. 223, referred to on the argument, as well

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as before the learned trial Judge, the defendant did not seek to justify the alleged defamatory matter published as being true, but he alleged it was a fair comment upon matters of public and general interest, and he was entitled to shew what the matters upon which he commented were, and without doing so it is clear he could not have established his plea of fair comment. The article in question seems to take for granted that the conduct of the plaintiff was publicly and generally known, not his mere opposition to allowing an exemption from taxation, but the manner of the man as a town councillor in carrying his views. This manner was characterized as that of "an illiterate half-baked crank." Now, how could the jury say that such an expression was a fair comment, or otherwise, unless the conduct commented upon was made to appear before them? It was not as if the plaintiff had been charged with having committed a breach of the criminal law, or with being guilty of some great moral turpitude—which would of itself bring him into public disgrace—but merely of conduct unbecoming the public position which he as a committeeman held in trust for the ratepayers who he represented. Now, was the plaintiff's conduct at the meeting of the committee in question a matter of public interest? I think it unquestionably was, and, moreover, I think the press has a right, and ought properly to have the right, to comment forcibly and vigorously upon all matters of public interest. Such comment, so long as it is fair and honest, is useful to all, and any public man is more or less exposed to it. Suppose the article had stated that the conduct of the plaintiff on the occasion in question was most disreputable and unworthy of any man of common sense who properly appreciated his public position? Could the remark be objected to under the circumstances, and if not, would such a remark be more severe than to use what has become of late a vulgar expression, "He 's a crank, a half-baked crank?" After a most careful consideration of the very lengthy list of cases which have been cited on the argument, the conclusion I

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have come to is, that the evidence was properly received; and the jury having considered it, and the whole article in which the alleged defamatory matter appears, having concluded that, under the circumstances, it was not libellous to say of the plaintiff that he is "an illiterate half-baked crank," I do not see that the plaintiff has any right to complain, and for the same reason I do not think the verdict should be interfered with because of the allegation in regard to "honesty being the best policy even in public matters."

I think no injustice has been done the plaintiff, and it is not desirable, even if we thought the jury ought more properly to have found for the plaintiff on the evidence, to prolong this litigation; it would not conduce to the public's interest nor to that of the litigants to grant a new trial, and the motion should be dismissed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

WEEKES V. FRAWLEY.

Receiver—Policy of life insurance—Order for receiver to sell—Jurisdiction—Subsequent declaration by insured for benefit of his wife and children—R. S. O. ch. 136, sec. 5.

An order was made, after judgment in an action, appointing a receiver and for the sale by him of a policy on the life of the defendant for $1,000 which would be fully paid up in ten years, and enjoining the defendant from dealing with the policy. Notwithstanding this, the defendant made an assignment or declaration for the benefit of his wife and children, under R. S. O. ch. 136, sec. 5:—

Held, reversing the decision of FERGUSON, J., that the order for sale was improper.

Per BOYD, C.—No order to sell should have been made against the will of the beneficiaries under the assignment, and *quære* if there was jurisdiction to make any such order.

If the beneficiaries failed to pay the accruing premiums, it might then be proper, as the receiver had no funds wherewith to pay them, to negotiate with the company for the surrender of the policy.

Stokoe v. Cowan, 29 Beav. 637, doubted.

Per ROBERTSON, J.—It was competent for the defendant at any time, even after the receivership order and injunction to make the declaration for the benefit of his wife and children, and the plaintiff could not interfere with the rights of the beneficiaries under it at the maturity of the policy, even supposing their rights to be limited to the residue after payment of the plaintiff's execution, which *semble* they were not.

Per MEREDITH, J.—Whether there was power to make the order to sell or not, it should not have been made in this case, it not being shewn to be necessary, having regard not only to the plaintiff's interests, but to those of other parties in the subject matter.

Statement.

THIS was an appeal from the order of FERGUSON, J., made in Chambers, declaring the transfer of an insurance policy in by the defendant, Thomas Frawley, to the claimants fraudulent and void as against the receiver and plaintiff, and ordering the plaintiff to deliver up the policy to the receiver, and authorizing the receiver to surrender or sell the policy for such sum as he could obtain therefor. The motion arose in the following way:—The plaintiff having judgment against the defendant for about $500, applied to the Court on notice to the defendant for the appointment of James Percy Moore as receiver by way of equitable execution to receive the interest of the defendant in an insurance policy upon his life in the Life Association of Scotland for the sum of £200, it being a life policy to be paid

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up in thirty years, upon which the payments had been made for twenty years.

On this motion, an order was made appointing Moore receiver, and restraining and enjoining the defendant from in any manner dealing with the policy.

The plaintiff subsequently moved before the local Judge at London, for an order that the receiver be authorized to surrender or sell the policy in order to realize the amount of the plaintiff's judgment. This motion, when it came before the local Judge, was referred by him, under Consolidated Rule 42, to a Judge in Chambers in Toronto, and, on the return of the motion before FERGUSON J., it appeared that a declaration of trust had been executed by the defendant, Frawley, in favour of his children, the claimants on the appeal, after the notice of motion for leave to surrender, had been served upon him. This declaration was alleged to have been made in pursuance of R. S. O. ch. 136, sec. 5, An Act to Secure to Wives and Children the Benefit of Life Insurance, and recited that at the time of the effecting the insurance he had made a parol declaration to that effect, and the subsequent declaration in writing was simply carrying out the intention then expressed. No affidavit was filed on behalf of the claimants, the only affidavit being the affidavit of the defendant, Frawley, and no one appeared on the motion for the defendant, Frawley, Mr. Cameron, who had been his solicitor, appearing on behalf of the claimants. The motion was enlarged to permit the cross-examination of Frawley on this affidavit, and it thereupon appeared that no former declaration had been made, and the declaration in question was simply an afterthought executed by him for the purpose, as held by FERGUSON, J., of defeating the plaintiff of his claim. The counsel for the claimants, however, contended that under the above mentioned statute, the defendant could make this declaration at any time, even after receiver appointed, but FERGUSON, J., held the contrary.

The claimants now appealed to the Divisional Court.

The appeal was argued on December 1st, 1892, before BOYD, C., and ROBERTSON and MEREDITH, JJ. Argument.

Cameron, for the appellants. We admit that our clients must claim subject to the receiver's rights, but there was no jurisdiction in Chambers to make the order appealed from, nor should the fruits of the policy be anticipated by a sale or surrender before the policy falls due. The receiving order only gave a lien on the policy and the right to receive to the extent of the debt, but left the right to assign in Frawley: R. S. O. ch. 136, sec. 5. The Court had no power to order the receiver to sell: *Flegg* v. *Prentis* [1892], 2 Ch. 428.

All orders made are merely for the purpose of receiving, but the Court will not anticipate the receipt of the fund: *Beamish* v. *Stephenson*, 18 L. R. Ir. 319.

N. W. Rowell, for the plaintiff. As the declaration of trust was made after the injunction and the appointment of the receiver, it was a mere nullity, the interest of the defendant having passed to the receiver. His interest was then in the officer of the Court, or [illegible] *custodiâ legis*. [BOYD, C., referred to *In re Hoare, Hoare* v. *Owen* (1892), 3 Ch. 94.] We rely on Beach on Receivers, sec. 200; *In re Pope*, 17 Q. B. D. 743; *Stuart* v. *Grough*, 15 A. R. 299, 307. Frawley cannot deal with the policy in any way to the prejudice of the receiver. The doctrine of *lis pendens* applies to such property: Bennett on Lis Pendens, p. 134. There are premiums due each year, and there is no money in the hands of the receiver to pay them with: Beach on Receivers, sec. 728. The Court may order a sale in order to protect the rights and interests of all parties: *Crane* v. *Ford*, Hopk. Ch. 114; Daniell's Chan. Prac., 6th ed., p. 934; Con. Rule 1133; Holmested & Langton, on the Judicature Act and Rules, at p. 871.

January 16th, 1893. BOYD, C.:—

A receivership order, after judgment, commonly called process by way of "equitable execution," assumes

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the exhaustion of all the ordinary remedies by way of execution and sale, and is obtained for the purpose of laying hold of some asset which is not exigible under the usual writ of *fi. fa.* In this case the piece of property which is to be dealt with is a policy of insurance on the life of the debtor for $1,000. Ten years' premiums are yet to be paid if the debtor so long lives, after which no more is to be paid. The judgment is for some $300 and costs. An order has been made for the sale of the policy by the receiver, which is appealed from.

Stokoe v. *Cowan*, 29 Beav. 637, if well decided, would justify this order as a matter of jurisdiction. But if well decided it would also shew that this policy could have been taken under the usual writ of *fi. fa.* by virtue of the provisions of section 17 of the Execution Act, R. S. O. ch. 64 (of which the original is the Imperial Statute 1-2 Vic., ch. 110, sec. 12). But I think this case should not be followed implicitly. Too much doubt has been cast upon it and it seems to extend unwarrantably the provisions of the statute in question. It was held by Brady, L. C., in *Alleyne* v. *Darcy*, 5 Ir. Ch. R. 56 (1855), that such a policy was not a "security for money" within the words of the statute which could be seized by the sheriff. He says a policy on a man's own life is hardly a security for money to be payable to him, and further that the direction being not to sell but to hold and collect is repugnant to the idea that a policy of insurance was contemplated by the framers of the Act. This decision was not cited to the Master of the Rolls when he decided *Stokoe* v. *Cowan* adversely thereto. Upon both decisions the matter again came before Sullivan, M. R., in *In re Sargent's Trusts*, 7 L. R. Ir. 66 (1879), who followed the Lord Chancellor Brady, and in a very able judgment held that whether the plaintiffs could seize the policy or not, it was very clear on the words of the statute that he could not sell it. See also *In re Rollason*, 34 Ch. D. 495. This being so it follows that the receivership order was rightly made in this case (*Beamish* v. *Stephenson*, 18 L. R. Ir. 319), but that the order to sell

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was going beyond what would be authorized by the statutory power of execution. If the legal impediment to execution is removed by means of or pending the receivership no higher right to sell is obtained than if there had been no such legal impediment: *Levasseur* v. *Mason* [1891], 2 Q. B. 77; *Flegg* v. *Prentis* [1892], 2 Ch. D. 428. Hence I think by the analogy of the statute, even if it does not directly apply, no order to sell should have been made against the will of the persons entitled under the assignment of the policy. They should have the opportunity of making payment of the semi-annual premiums, so as to keep the policy on foot, and if they do so the policy should remain in the hands of the receiver till it can be realized upon the death of the insured. If they fail to keep up the payments it may then be proper (as the receiver has no funds wherewith to pay the premiums) and to avoid the risk of forfeiture of the security, to negociate with the company for the surrender value of the policy. The order may be modified so as to protect the interests of all parties by providing that payment be made by the insured or his assigns, and receipts therefor produced by the receiver some days to be agreed on before the last day of payment, in default of which the policy may be surrendered.

No costs of this appeal.

I have read the judgment of my brother Robertson, but I do not propose to consider the broad question of the rights of the wife and children of the insured under a policy in respect of which a receiving order has been made. No declaration of trust or assignment of the policy was made before the appointment of the receiver and the injunction to restrain the defendant dealing with the policy, and the appeal before us was argued on the footing that the act of the defendant in making the transfer was subject to the charge created by the receiving order for the benefit of the one creditor who had obtained it. Therefore I do not feel called upon to express an opinion upon a point which, so far from being argued, was conceded.

Judgment. Robertson, J.

ROBERTSON, J.:—

On the facts presented on the motion for the interim injunction, no fault can be found with the order directing its issue, and no one appearing to oppose its being continued, and no facts alleged then presented to the Court, that other persons were interested in the policy of insurance in question, it was as a matter of course continued, and the order for receiver made; but on this appeal it is made to appear that the assured, at the time the said policy was issued, declared the same to be held by him in trust for his wife and family, as though the written declaration of trust was then made; and whether it was then so declared or not, in my judgment it makes no difference; under the statute, "to secure to wives and children the benefit of life insurance," R. S. O. 1887, ch. 136, sec. 5, it was competent for the assured at any time thereafter to make a declaration that the policy is for the benefit of his wife, or his wife and children, or any of them, and by such declaration the policy under the Act absolutely enures and shall "be deemed a trust for the benefit of his wife, for her separate use and of his children or any of them, according to his intent so expressed or declared, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration."

In my judgment had the declaration been made by the assured prior to the date of the order appointing the receiver, there would be no difficulty in holding that this plaintiff had no rights, which would enable him as a judgment creditor to interfere with the policy in question; and I am of opinion now that he cannot interfere with it, under any circumstances, so as to destroy the rights of the beneficiaries under it at its maturity, even supposing that their rights are limited to the residue, after the payment of the plaintiff's

execution, which I do not think they are. It would be, even under such circumstances most inequitable to sacrifice the policy by sale or surrender, when it would not perhaps realize one-fifth of the amount which will be payable at its maturity, merely for the purpose of enabling the plaintiff to recover now something on his judgment against the assured, and that something perhaps not one-third the amount due to him, and utterly destructive of the rights of the beneficiaries. Judgment. Robertson, J.

But has the plaintiff or any judgment creditor the right under an equitable or other execution to seize and sell a policy which may at any time before its maturity be declared to be effected for the benefit of the wife or children of the assured or any of them under the Act in question?

The 5th section of the Act provides against the declaration interfering with any "pledge" of the policy to any person prior to such declaration. But the seizing under any execution, cannot in my judgment be deemed a "pledging" of it. Pledging is (according to Kent) a "bailment or delivery of goods" (and it may be assumed that a policy of insurance is "goods" exigible under equitable execution, if not under ordinary *fi fa.*) "by a debtor to his creditor, to be kept till the debt be discharged; or to use the more comprehensive definition of Mr. Justice Story" in his commentary, or work on Bailments (9th ed., sec. 286), "it is a bailment of personal property, as security for some debt or engagement. All kinds of personal property that are vested and tangible, and also negotiable paper may be the subject of pledge. * * A pawn or pledge is the *pignori acceptum* of the civil law; and according to that law, the possession of the pledge (*pignus*) passed to the creditor, but the possession of the thing hypothecated (*hypotheca*) did not:" Kent's Commentaries, vol. 2, p. 577. In my judgment the appointment of a receiver, nor the seizure by him under the equitable execution granted in this case, does not create a pledge.

The Act was passed for the benefit of wives and children, and it in effect declares that so far as any insurance

Judgment.

Robertson, J.

money is concerned, the creditors of the assured have no rights which could interfere with the rights of the wife and children, from the moment these rights are declared by the assured under the provisions of section 5. And in my judgment it is competent for the assured at any time before the maturity of the policy, and in case of seizure under execution, before sale or disposal thereunder, and it matters not whether he is insolvent or not, to make the declaration for their benefit; and money secured by life assurance is subject at any moment to be declared to be held in trust for such benefit, and from that moment such money ceases to be an asset of the estate of the assured.

In my judgment the order made on the 17th of October, 1892, after the declaration had been made, was an error, as there was no property exigible, even under equitable execution, the money payable at maturity of the policy from the date of the declaration having enured to the benefit of these claimants, according to the terms of the declaration; and to give effect to the order appointing a receiver, after it has been made to appear that the statute has been invoked for the benefit of the children would to my mind be running counter to the aim, object and intention of the Legislature when it created the beneficiary Act referred to. I think that the appeal should be allowed with costs, and that the policy should be delivered up to children, the now claimants, and that they should be paid the costs not only of the motion, on which the order of the 17th of October, 1892, appealed from was made, but the costs of this appeal. But I do not think the defendant should have his costs.

MEREDITH, J.:—

It does not seem to me needful to consider whether there was power in the learned Judge in Chambers to make the order in question; for, assuming the power, the case was not, in my opinion, a proper one for the exercise of it.

Judgment.
Meredith, J.

When an execution creditor seeks the extraordinary assistance of the Court in a sacrifice of the property of his debtor in order that the execution may bear some immediate fruit, it does seem to me that a very strong case in support of the application should be made; that, indeed, the granting of it is necessary, having regard not only to the plaintiff's interests, but to the rights and interests of all parties and persons, of a substantial character, in the subject matter.

No such case was made: on the contrary, it appears that by the proposed surrender or sale the policy and all possible rights under it would be sacrificed in order that the plaintiff might realize immediately, perhaps $250, upon his execution for double that sum. And this although the sum assured is $1,000—with some profits; although the annual premium is but $18, and it has been duly paid hitherto, and there is no reason for yet doubting that the future premiums will be paid in the same way; although twenty, out of the but thirty at most, payments have been made; and although the insured is said to be an old man in feeble health and strength.

Surely the plaintiff cannot justly seek, nor the Court—if it have the power—aid in, a sacrifice of this policy of insurance without anything more substantial than such far fetched imaginary possibilities—suggested by counsel—as that the assured might avoid the policy by committing suicide, or by moving to some remote and prohibited part of the globe to prevent the plaintiff having any benefit from it, though that too would deprive his children, as well, of the large surplus after payment of the plaintiff's debt and costs in full.

Until something more appears than is now before the Court, I cannot but think that wrong would be done in permitting a surrender of the policy in this way and for the sum proposed.

Dealing with the matter as it was argued before us, I cannot understand how the injunction can prevent the children taking under the assignment: its terms were properly

Judgment.
Meredith, J.

limited to transfers in prejudice of the plaintiff's rights; the assignees have never claimed, and do not now claim, except subject to such rights: and if that were not so, but if the assignment would be otherwise valid, would the plaintiff have any remedy except against the defendant for breach of the injunction? Nor can I perceive why, notwithstanding the order appointing a receiver, the plaintiff might not, by deed, properly assign his interest in the surplus of the fund after the satisfaction of all sums the receiver might lawfully take. There was no interference with the receiver's rights or possession. The assignees have, therefore, an interest in the policy, and a *locus standi* here. The premiums may be paid by the receiver if the defendant and his assignees make default; till such time, it seems to me, there is no sufficient excuse for his application, whatever might be said of it then.

When, if ever, another application becomes necessary and is made, the new feature of the case can be presented, and, after argument, determined. I would be sorry to think that merely because counsel did not present or urge it, any party should be deprived of any substantial right apparent to the Court; a reargument would seem to me, when necessary, the proper course.

I would allow the appeal and set aside the order in question, with costs of the motion and appeal, to the appellants; but without costs to the defendant, whose conduct does not seem to entitle him to any favourable consideration.

Appeal allowed and order set aside with costs to the appellants; and leave to appeal moved for and granted.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

BEATTY V. FITZSIMMONS ET AL.

Mortgage—Sale of equity of redemption—Indemnity against mortgage—Implied contract—Rebuttable presumption.

When a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance, the right to indemnification against it does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract.
Waring v. *Ward*, 7 Ves. 332, explained.

Statement.

BY an indenture bearing date the 7th January, 1891, the plaintiff, as executrix and devisee of her deceased husband, conveyed certain lands to the defendants, who were the surviving partners of a mercantile firm of which the plaintiff's husband had been a member. It was recited in the indenture that a large sum of money had been found to be due from the estate of the plaintiff's husband to the defendants; and that she had agreed to convey all his real estate to them, in consideration of a release of all their claims against her as executrix, and of the sum of $1,000. The considerations expressed were the matters and agreements recited, and the sum of $1,000. The grant was to the defendants, their heirs and assigns for ever, of all and singular the right, title, and interest of the plaintiff as executrix, devisee, and dowress of her husband, and as mortgagor of the lands (describing them); *habendum* to and for the sole and only use of the defendants, their heirs and assigns for ever. The plaintiff covenanted with the defendants that she had done no act to incumber the lands saving by a mortgage for $6,000 principal, given to the Ontario Investment Association on the 14th April, 1886, and registered, etc.; and released to the defendants all her claims upon the lands.

There was no covenant by the defendants with regard to the mortgage or otherwise.

Statement.

The indenture was executed by the plaintiff alone, but it was admitted that it had been accepted by the defendants.

Judgment having been obtained against the plaintiff by the Ontario Investment Association upon her covenant for payment of the mortgage money mentioned in the mortgage made by her to the association, she brought this action against the defendants to compel them to pay off the mortgage and to indemnify her against it.

The action was tried at the Chancery sittings at Sandwich, in May, 1892, before FERGUSON, J., who dismissed it with costs.

The plaintiff appealed to the Queen's Bench Divisional Court, and her appeal was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 8th December, 1892.

W. R. Meredith, Q. C., for the plaintiff. Parol evidence was admitted to shew that it was not the intention of the parties that the defendants should pay off the mortgage or assume liability for it. Such evidence was improperly received. It is not a question of intention at all. The moment you establish that a man has become the purchaser of an equity of redemption, you shew a contract by him to pay off the mortgage: *Boyd* v. *Johnston*, 19 O. R. 598; *Waring* v. *Ward*, 7 Ves. 332. The mortgagor becomes a surety, and the assignee of the equity becomes the principal debtor. Whether the liability of the assignee rests upon an equity or an implied contract, it is still a contract to be enforced by the Court, and parol evidence to vary it cannot be received. I refer to *Abrey* v. *Crux*, L. R. 5 C. P. 37; *Barry* v. *Morse*, 3 N. H. 132; *Anderson*, v. *Yell*, 15 Ark. 9; *Prescott Bank* v. *Caverly*, 7 Gray 217; *Bank of Albion* v. *Smith*, 27 Barb. 489; *Goodwin* v. *Davenport*, 47 Maine 112; *Susquehanna B. & B. Co.* v. *Evans*, 4 Wash. 480; Woodfall on Landlord and Tenant, 14th ed., p. 178; *Bandy* v. *Cartwright*, 8 Ex. 913; *Browning* v.

Wright, 2 B. & P. 13; *Williams* v. *Burrell*, 1 C. B. at pp. 429-431. If the case is to be dealt with as upon the reformation of a contract, I refer to *Dominion Loan Society* v. *Darling*, 27 Gr. 68; 5 A. R. 576; *McKay* v. *McKay*, 31 C. P. 1; *Ferguson* v. *Winsor*, 11 O. R. 88; *McNeill* v. *Haines*, 17 O. R. 479; *Clarke* v. *Joselin*, 16 O. R. 68. All the documents are against the defendants here; there is nothing upon which the reformation can be decreed. The most that can be said in favour of the defendants is that the parties were not *ad idem*. Argument.

Moss, Q. C. (with him *Atkinson*, Q. C.), for the defendants. The plaintiff's alleged right to compel the defendants to pay off the mortgage does not arise from contract at all. There is a presumption of an intention which may be, and in this case has been, rebutted by evidence. I refer to *Waring* v. *Ward*, 7 Ves. 332; *Corby* v. *Gray*, 15 O. R. 1; *McMichael* v. *Wilkie*, 18 A. R. 464; *Davidson* v. *Gurd*, 15 P. R. 31; *Ashby* v. *Jenner*, 32 Sol. J. 576; Warvelle on Vendors, vol. 2, p. 654. If one party to a transaction sees that the other understands it in a different way, he is bound to tell him; and if he does not do so, he is bound to the view which the other party takes: *Wyld* v. *Liverpool, etc. Ins. Co.*, 23 Gr. at p. 465; *Smith* v. *Hughes*, L. R. 6 Q. B. 597. If the evidence is not admissible as the case stands, the defendants have made out a case for rectification.

Meredith, in reply, referred to *Re Gloag and Miller's Contract*, 23 Ch. D. 320; *Ellis* v. *Rogers*, 29 Ch. D. 661; *Walker* v. *Bartlett*, 18 C. B. 845; *Kellock* v. *Enthoven*, L. R. 8 Q. B. 458; L. R. 9 Q. B. 241.

February 6, 1893. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The main contention on the plaintiff's part was that she having proved the indenture of the 7th January, 1891, and the acceptance thereof by the defendants, the out-

Judgment.

Armour, C.J.

standing mortgage of the 14th April, 1886, made by her to the Ontario Investment Association, and the judgment obtained by the association against her upon the covenant contained in such mortgage for the payment of the mortgage money therein mentioned, had thereby raised a presumption or implication that the defendants were to pay off the said mortgage or to indemnify her against it; and that such presumption or implication could not be rebutted by parol evidence.

The implication that the defendants were to pay off this mortgage or indemnify the plaintiff against it did not arise from anything contained in the deed, nor from the construction to be placed upon the deed itself, but was an implication arising from the facts proved by the plaintiff; and the facts so proved had not the effect of excluding the proof of other facts, by parol or otherwise, to rebut the implication so raised.

The implication arising from the facts so proved by the plaintiff was, in my opinion, the implication of a contract on the part of the defendants to pay off this mortgage or to indemnify the plaintiff against it.

In *McMichael* v. *Wilkie*, 18 A. R. 464, Osler, J. A., said at p. 470: "Then as regards the deed to herself of the Manitoba land, she has not executed it, and even if she was *sui juris* the right of Wilkie to indemnity would under similar circumstances depend, not upon contract, but upon the equitable obligation independent of contract said by Lord Eldon in *Waring* v. *Ward*, 7 Ves. at p. 337, to be imposed upon the purchaser to indemnify the vendee against his personal obligation to pay the money due upon the mortgage, for that having become the owner of the mortgaged estate he must be supposed to intend to indemnify the vendor against the mortgage." And Maclennan, J. A., said at p. 474: "As I understand the authorities the principle on which the obligation of a purchaser to pay off a mortgage rests in such a case is an equitable one, and not contract. This is fully explained by Lord Eldon in *Waring* v. *Ward*, 7 Ves. at p. 337."

Judgment. Armour, C.J.

But upon what is this equitable obligation founded, if not upon implied contract? And what Lord Eldon said in *Waring* v. *Ward*, 7 Ves. 332, at p. 336, shews, in my opinion, that he founded this equitable obligation upon implied contract. He said: "The same principle applies to the purchase of an equity of redemption; for the party means at the time of the contract to buy the estate subject to that mortgage; in relation to which mortgage the personal contract was entered into; and that was not his. If he enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

When Lord Eldon here uses the words "independent of contract," I think that the context clearly shews that he meant independent of express contract. And when he uses the words "for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage," he undoubtedly refers to there being in such case, an implied contract to indemnify the vendor.

In *Jones* v. *Kearney*, 1 Dr. & War. 134, the Lord Chancellor said at p. 155: "Now, what was the situation in which Kearney, the defendant, stood? He became the assignee of the premises under the deed of the 24th of September, 1834. He was in the ordinary position of a purchaser buying an estate *cum onere*. The premises were subject to a burden: the purchaser did not enter into any particular obligation to discharge that burden, or to indemnify the seller; it was not necessary that he should do so. This Court fastens on every such purchaser a liability to indemnify the seller against the incumbrances affecting the

Judgment. property sold. If I create an incumbrance on my estate
Armour, C.J. and sell, and no engagement be entered into with respect to that incumbrance, but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such incumbrance. It was my object, in so selling, to charge him and indemnify myself."

"The liability to indemnify the seller" was fastened upon the purchaser because the facts proved shewed that he impliedly contracted with the seller to indemnify him: *Thompson* v. *Wilkes*, 5 Gr. 594; *Re Cozier*, 24 Gr. 537; *Boyd* v. *Johnston*, 19 O. R. 598.

The decisions in the cognate case of the lessee who has assigned his lease without any express contract for indemnity against the payment of the rent and performance of the covenants, all proceed upon the ground of there being an implied contract for indemnity: *Burnett* v. *Lynch*, 5 B. & C. 589; *Wolveridge* v. *Steward*, 1 Cr. & M. 644; *Moule* v. *Garrett*, L. R. 5 Ex. 132.

So also the decisions in cases where shares in companies have been transferred without any express contract by the purchaser to indemnify the seller against future calls, proceed upon the ground of implied contract: *Walker* v. *Bartlett*, 18 C. B. 845; *Wynne* v. *Price*, 3 DeG. & Sm. 310; *Evans* v. *Wood*, L. R. 5 Eq. 9; *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241.

But whether the implication be of an equitable obligation or of a contract, is of no consequence, if in either case parol evidence is admissible to rebut it, or rather to shew that upon other facts being proved, no such implication arises.

The argument is that if A. makes a mortgage upon his land to B., and then conveys the equity of redemption to C., a presumption arises, which cannot be rebutted, and is an absolute rule of law, that C. is to pay off the mortgage or to indemnify A. against it.

But this presumption does not arise from any thing contained in either the mortgage or deed, but from the facts that A., having made a mortgage upon his land to B., then conveys the equity of redemption to C.

Judgment.

Armour, C. J.

And there is no rule of evidence which, when certain facts are proved which raise an implication, whether of an equitable obligation independent of contract, or of contract, prohibits the proof of other facts to shew that no such implication can arise.

In my opinion, the presumption or implication arising from the facts proved by the plaintiff was a rebuttable presumption or implication, and parol evidence was admissible in proof of other facts tending to shew that no such presumption or implication could arise: Greenleaf on Evidence, 15th ed., sec. 296; *Corby* v. *Gray*, 15 O. R. 1.

Such other facts, proof of which was admitted at the trial, in no way contradicted, varied, added to, or subtracted from the terms of the plaintiff's deed to the defendants, and were collateral; and, being believed by the learned Judge who tried this case, destroyed the presumption or implication arising from the facts proved by the plaintiff.

We see no reason to differ from the finding of the learned Judge upon the evidence before him. And we dismiss the motion with costs.

[See *Walker* v. *Dickson*, 20 A. R. 96.—REP.]

[QUEEN'S BENCH DIVISION.]

FAULKNER ET AL. V. FAULKNER ET AL.

Contract—Covenant with mother to educate child—Action by child for breach of—Trust—Action by executors of mother—Measure of damages.

The defendants' mother having conveyed her farm to them, they mortgaged it to her in consideration of the conveyance and of $2,500, and covenanted in the mortgage, *inter alia*, to educate their younger brother. The latter was not a party to the covenant, nor was there anything in the mortgage giving him a right to maintain an action upon it, but there was a stipulation that if the defendants failed to educate him, the mother or her executors might distrain upon them for such sums as might be required from time to time to secure the due performance of the agreement. After the death of the mother, this action was brought by her executors and the younger brother for damages for breach of the covenant:—

Held, that there was no trust in favour of the younger brother, and that the action was not maintainable by him:—

Held, however, that it was maintainable by the executors to the extent that they might recover such sum as would enable them to perform the covenant to educate their co-plaintiff.

West v. *Houghton*, 4 C. P. D. 197, distinguished.

Statement. ON the 30th October, 1874, Mary Faulkner was the owner in fee of a farm in Caledon. On that day she and her husband, George Faulkner the elder, by deed conveyed the property to the defendants, her sons William Faulkner and George Faulkner the younger, and their heirs: habendum to the grantees, their heirs and assigns, unto and to the use of the said Mary Faulkner during her life, and after her death to the use of the grantees, their heirs and assigns for ever. The consideration was stated in a recital, as follows: "to make a suitable provision for her two children, the parties of the second part," the grantees, "and in further consideration of the grants, covenants, and conditions contained in a certain other indenture bearing even date herewith, and made between the said parties hereto of the second part, of the first part, and the said Mary Faulkner, of the second part."

The indenture referred to was a mortgage dated 30th October, 1874, from the defendants to Mary Faulkner, purporting to be made in consideration of the conveyance

Statement.

above referred to, and of $2,500 advanced by the mortgagee to the mortgagors. Proviso, that the mortgage should be void on payment of $2,500, as follows: $800 for the use of Hugh Faulkner; $300 for the use of Margaret Faulkner; $200 for the use of Mary Faulkner the younger; $200 for the use of Anne Faulkner; $500 for the use of Archibald Faulkner; and $500 for the use of Hugh Donald Faulkner, the plaintiff in this action, upon his coming of age. Provided that the receipts of the parties to whose use these sums were made payable should be effectual releases for the amounts payable, and that they should give discharges to be registered in the same manner as if they had been mortgagees; and that in case of default in payment of any of such moneys, the persons for whose use they were made payable might sue for the same as if they had been mortgagees. Then followed a covenant in the following terms: "And this indenture further witnesseth that, for the consideration aforesaid, the said mortgagors do hereby covenant, promise, and agree that they will properly keep, clothe, and educate Archibald Faulkner and Hugh Donald Faulkner, before named, until they arrive at the age of twenty-one years, or until such time as they or either of them cease to reside with the said mortgagors, and with them as members of one family, such education to consist of not less than four months' schooling in each year, for six years, at a common school." A similar covenant to clothe, educate, and maintain Margaret Faulkner, Mary Faulkner, and Anne Faulkner, other children of the mortgagee, followed, and the mortgage continued: "All of said covenants and conditions to be observed and performed on behalf of the said * * Margaret Faulkner, Mary Faulkner, Anne Faulkner, Archibald Faulkner, and Hugh Donald Faulkner, to be a charge and lien upon the lands hereinbefore described, in the same manner as if the same had been an annuity or rent charge charged thereon; and it is hereby declared and agreed that in case of default in the due performance of any of the duties, covenants, and agreements hereinbefore covenanted and agreed to be done, observed,

Statement.

and performed, that it shall and may be lawful for the said mortgagee, her executors, administrators, and assigns, from time to time, and so often as default shall happen to be made, to levy and make distress of the goods and chattels of the mortgagors, and of the goods and chattels upon the premises hereinbefore mentioned, in the same manner as a landlord distraining for rent, for such sum and sums of money as will from time to time be required to make good and secure the due performance of the duty, covenant, or agreement, from time to time in default as aforesaid."

Mary Faulkner, the mortgagee, died on 30th April, 1875, leaving a will whereby she appointed Alexander McColl, the defendant William Faulkner, and one Hugh Faulkner to be her executors, and probate was granted to them on 15th May, 1875. On 13th April, 1885, an agreement was made between the two defendants whereby they divided between them the land conveyed to them by their mother, Mary Faulkner, and whereby the defendant William Faulkner agreed to assume and perform the obligations imposed upon both defendants by the mortgage to Mary Faulkner above mentioned.

The present action was brought by Hugh Donald Faulkner, and by Alexander McColl and Hugh Faulkner, as executors of the last will and testament of Mary Faulkner, deceased, against William Faulkner and George Faulkner, for payment of the $500 payable for the use of Hugh Donald Faulkner under the mortgage, and also to recover damages for the alleged breach by the defendants of their covenant in the mortgage to educate him.

Hugh Donald Faulkner lived with the defendants until they divided the farm, and thenceforth with William Faulkner, upon it, until he became twenty-one, on 31st January, 1889, and worked with them as members of one family; he alleged that the defendants neglected and refused to allow him to attend school excepting during short periods so scattered over the different years as to be of little use to him. A correspondence took place before action between

the solicitors for the plaintiff and the defendant William Faulkner. The latter was willing to pay the $500 and some interest upon it upon obtaining a release in full, which the plaintiff's solicitors refused to give. The defendant William Faulkner, after action, paid into Court $514.50 in full of the claim for $500 and interest, and disputed any claim in respect of the alleged breach of covenant to educate. The defendant George Faulkner asked to be indemnified by his co-defendant under the terms of their agreement above mentioned. Statement.

The action was tried before FALCONBRIDGE, J., and a jury at Brampton on 18th March, 1892, so far as the question of education was concerned, and they returned a verdict for the plaintiff for $200 upon that issue. The learned trial Judge found the other issue also in favour of the plaintiff to the extent of $39 beyond the amount paid into Court, and upon the whole case ordered judgment to be entered for the plaintiffs for $239, with full costs of suit, in addition to the sum which had been paid into Court.

At the Michalmas Sittings, 1892, the defendant William Faulkner moved to set aside this judgment and to enter judgment for the defendants upon the grounds:—

1. That there was no privity of contract between the plaintiff Hugh Donald Faulkner and the defendants.

2. That no action survived to the executors of Mary Faulkner upon the contract, because no damages accrued to the estate of the deceased by reason of the alleged breach.

3. That no trust was created by the mortgage in favour of the plaintiff, which could be enforced by him.

Or for a new trial on the ground that the damages were excessive, and that the finding of the Judge was contrary to the weight of evidence and the law.

The motion was argued on 24th November, 1892, before the Divisional Court [ARMOUR, C. J., and STREET, J.]

Argument.

E. Myers, Q. C., for the defendant William Faulkner. The covenant in the mortgage is an independent covenant; it is not included in the proviso. The covenant is with the mother, the mortgagee. The most that the plaintiff Hugh Donald Faulkner can in any case be entitled to is damages for loss of eleven months' education. The covenant means that the defendants shall be always ready to send him to school. There is evidence that he refused to go to school. Hugh Donald is no privy to the contract and cannot enforce it: Pollock on Contracts, 7th ed. (1892), pp. 200-2; *Tweddle* v. *Atkinson*, 1 B. & S. 393; *Playford* v. *United Kingdom Telegraph Co.*, 38 L. J. Q. B. 249; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re D'Angibau*, 15 Ch. D. 228. Nor can he enforce it as a trust in his favour: Lewin on Trusts, text book ed., p. 80; *Robertson* v. *Lonsdale*, 21 O. R. 600; *Gandy* v. *Gandy*, 30 Ch. D. 57. And the cause of action did not survive to the executors: Williams on Executors, p. 714. It is contrary to public policy: Bisphan's Principles of Equity, sec. 547; Pollock, pp. 303-4. The mother had no control over the child while the father lived: Simpson on Infants, 2nd ed., p. 177. At the most nominal damages only can be recovered: *McLean* v. *Dun*, 1 A. R. 153; Sedgwick on Damages, 7th ed., p. 238; 8th ed. sec. 270; *West* v. *Houghton*, 4 C. P. D. 197. The tender before action was sufficient, and too much interest had been allowed.

Aylesworth, Q. C., (*McKechnie* with him) for the plaintiffs. The damages are very moderate, and there is ample evidence to support the verdict. There is here a trust in favour of Hugh Donald. The conveyance is upon consideration of the complete performance of all covenants in the mortgage. The two together are equivalent to a deed of the property to the defendants in trust to do with it as directed. I refer to *Henderson* v. *Killey*, 14 O. R. 137; 17 A. R. 456; *Osborne* v. *Henderson*, 18 S. C. R. 698; *Gregory* v. *Williams*, 3 Mer. 582; *Re McMillan*, 17 O. R. 344; *Mulholland* v. *Merriam*, 19 Gr. 288; *Mitchell* v. *City of London Assurance Co.*, 15 A. R. 262; *Re Flavell*, 25 Ch. D.

89. The plaintiffs are also entitled to enforce the covenant as a charge upon the land. The question is raised by the counter-claim. The action may also be supported as for breach of covenant. The express stipulation in the mortgage that actions may be maintained is applicable to everything in the instrument, and creates an estoppel against the defendants. Argument.

Myers, in reply.

February 6, 1893. The judgment of the Court was delivered by

STREET, J.:—

The only question raised upon the argument with regard to the claim of the plaintiff Hugh Donald Faulkner to the $500 payable to him under the mortgage was one as to the amount of interest which he should recover. The defendant William Faulkner had paid the interest, before action, upon this sum down to 1st February, 1891, at the rate of seven per cent. He alleged that on 23rd June, 1891, he had tendered $514.50 to Hugh Donald Faulkner in satisfaction of his claim, and urged that he should not be charged with interest after that date. Upon being sued in this action he paid the $514.50 into Court, where it now remains. The learned trial Judge disposed of this portion of the case without the intervention of the jury, and held that no proper tender was shewn, the offer of the money having been coupled with a condition that a release of all claims should be executed. In this view we entirely concur. There appears, however, to be an error in the computation by counsel at the trial of the interest for which the plaintiff Hugh Donald Faulkner should recover. The whole principal and interest to the date of the trial amounted to $539; the defendant William Faulkner had paid into Court $514.50; so that the balance payable to Hugh Donald Faulkner over and above the amount paid into Court was only $24.50, and not $39, as found by the

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judgment. The fact that $14.50 of the interest had been paid into Court was evidently overlooked.

The issue with regard to the claim made for damages for the defendants' breach of their covenant to educate the plaintiff Hugh Donald Faulkner raises a different question, that covenant having been made between the defendants and the mortgagee, Mary Faulkner, deceased, and, there being upon the face of the mortgage nothing, in terms, giving to Hugh Donald Faulkner a right to maintain an action upon it, although such a right is given him with regard to the $500.

In all the cases since *Tweddle* v. *Atkinson*, 1 B. & S. 393, in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favour: *Mulholland* v. *Merriam*, 19 Gr. 288; *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re Rotherham Alum Co.*, 25 Ch. D. 111; *Gandy* v. *Gandy*, 30 Ch. D. 57; *Henderson* v. *Killey*, 17 A. R. 456; *Osborne* v. *Henderson*, 18 S. C. R. 698; *Robertson* v. *Lonsdale*, 21 O.R. 600.

In the present case the same course has been taken, and the right of action of the planitiff Hugh Donald Faulkner is sought to be sustained upon the ground that the effect of the mortgage is to make the mortgagee, Mary Faulkner, a trustee for him of the benefits in his favour for which she stipulated. I am unable to find anything in the circumstances or in the instrument to support this contention. There is simply a covenant by the two defendants with the mortgagee that for certain considerations they will educate their brother, the plaintiff, with the superadded stipulation that if they fail to do so, she may distrain upon them for such sums as may be required from time to time to secure the due performance of the agreement. It is plain from the cases to which I have referred that to entitle the plaintiff Hugh Donald Faulkner to

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claim the rights of a *cestui que trust*, something more is necessary than that he should shew himself entitled to a benefit under the instrument. He must shew that the circumstances are such as to give him a vested right which the other parties to the contract could not terminate without his consent. Had there been here, for instance, a declaration that any moneys recovered by distress from the defendants, upon their failure to educate their brother, should be held by the mortgagee for the purpose of educating him, I should think a sufficient trust in his favour would have been made out.

In *Gandy* v. *Gandy*, 30 Ch. D. 57, a separation deed provided that the husband should pay to the trustees, for the use of the wife and her adult daughters, a certain annual sum, and should also pay to the trustees the expenses of the maintenance and education of her two infant daughters. One of the infant daughters by her next friend brought an action against her father for his failure to pay to the trustees the sums required to maintain and educate her, and it was held by the Court of Appeal that no trust in her favour was created, and that she could not maintain the action; that the effect of the covenant as regarded the infant children was not to give them any benefit by way of right—any beneficial right—but simply to provide as to what was to be done by the husband on the separation and on the contract between himself and his wife.

I can find nothing in this mortgage which would have prevented the mortgagee from revoking at any time, with the consent of the defendants, the arrangement made with them, and making a new one containing no stipulations at all in favour of her other children. I am of opinion therefore that this action cannot be maintained by Hugh Donald Faulkner so far as this branch of it is concerned.

The executors of Mary Faulkner's will are parties plaintiff, however, and they appear to stand in a different position. Simply as a matter of damages for the breach of the covenant to educate the plaintiff Hugh Donald Faulkner, it may be, and was, plausibly urged that they can recover

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nothing beyond a nominal sum, because she paid out nothing, and her estate is liable to pay out nothing for the education of Hugh Donald Faulkner, and neither she nor her estate has suffered damage by reason of the defendant's failure to educate him.

The case at first sight seems to fall within the authority of *West* v. *Houghton*, 4 C. P. D. 197. In that case the facts were that the plaintiff, a landowner, had granted exclusive rights of sporting over his estate to the defendant, who covenanted to keep down the rabbits on the estate so that no appreciable damage should be done to the crops upon it. At the time the covenant was entered into the property was in the occupation of a tenant, who continued to occupy it down to the time the action was brought. Appreciable damage was done to his crops by rabbits on the estate, and an action was brought by the plaintiff against the defendant to recover these damages. It was held, however, that being under no liability to compensate the tenant for such damage and having paid him no sum in respect thereof, the plaintiff was entitled to nominal damages only.

In the present case, however, there is an express stipulation forming part of the covenant by which the damages for its breach are fixed at such sum as may be required to secure the due performance of the agreement, the plain intention being that if the defendants failed to perform their covenant they should furnish the mortgagee with so much money as would enable her to do it. The plaintiffs the executors have succeeded to her rights under this covenant, and are entitled, in my opinion, to recover for her estate the money which she would have been entitled to recover had she lived, under the terms of the covenant. Otherwise the defendants would be entitled to break with impunity the obligation into which they entered as part of the consideration for the conveyance to them of this farm.

The jury have not assessed any damages upon this basis; they were asked, in case they came to the conclusion that

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the defendants had broken their covenant to educate Hugh Donald Faulkner, to fix a sum by way of compensation for the injury which he had suffered and would suffer for the remainder of his life from his lack of education, and for the profit that the defendants derived from his labour when he ought to have been at school. These damages the jury fixed at $200. In the view we have taken of the rights of the parties, we must obviously reject the basis upon which these damages were computed. The defendants failed to send Hugh Donald Faulkner to school during a period of eleven months. How much money would be sufficient to enable the executors to perform the broken part of the covenant, should they be entitled to apply the money of the estate for that purpose? The amount in any event is so small that we desire to avoid the expense of sending the case down for trial again for the purpose of having it assessed. After giving the matter the best consideration we are able to, we think that $100 would be a reasonable sum to fix; and if the parties agree, judgment may be entered for the plaintiffs the executors for that sum upon this issue. If either party objects to this as a proper sum, the case must go down again for the purpose only of having these damages assessed, but it must be at the risk of costs in case of failure. If the suggestion we make is accepted, there will be judgment for the executors for $100, and for the plaintiff Hugh Donald Faulkner for $24.50, and for the $514.50 paid into Court, with the interest upon it, and the plaintiffs will recover their full costs of the action. If our suggestion is not accepted, there will be judgment for the $24.50 and the money in Court in favour of Hugh Donald Faulkner, with full costs of the action; and an issue as to the damages will be sent for trial, the costs of which will be reserved.

In any event there will be no costs of the motion in the Divisional Court to either party.

[QUEEN'S BENCH DIVISION.]

QUICK V. CHURCH.

Husband and wife—Adultery of husband—Alienation of husband's Affections—Support of wife—Married Women's Property Act—Damages.

When a husband leaves his wife to live in adultery with another woman by her procurement, and lives and continues by such procurement to live in adultery with her, whereby his affections are alienated from his wife and she is deprived of her means of support, an action lies at common law by the wife against such woman.

The Married Women's Property Act, R. S. O. ch. 132, by allowing a wife to sue without her husband and by making the damages recovered the separate property of the wife, removes the former difficulty in enforcing such a cause of action.

Review of English and American decisions.

Statement. THE plaintiff by her statement alleged: (1) That she was a married woman residing in Woodstock, and the defendant was a widow residing at Green Bay, in the State of Wisconsin; (2) That she was the wife of Joseph Quick, who formerly lived in Woodstock, to whom she was married about twenty-five years ago, and by whom she had had five children; (3) That the plaintiff and the said Joseph Quick lived together in Woodstock till about the end of August, A.D. 1890, and during the time they lived there the said Joseph Quick always provided for the said plaintiff and his family, and was a kind and affectionate husband till about four or five years ago; (4) That during the year 1888 the defendant was a married woman, living about seven or eight miles from Woodstock with her husband; (5) That the defendant became acquainted with the said Joseph Quick, the husband of the plaintiff, and sought in various ways to induce the said Joseph Quick to visit her at her home; (6) That at the repeated requests of the said defendant, the said Joseph Quick did go to the house of the defendant on various occasions during the lifetime of the defendant's husband, and the said Joseph Quick frequently met the said defendant at different places away from her home; (7) That in or about the month of April,

A.D. 1889, the husband of the defendant died, and from that date the visits of the said Joseph Quick to the defendant became very much more frequent, and at times he remained away from his home in Woodstock for several days in company with the defendant, either at her house or elsewhere, and the defendant and the said Joseph Quick became unduly intimate; (8) That about the month of August, A.D. 1890, the said Joseph Quick, on the repeated solicitations of the defendant, left the plaintiff and his family in Woodstock and went to Green Bay, in the State of Wisconsin, in company with the defendant; (9) That the defendant and the said Joseph Quick there looked around for a hotel, and in a few days the defendant purchased a hotel and paid a deposit on same, and she left the said Joseph Quick there until she returned to her home near Woodstock, and disposed of her farm, stock, and implements; (10) That the defendant then returned to Green Bay and took possession of the said hotel, and she and the said Joseph Quick had ever since lived together in said hotel; (11) That by reason of the actions of the defendant in regard to the said Joseph Quick, the plaintiff had been deprived of the comfort and enjoyment of the society of her husband, the said Joseph Quick, and his affections had been alienated from the plaintiff; and she had also been deprived of her only means of support and maintenance, as the said Joseph Quick had neglected and refused to provide for the said plaintiff ever since he left her in August, A.D. 1890. Statement.

The defendant by her statement of defence: (1) denied all the allegations in the statement of claim, and in particular the defendant most strongly denied that she ever at any time had been unduly intimate with Joseph Quick, in the statement of claim mentioned, or had alienated his affections from the plaintiff, or that she had ever done any act having that purpose or tendency; and she said (2) that long prior to the year 1888 the plaintiff and the said Joseph Quick, in the statement of claim mentioned, finding their temperaments incompatible, agreed to live

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apart, and by mutual consent executed a deed of separation for that purpose, and they had since been living apart from each other; and she further said (3) that the statement of claim disclosed no cause of action, and she claimed the same relief as if she had demurred.

Issue.

The cause was tried at the Autumn Sittings of this Court, 1892, at Brantford, by STREET, J., and a jury.

The jury under the charge of the learned Judge, which was not objected to, and in which he carefully reviewed the facts, found a verdict for the plaintiff and $4,500 damages, made up of $2,500 for alienation of affections, and $2,000 for loss of support, which the jury thus divided, the learned Judge having requested them to say how much damage they gave for each of such causes.

At the Michaelmas Sittings, 1892, of the Divisional Court the defendant moved to set aside the verdict and judgment, and to enter a nonsuit or verdict for defendant, or for a new trial, on the ground that the verdict and judgment were against law and evidence and the weight of evidence; and on the ground that the plaintiff failed to prove any cause of action against the defendant; that the claim of the plaintiff was not sustainable in law; on the ground of surprise in the evidence of the witness Hagey swearing that the defendant left the country in August, when in fact she left in October, and in the evidence that the anonymous letter produced at the trial, was written by the defendant, and in the evidence of the plaintiff as to the conversation with the defendant at Green Bay; that the damages were excessive, and were not sustainable in law; and on other grounds raised by the pleadings; and on grounds taken by counsel at the trial.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 9th and 10th December, 1892.

McCarthy, Q. C., for the defendant. There is no evidence of any enticement of the plaintiff's husband by the

defendant, and there should be a nonsuit on that ground. But the action does not lie at all: Chitty on Pleading, vol. 1, p. 187; Bacon's Abr. tit. "Trespass," C. 1; Selwyn's Nisi Prius, tit. "Adultery;" Buller's Nisi Prius, 7th ed., p. 86. The result of the cases is that an action is not maintainable unless where there is loss of service: Kerr's Blackstone, vol. 3, p. 151; *VanArnam* v. *Ayers*, 67 Barb. 544. There must be some servitude or right of property: *Lynch* v. *Knight*, 9 H. L. C. 577. In *Westlake* v. *Westlake*, 34 Ohio St. 621, the action was held to lie upon the wording of the Ohio Married Women's Act. The only action that can be maintained is for some proprietary loss, and the unity of the husband and wife in that regard is not affected by the Married Women's Property Act, R. S. O. ch. 132. The only sections that have any bearing are sec. 3, sub-sec. 2; sec. 4, sub-sec. 4; and sec. 14; and these do not assist the plaintiff. Sec. 7 does not assist. A wife has no such right in the consortium of her husband as is asserted here, and even if she has, it does not so belong to her separate estate as to enable her to sue; and the unity of husband and wife is not destroyed by legislation: *Butler* v. *Butler*, 14 Q. B. D. 831; *Re Jupp*, 39 Ch. D. 148; *Hyde* v. *Scyssor*, Cro. Jac. 538; *Buckley* v. *Hale*, *ib.* 655; [FALCONBRIDGE, J., referred to *Re Wilson*, 20 O. R. 397, and *Spahr* v. *Bean*, 18 O. R. 70] No one ever heard of an action by a wife against a person for beating her husband and so depriving her of his society and support. Then the finding of the jury is monstrous; there is absolutely no evidence to support it. The damages, too, are enormous. It is not a case for sentimental damages. The principle of seduction and criminal conversation should not be extended. Argument.

Fullerton, Q. C., (*J. A. Macdonald* with him) for the plaintiff. In *McMillan* v. *Jelly*, 17 C. P. 702, it was held that the gist of the action of criminal conversation is the loss of the comfort and society of the wife. See also *Patterson* v. *McGregor*, 28 U. C. R. 280. It is not *quare servitium amisit*, but *quare consortium amisit*: *Rigaut*

Argument.

v. *Gallisard*, 7 Mod. at p. 82, per Holt, C. J. I submit it is wrong to say that loss of service is the gist of the action. The services of the wife have never been the foundation of the action. The law as to the position and rights of the wife have undergone a change: *Regina* v. *Jackson* [1891], 1 Q. B. 671, where all the old cases are cited and dissented from. The old law of servitude was based on the same principle which allowed the husband to beat and imprison the wife, and under which she was regarded as his chattel. I submit the old law has passed away. In *Winsmore* v. *Greenbank*, Willes 577, it was held that such an action as this brought by the husband would lie. The foundation of the action is not the sexual intercourse, but the loss of *consortium*; that applies to the wife as well as to the husband; and therefore she should have the action. In *Heermance* v. *James*, 47 Barb. 120, the husband recovered damages against the person who induced his wife to refuse him intercourse. It is part of the original contract between husband and wife. A woman may recover for the loss of a prospective husband, and why not for a husband *in esse*? It is said that the difference is on account of the unity of husband and wife; but the Married Women's Act has changed that. Now she can sue for the loss of her husband. It is the same action that she had for the loss of her lover. I refer to Bigelow L. C. on Torts, 3rd ed., p. 42; Odger on Libel, 2nd ed., pp. 298-9; Starkie on Slander, 3rd ed., p. 320. The right of the wife to the society of her husband was enforced by the ecclesiastical Courts. This is dealt with in *Westlake* v. *Westlake*, cited by my learned friend, and also in *Regina* v. *Jackson*. The ecclesiastical law was part of the law of the land, and was recognized by the Courts of law: *Wilson* v. *Wilson*, 5 H. L. C. 40 at pp. 57, 60; *Anquez* v. *Anquez*, 1 P. & D. 176. The right to sue for loss of *consortium* was expressly upheld by the Irish Exchequer Chamber in *Lynch* v. *Knight*, 5 L. T. N. S. 291; affirmed by the House of Lords, 9 H. L. C. 577. I refer also to *Baker* v. *Baker*, 16 Abbott N. C. (Supreme Court of New York) 293, overruling

VanArnam v. *Ayers*, 67 Barb. 544; *Warner* v. *Miller*, 17 Abbott N. C. 221; *Churchill* v. *Lewis*, *ib.* 226; *Jaynes* v. *Jaynes*, 39 Hun (46 N. Y. Supreme Court) 40; *Mehrhoff* v. *Mehrhoff*, 26 Fed. Repr. 13. As to the loss of support, the plaintiff may be entitled to sue for that, even if not for loss of *consortium*. The husband, both by statute and common law, is bound to maintain his wife: *Regina* v. *Bissell*, 1 O. R. 514; Addison on Contracts, 9th ed., pp. 397-9; *Barrow* v. *Barrow*, 18 Beav. 529; *Davidson* v. *Wood*, 32 L. J. Ch. 400; *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568. The wife, being entitled to support, is entitled to bring an action against any one who induces the husband to refuse that support: *Lumley* v. *Gye*, 2 E. & B. 216; *Bowen* v. *Hall*, 6 Q. B. D. 333, at p. 337. Under the Married Women's Property Act the wife is capable of suing and being sued in contract or tort, and the husband need not be made a party. This is a tort—a personal wrong to the plaintiff—and the damages are to her as her separate property. Section 3, sub-section 2, as it now stands, leaves out the words "in contract or in tort." The enactment is therefore wider than it was before. In *Brennen* v. *Brennen*, 19 O. R. 327, the objection was not taken that the wife could not sue alone. As to damages, $4,500 would not be regarded as too large in seduction. Argument.

McCarthy, in reply. Has the plaintiff sustained any actionable wrong, and, if so, can she sue under the Married Women's Property Act? The American cases must be taken as referring to the particular terms of the statutes in force. My learned friend says the wife is no longer a chattel. Then, is the husband a chattel? I refer to *Re Cochrane*, 8 Dowl. 630. Has a wife a right in the *consortium* of her husband as a legal right for which an action can be maintained? There is no doubt a wife can by herself maintain an action for a tort: *Spahr* v. *Bean*, 18 O. R. 70; but this is no wrong.

February 6, 1893. The judgment of the Court was delivered by

Judgment. Armour, C.J.

ARMOUR, C. J.:—

I think it must be taken from what was shewn on the trial and the charge of the learned Judge, that the jury found that the plaintiff's husband left the plaintiff and went to live with the defendant by the procurement of the defendant, and lived and continued to live in adultery with the defendant by the procurement of the defendant.

And I think that if any amendment of the pleadings consistent with this finding is necessary to be made, it ought to be made, and we allow it to be made.

I am of the opinion that the evidence warranted the jury in coming to the conclusion they did, and in making this finding.

And I see no reason for interfering with the finding on the ground of alleged surprise.

Nor are the damages excessive, having regard to the decisions as to damages in cases of this nature.

The important question, however, is whether, assuming this finding to be correct, the action is maintainable.

If this finding does not constitute a good cause of action at the common law, it may be that owing to the very narrow judicial construction put upon the Act R. S. O. ch. 132, respecting the property of married women, it is not a good cause of action now.

That Act provides, sec. 3, sub-sec. 2, that "A married woman shall be capable * * of suing and being sued, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her * * shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property * * ." And it is said that this provision gave the married woman no action which she had not before, but merely enabled her to prosecute such action as if she were a *feme sole*, and made the damages recovered therein her separate property.

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It also provides, sec. 14, that "Every woman * * shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort * * ."

It has been held that, under a similar provision of law to this, the married woman, in cases to which I shall hereafter refer, acquired a right to sue for such damages as were recovered in this action.

There have been various decisions in different States of the Union upon this question, but they are not all one way.

The question seems to have first arisen in 1871, and to have been the subject of decision down to the present time.

In *Clark* v. *Harlan*, 1 Cinn. S. C. 418 (1871), the action was brought by the wife against one Elliot Clark for wrongfully and maliciously enticing away the plaintiff's husband from her residence, whereby she was deprived of his society, protection, and support, and for detaining and harbouring in his private residence her husband, and refusing her access to him; and a demurrer to the action was overruled, and the action held to be maintainble—the code giving the wife the right to sue for her separate property, and authorizing her in all cases relating to her personal estate to sue as a *feme sole*, and the statute giving her all rights of action which had grown out of the violation of her personal rights, to be and remain her separate property.

In *Westlake* v. *Westlake*, 34 Ohio St. 621 (1878), the action was brought by the wife against the father of her husband for wrongfully inducing her husband to abandon her or send her away; and the majority of the Court held the action to be maintainable; and that, whatever doubts might exist at common law as to this action being maintainable, owing to the common law unity of person and

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the legal incidents flowing from it, the reasons that gave rise to those doubts either never existed in Ohio, or had been swept away by legislation.

In *VanArnam* v. *Ayers*, 67 Barb. 544 (1877), the complaint charged, among other things, that the plaintiff's husband was, by the persuasion of the defendant, become entirely separated from the plaintiff, and she was deprived of his society, support, maintenance, and help; and Hardin, J., allowed a demurrer to it, as shewing no cause of action.

In *Breiman* v. *Paasch*, 7 Abbott N. C. 249 (1879), the action was by the wife against another woman for maliciously gaining the affections of her husband and causing him to have carnal intercourse with her, and maliciously enticing him to desert her and leave her without the means of support. The Court on demurrer held that a good cause of action was disclosed for which the wife could sue alone.

In *Logan* v. *Logan*, 77 Ind. 558 (1881), the action was brought by the wife against the father of her husband for, amongst other things, inducing her husband to abandon her by promises, persuasion, and threats, whereby she lost her husband's company, care, and support; and it was held by a majority of one in the Supreme Court of Indiana that the action was not maintainable, for the loss of a husband's society was not an injury to the character or person of the wife, and the remedy given by the statute of Indiana was confined to injuries to the person or character of the wife.

In *Baker* v. *Baker*, 16 Abbott N. C. 293 (1885), the action was by the wife against Henry Baker for maliciously and wrongfully enticing away the plaintiff's husband, and thereby depriving her of the comfort, protection, and benefit of his society and companionship. The Supreme Court of New York held the action maintainable at common law; and also held that under the statute of that State which enabled a married woman to maintain an action in her own name for damages against any per-

son or corporation for an injury to her person or character, the same as if she were unmarried, and made the avails of such action to be her sole and separate property, she was enabled to sue alone for the damages claimed. See also *Warner* v. *Miller*, 17 Abbott N. C. 221 (1885); *Churchhill* v. *Lewis*, *ib.* 226 (1885). Judgment. Armour, C.J.

In *Bassett* v. *Bassett*, 20 Bradwell 543 (1886), the action was brought by the wife against the father of her husband for wrongfully and maliciously enticing her husband to separate himself from her, whereby she was deprived of his society, affection, protection, and support; and it was held by the Supreme Court of Illinois that, under legislation in that State very similar to our legislation, the action was maintainable.

In *Mehrhoff* v. *Mehrhoff*, 26 Fed. Repr. 13 (1886), the Circuit Court held that the action, which was brought by the wife against the father and mother of her husband for alienating the affections of her husband and depriving her of his society, care, and support, was maintainable; that the reason of its not being maintainable at common law was the unity of the husband and wife; and, as by the law of Kansas a woman might while married sue and be sued in the same manner as if she were unmarried, the difficulty arising out of the unity of husband and wife was got rid of.

In *Jaynes* v. *Jaynes*, 39 Hun (46 N. Y. Supreme Ct.) 40 (1886), the action was brought by the wife against Alfred Jaynes for wrongfully and maliciously enticing her husband to abandon her and live apart from her; and it was held by the Court that as the only difficulty in the way of such an action at common law was the unity of husband and wife and the husband being therefore necessarily a party, and as that had been got rid of by legislation in that State allowing the wife to sue alone, the action was maintainable.

In *Bennett* v. *Bennett*, 116 N. Y. 584 (1889), the action was brought by the wife against Oliver Bennett for enticing away her husband and depriving her of his support, comfort, aid, protection, and society; and it was held by the

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majority of the Court that the wife had this right of action at the common law, but was unable to enforce it, being obliged to join her husband in the action, and that the civil code of that State enabling her to sue alone got rid of the difficulty.

In *Foot* v. *Card*, 58 Conn. 1 (1889), the Court held that an action could be maintained by a wife against a woman who had alienated from her the affection of her husband and deprived her of his society.

In *Seaver* v. *Adams*, 19 Atl. Repr. 776 (1890), the Supreme Court of New Hampshire held that a declaration alleging that the defendant seduced the plaintiff's husband and alienated his affections from her was good on demurrer, and that the legislation in New Hampshire had removed the disability at common law by reason of the unity of husband and wife.

In *Doe* v. *Roe*, 82 Maine 503 (1890), the action was by the wife against another woman charging that the defendant debauched and carnally knew her husband, thereby alienating his affection and depriving her of his comfort, society, and support; and the Court held that the action was not maintainable.

In *Duffies* v. *Duffies*, 45 N. W. Repr. 522 (1890), the action was by the wife against the mother of her husband for having wrongfully induced, persuaded, and caused her husband to refuse to live with her any longer or to cohabit with, support, or maintain her; and the Supreme Court of Wisconsin by a majority held that neither at the common law nor by statute would the action lie in Wisconsin.

In *Postlewaite* v. *Postlewaite*, 28 N. E. Repr. 99 (1891), the Court of Appeal of Indiana held that a (divorced) wife might maintain an action for damages against another woman for alienating the affections of her husband.

In *Warren* v. *Warren*, 50 N. W. Repr. 842 (1891), the Supreme Court of Michigan held that a wife might maintain an action against a man for the alienation of her husband's affections from her and procuring his desertion of her.

Judgment. Armour, C.J.

In *Haynes* v. *Nowlin*, 29 N. E. Repr. 389 (1891), the Supreme Court of Indiana held that an action by a wife against one who wrongfully entices her husband from her, and thereby deprives her of his *consortium* and support, was maintainable, and that *Logan* v. *Logan*, above referred to, was no longer law.

And this case was followed by the Supreme Court in *Wolf* v. *Wolf*, 30 N. E. Repr. 308 (1892).

These cases are not authorities by which we are bound, for we must decide this case according to the law of our own country, but they serve a useful purpose in shewing the arguments used by able jurists in favour of and against the maintenance of such an action as this.

And the arguments therein made use of against the maintenance of the action are principally founded upon this passage in Blackstone's Commentaries, book iii., ch. 8:—"We may observe that in these relative injuries (that is, injuries offered to a person considered as a husband, as by the abduction of and adultery with his wife; injuries offered to a person considered in the relation of a parent, as by the abduction of his child; considered in the relation of a guardian, for the abduction of his ward; and considered in the relation of a master, by enticing away or by assaulting his servant), notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom: while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior has no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she has no separate interest in anything during her coverture. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He has no property in his master; and if he receives his part of the stipulated contract he suffers no injury, and is therefore entitled to no

Judgment. action for any battery or imprisonment which such master
Armour, C.J. may happen to endure."

But the learned commentator is only speaking of those injuries to which he has already referred, and cannot be taken to mean that the wife has no interest in the relationship of husband and wife; and that the servant has no interest in the relationship of master and servant; and that no action will lie at the suit of the wife against a person who wrongfully induces her husband to deprive her of his *consortium* and support; and that no action will lie at the suit of a servant against a person who wrongfully induces his master to break their contract of service: *Lumley* v. *Gye*, 2 E. & B. 216; *Bowen* v. *Hall*, 6 Q. B. D. 333. For he says in vol. 1, ch. 15, that marriage includes the reciprocal rights and duties of husband and wife.

Whether we regard marriage as a contract or as a status, *consortium* was the foundation of it; it was the man and the woman casting in their lots together; it means marriage and all that marriage implies; and is as much the *consortium* of the man as of the woman, of the woman as of the man.

It is therefore a contradiction of the term to say that in marriage the husband has the right to the *consortium* of his wife, but that the wife has no right to the *consortium* of her husband.

But it is upon this ground that it is denied that the wife had at the common law a cause of action such as this.

The husband had his action at the common law against the defiler or enticer away of his wife, *per quod consortium amisit*, which was the only allegation of damage that was required, and the defilement being proved, the damage was presumed. He might have added, by way of aggravation, other loss besides that of *consortium*, but it was unnecessary to do so: *Winsmore* v. *Greenbank*, Willes 577; *Chambers* v. *Caulfield*, 6 East 244; *Wilton* v. *Webster*, 7 C. & P. 198; *Bigaouette* v. *Paulet*, 134 Mass. 123; and he might have brought such action either in tresspass or case: *Chamberlain* v. *Hazlewood*, 5 M. & W. 515.

Judgment.
Armour, C.J.

Why should not the wife have had an action at the common law against the paramour and enticer away of her husband, *per quod consortium amisit*?

There is in principle no legal reason why this was not a good cause of action at the common law.

In *Lynch* v. *Knight*, 5 L. T. N. S. 291, Pigot, C. B., said at p. 293: "*Consortium* in its obvious meaning necessarily includes the idea of a union of two persons, each of whom is the consort of the other, and it is impossible to maintain that either has an exclusive interest, or that each has not a common interest in that community of lot which involves mutual assistance, but which does not make either the servant, in the ordinary sense of the word, of the other."

The majority of the Court agreed with this judgment, and with that of Christian, J., to the same effect, and so far it is an authority for the view I have expressed.

This case went to the House of Lords, and is to be found 9 H. L. Cas. 577, and what was said there on this subject, although unnecessary to the decision of the point on which the case went off, has been invoked by each party to this controversy as favourable to her.

But it cannot be contended that what was said on this question was authoritative. Lord Chancellor Campbell said at p. 589: "Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. * * But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognize, to the wife as well as to the husband. The wife is not the servant of the husband, and the action for criminal conversation by the husband does not, like the action by a father for seduction of a daughter, rest on any such fiction as a loss of the services of the wife. The better opinion is that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband who had seduced him. But I conceive that this rests on the consideration that, by the adultery of the husband, the wife does not necessarily lose the *consortium* of her husband; for she may, and, under certain

Judgment.
Armour, C.J.

circumstances, she ought to condone and still enjoy his society; whereas condonation of conjugal infidelity is not permitted to the husband, and, by reason of the injury of the seducer, the *consortium* with the wife is necessarily for ever lost to the husband."

It is plain that when he says, "the better opinion is that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband who had seduced him," he is not drawing a logical conclusion from the preceding part of his judgment, but the logical conclusion to be drawn from it would be that she could maintain such an action. And the reason that he gives for such a conclusion is not a legal reason, but a social reason; and he treats the adultery of the husband as not necessarily depriving the wife of the *consortium* of the husband, although it is clear that it might do so, and the adultery of the wife as necessarily depriving the husband of the *consortium* of the wife, although it is equally clear that it might not do so.

Lord Brougham merely said that he entirely agreed with his late noble and learned friend in his observations, with this exception, that he was rather inclined to think, though that had become immaterial, that the action would not lie.

Lord Cranworth said that he was strongly inclined to think that the view taken by his late noble friend, that for slanderous words spoken of a wife, not actionable in themselves, but occasioning special damage to her by depriving her of the *consortium* or conjugal society of her husband, the husband and wife might maintain an action against the slanderer.

Lord Wensleydale considered the question, "Whether a wife can maintain an action for the loss of the *consortium* of the husband by a wrongful act of the defendant (joining, of course, her husband for conformity);" and said, "I have made up my mind that no such action will lie. To test this, suppose an action brought by the wife for false imprisonment of the husband by the defendant, for a

Judgment. Armour, C.J.

period of time, by which she lost the *consortium* of the husband during that time. Would such action lie? If it would not, *a fortiori*, no action could be maintained for slander attended with the special damage of the loss of the husband's society;" and he agreed with Baron Fitzgerald, "that the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of the husband." Then he speaks of "the assistance of the wife in the conduct of the household of the husband, and in the education of his children," which would be *servitium*, not *consortium*; and says "the loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply; and it cannot be presumed that the wrongful act complained of puts an end to the means of that support without an averment to that effect. And if there were such an averment, the recovery of a compensation must be by joining the husband in the suit, who himself must receive the money, which would not advance the wife's remedy. The wife is, in fact, without redress by any form of action for an injury to her pecuniary interests." See *Davies* v. *Solomon*, L. R. 7 Q. B. 112; *Palmer* v. *Solmes*, 45 U. C. R. 15.

But this judgment of Lord Wensleydale does not shew why mere loss of *consortium* (supposing the wife to be living apart from the husband, as in *Chambers* v. *Caulfield*), can be estimated in the case of the husband, and cannot be estimated in the case of the wife.

There was no averment in that case of loss of support, (as there is coupled with proof in this) and Lord Wensleydale does not say that the action would not have lain had there been such an averment; but that the wife's remedy would not have been advanced, for she would have been obliged to join her husband, and the damages would have been his.

Judgment.

Armour, C.J.

There is nothing in this judgment, taken as a whole, which concludes the question in this case, or which shews that the *consortium* of the wife is not the same as the *consortium* of the husband, or that one is not as capable of estimation in law as the other.

The real reason against this action by the wife was not a legal reason, but a social reason, resting upon the peculiar notions of the English people with regard to the relations between husband and wife. One of these notions received a shock which startled all England in the decison of *Regina* v. *Jackson* [1891], 1 Q. B. 671. Another of these notions as to the relative degrees of chastity to be required of the husband and wife respectively, is thus set forth by that great moralist, Dr. Johnson, in this passage: "Between a man and his wife a husband's infidelity is nothing; wise married women do not trouble themselves about the infidelity of their husbands. The difference between the two cases is boundless. The man imposes no bastards on his wife. A man to be sure is criminal in the sight of God, but he does not do his wife any very material injury, if he does not insult her; if, for instance, he steals privately to her chambermaid. Sir, a wife ought not greatly to resent this."

This latter notion prevailed against putting the wife on the same footing as the husband with regard to adultery, in the Divorce Act, 20 & 21 Vic. ch. 85, notwithstanding the powerful arguments of Lords Lyndhurst and Brougham: Hansard, vols. 134, 142, and 143.

It is to be hoped that this notion does not still exist to the extent it did in Dr. Johnson's time, for it may prove fatal to this judgment; but that it does now exist is apparent from the fact that the adulterer retains his place in society, while the adulteress loses hers.

The unity of the husband and wife is in some places urged as against this action; but the wife was always entitled to maintain an action for personal wrongs by joining her husband; and this therefore constitutes no objection to the action.

Judgment.

Armour, C.J.

It is said that there is no precedent for such an action as this, that is, that there is no record of any such action having been brought; but this is not to be wondered at, for the husband had to be joined, and the damages, if recovered during coverture, went to him; but there is nothing in this to shew that the cause of action did not exist.

It would be difficult to find any record of an action brought by a wife against a person who had procured her husband to assault and beat her, and for the same reason; but no one would doubt that such a cause of action did exist.

The action for criminal conversation may be a disgrace to our law, but it would be a still greater disgrace to our law if it existed only for the husband and not for the wife.

The finding of the jury constituted, in my opinion, a good cause of action at the common law; the difficulty in the way of enforcing it lay in the necessity for joining her husband and in his being entitled to the damages if recovered during coverture; this difficulty has now been removed by the Act respecting the property of married women, allowing the wife to sue without joining the husband and giving her the damages recovered as her separate property; and this action is therefore maintainable.

The motion will, therefore, be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

BARNIER v. BARNIER.

Tenants in common—Ejectment—Ontario Judicature Act.

A tenant in common, in an action for the possession of land against a person without any title, can recover judgment only for the possession of his share; and the Ontario Judicature Act has made no difference in this respect.

Statement. THIS was an action to recover possession of land, brought by Alfred Barnier against Henry Barnier, and was tried at Chatham before FERGUSON, J., on the 20th May, 1892. The facts are stated in the judgment.

Douglas, Q. C., for the plaintiff.
John Reeve, for the defendant.

June 15, 1892. FERGUSON, J.:—

The action is for the possession of the easterly one-third of lot number three in the second concession of the township of Dover.

The trial took place at Chatham upon admissions made in open court and without any other evidence being given. There are admissions in writing, signed by counsel, which were put in. These, however, do not differ from the plain admissions made at the bar.

The facts, then, on which judgment has to be given are as follows:—

The land came by devise from an owner of it to eight persons as tenants in common. This tenancy in common was expectant upon the termination of a life estate in the whole, by the same will given to the widow of the testator. This widow has died, and the tenancy in common is now a tenancy in possession. The plaintiff (not being one of the eight tenants in common who took under the devise) purchased, and has had conveyed to him, five undivided one-eighth shares of the land, one of such shares being the share

Judgment.

Ferguson, J.

of the defendant, who was one of the original eight tenants in common. The conveyance of this share was one made directly from the defendant to the plaintiff.

The title of the plaintiff then is, and is admitted to be, a good title to five undivided one-eighth shares in the land, all the shares being equal. The defendant has now no title to the land or any of the shares in it. He does not profess to have really any title to the land or any part of it. It is admitted that he has not. His position is simply this. He was in possession as tenant under a lease from his mother, the widow of the testator, who had the life estate, and after her death he remained in possession and is still in possession. Upon being asked by the plaintiff to give the possession to him, he answered by saying: take possession of your five one-eighth parts, and I will continue in possession of the other three one-eighth parts; and he confines his defence to such three one-eighth parts. The defendant has not disputed, and does not now dispute, the right of the plaintiff to possession as for and in respect of the five undivided one-eighth parts or shares to which the plaintiff has title; and the question is as to whether or not the plaintiff can recover from the defendant for the whole or more than in respect of the five-eighth parts.

The Judicature Act has not, as I understand, made any material change in the principles that govern the rights of the parties in an action for the recovery of the possession of land; although it very greatly changed the practice in such actions. A notice was given by the plaintiff to the defendant, professedly under the provisions of Rules 698 and 699; but I do not see that this case is such an one as is contemplated by these Rules. There is no "want of technical form" in the plaintiff's title, of which the defendant is seeking to take advantage, or, so far as I can see, any of those things mentioned in these Rules against which provision is made. On the contrary of this, both parties state the facts respecting the title precisely in the same way. There is no dispute or difference as to the facts.

In the case *Doe d. Hellyer* v. *King*, 6 Ex. at p. 795, Baron

Judgment.
Ferguson, J.

Platt is reported to have said: "Now, a tenant in common is the owner of the whole estate in common with his co-tenants; therefore, as soon as he has proved his right to the possession in common with others, and that the defendant, having no such right, is a wrongdoer as against him, he is, in my opinion, entitled to a general verdict, for the purpose of recovering possession of the whole." This way of considering such a case seems very reasonable and forcible; but the learned Baron was the dissenting Judge. The opinion of the other two eminent Judges was the opposite of this; and the language of their judgments (especially that of Baron Alderson), leaves no doubt that the opinion was that tenants in common who sue in ejectment can recover (even from a trespasser), only in respect of the shares to which they prove title.

In the case *Denne d. Bowyer* v. *Judge*, 11 East 288, there had been five trustees for sale, whose title was joint. A conveyance had been executed apparently by the five, but the signatures of only three were proved; it was received as a deed of the three. The Court said this had the effect of severing the joint estate, and of conveying three-fifths of it to be held in common with the two remaining parts. The plaintiffs in ejectment were depending on this title. A verdict was had for the whole. A rule *nisi* was obtained to enter a nonsuit or confine the verdict to the three-fifths. A verdict for the three-fifths was ordered.

Both these cases are referred to with approval, and, as I think, followed in the cases *Lyster* v. *Kirkpatrick* and *Lyster* v. *Ramage*, 26 U. C. R. 217 and 233, respectively. In each of these cases the recovery was for two undivided third parts of the estate.

I do not see that what was decided in the case *Doe d. Lulham* v. *Fenn*, 3 Camp. 190, is against the decisions above referred to. Even if this were otherwise, the later decisions should govern.

I may say that I have made very considerable search and perused a large number of cases for authority supporting the view stated by Baron Platt, the dissenting

Judge in *Doe d. Hellyer* v. *King*, but I cannot say that I have found any, and none was referred to on the argument. If I did not consider that the authorities bind me to do otherwise, I should incline to adopt the reasoning of Baron Platt in that case. But I think I cannot do anything other than say that the present plaintiff (though the defendant has no title at all) can recover possession only in respect of the five undivided one-eighth shares of the land. These are the shares and the only ones to which he has shewn title. This possession the plaintiff might have had (according to the admissions) without litigation before this action; but, in my view, the defendant deserves little, if any, consideration. Although there are some cases looking in that direction, I am not, I think, bound to decide anything in his favour. Judgment. Ferguson, J.

There will be judgment for the plaintiff for the five-eighths undivided, without any costs to either party.

[QUEEN'S BENCH DIVISION.]

CARROLL V. FREEMAN.

Negligence—Permitting child to drive mowing-machine—Volunteer—Judge's charge.

The plaintiff, a boy of eight, came upon the defendant's land, where the latter was mowing hay, and the defendant permitted him to get upon the mowing-machine alone, and to drive the horses. By reason of one of the wheels striking into a furrow, the plaintiff was thrown out of his seat, and, falling on the knives of the machine, was injured. The trial Judge told the jury that if the defendant was not using reasonable care in allowing the plaintiff to be upon the machine, he was guilty of negligence:—

Held, a proper direction; and a verdict for the plaintiff was allowed to stand.

The question whether the plaintiff was a trespasser or volunteer or licensee was not material.

THIS was an action tried before ARMOUR, C. J., at the Napanee Assizes, on 31st October, 1892, with a jury. Statement.

The plaintiff, a boy of eight years of age, suing by his father as his next friend, sought to recover from the de-

Statement

fendant, a farmer, damages for the alleged negligence of the latter in putting him upon a mowing machine, from which he fell and was injured by the cutting-knives.

The evidence shewed that upon the day of the accident the defendant was mowing hay upon his own land, using for the purpose a mowing machine drawn by two horses. The plaintiff and his sister, a girl of fifteen years of age, were picking berries upon the defendant's property, near where the defendant was working. The plaintiff asked the defendant to let him get on the machine, and the defendant assented, and either put him upon the seat or allowed him to get upon it and to drive the horses. It was stated by the plaintiff's sister, and denied by the defendant, that she had asked the defendant not to allow the plaintiff to get on the machine, as he might get hurt. While the plaintiff drove the horses, the defendant stood upon the ground a short distance away. One of the wheels suddenly struck into a furrow or hole, and the plaintiff, who was too small to be able to brace himself in his seat, fell forward upon the knives of the machine and was severely injured.

The learned Chief Justice left to the jury the disputed facts, and asked them whether the defendant was using that reasonable care which a majority of persons under similar circumstances would have exercised in allowing the plaintiff to be upon the machine, and told them that if he was not, he was guilty of negligence. The jury found a verdict for $300 in favour of the plaintiff.

The defendant moved at the Michaelmas Sittings of the Divisional Court in 1892, for an order setting aside the verdict and directing judgment to be entered for the defendant or for a new trial, upon the ground that the plaintiff was a trespasser or volunteer or licensee, and not an employee, and that he assumed all risks in going where he did; and upon the ground of misdirection.

The motion was argued on the 28th November, 1892, before the Divisional Court, (FALCONBRIDGE and STREET, JJ.)

Argument.

C. J. Holman, for the defendant. There was no actionable negligence on the part of the defendant; the plaintiff at best was a licensee, and a licensee who enters the premises by permission only, cannot recover damages for injuries sustained. He goes there at his own risk and enjoys the license subject to its concomitant perils: *Mangan* v. *Atterton*, L. R. 1 Ex. 239; *Sweeny* v. *Old Colony R. R. Co.*, 10 Allen 368; Bigelow's Leading Cases on the Law of Torts, p. 697; *Holmes* v. *North-Eastern R. W. Co.*, L. R. 4 Ex. 254; *Lygo* v. *Newbold*, 9 Ex. 302. There is a clear distinction in the cases as to the duty which a man owes to persons who come on his premises as bare volunteers, and those who come as customers on invitation, expressed or implied: *Indermaur* v. *Dames*, L. R. 1 C. P. 274; *Hounsell* v. *Smyth*, 7 C. B. N. S. 731; *Denny* v. *Montreal Telegraph Co.*, 42 U. C. R. 577. As the plaintiff went upon the premises by the mere license of the defendant, he went there subject to all the risks attending his going: *Holmes* v. *North-Eastern R. W. Co.*, L. R. 4 Ex. 254. Had the plaintiff been an adult, the action could not have been maintained. He voluntarily meddled with property, and the rule is the same for an infant as an adult: *Hughes* v. *Macfie*, 2 H. & C. 744. The law is fully discussed in two articles in the Albany Law Journal, vol. 27, pp. 79, 467. In many respects the case is very like *Hargreaves* v. *Deacon*, 25 Mich. 1, where the Court says at p. 3: "We feel, usually, more indignation at the wrongs done to children, than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers towards them, resting entirely on the fact that they are children." The child drove successfully around three sides of the field, and on the fourth side went into a dead furrow. The plaintiff was a volunteer, and the defendant was not bound, as against him, to have his furrows in a good state: *Blackmore* v. *Toronto Street R. W. Co.*, 38 U. C. R. 172; *Singleton* v. *Eastern Counties R. W. Co.*, 7 C. B. N. S. 287. The learned Chief Justice at the trial

Argument. stated to the jury that the law was the same as is laid down in *Vicary* v. *Keith*, 34 U. C. R. 212, and *Grizzle* v. *Frost*, 3 F. & F. 622. Those cases are not applicable here, but are cases of contract and hiring, which raise a different relationship between the defendant and the plaintiff. The plaintiff was in charge of his sister, and she warned him not to go upon the machine. He knew that he was doing wrong, and cannot recover: *Waite* v. *North-Eastern R. W. Co.*, E. B. & E. 719; Shirley's L. C., p. 273. In *Clark* v. *Chambers*, 3 Q. B. D. 327, the plaintiff was not a trespasser or licensee. *Lynch* v. *Nurdin*, 1 Q. B. 29, is distinguishable, and its authority is questioned in *Wilson* v. *Brett*, 11 M. & W. 113, and other cases.

Aylesworth, Q. C., for the plaintiff. Allowing the boy to drive on unattended was negligence. *Lygo* v. *Newbold*, 9 Ex. 302, is still law. *Mangan* v. *Atterton*, L. R. 1 Ex. 239, is overruled by *Clark* v. *Chambers*, 3 Q. B. D. 327. I refer to *Dixon* v. *Bell*, 5 M. & S. 198; *Crawford* v. *Upper*, 16 A. R. 440. This case may be viewed as one of employment. Hiring or wages is not necessary to constitute employment. The defendant gave the plaintiff no instructions as to the management of the horses or machine: *O'Brien* v. *Sanford*, 22 O. R. 136; Smith on Negligence, 2nd ed., p. 243.

Holman, in reply. In *Dixon* v. *Bell*, 5 M. & S. 198, the child was the *servant* of the defendant.

February 13, 1893. The judgment of the Court was delivered by

STREET, J.:—

I am of opinion that the whole question in this case is whether the defendant was or was not guilty of negligence under the circumstances; that there was evidence from which the jury might properly find that he was guilty of negligence; and therefore that the case could not have been withdrawn from the jury; and I am unable to see

that the charge was not in accordance with undoubted law. The question as to whether the plaintiff was a trespasser or volunteer or licensee, and not an employee, does not appear to be material. The defendant was in possession of what must be treated as a dangerous machine, upon which he consented that the plaintiff, a child of eight years of age, should seat himself, and which, with his permission, the plaintiff used. While using it he fell off and met with the injuries of which he complains. I think the defendant cannot complain if a jury is asked to say whether this was or was not negligent conduct on his part, nor should he be surprised at their finding that it was. The principle of *Dixon* v. *Bell*, 5 M. & S. 198, seems clearly to apply to this case, and to be still accepted law. See also *Clark* v. *Chambers*, 3 Q. B. D. 327; *Lynch* v. *Nurdin*, 1 Q. B. 29; Shirley's L. C., Bl. ed., p. 273.

Judgment.
Street, J.

In my opinion the motion should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

ALLISON V. MCDONALD.

Partnership—Joint and several debt—Principal and surety—Discharge of collateral security—Release of surety—R. S. O. ch. 122, secs. 2, 3, 4.

When a partner retires from a firm, although the relationship of principal and surety may have been created thereby between himself and the remaining partners, such arrangement, whether known to a creditor of the firm or not, does not affect his rights against the members of the firm as joint debtors, unless he has accepted the liability of the remaining partners in satisfaction and discharge of the liability of the retiring partner.

R. S. O. ch. 122, secs. 2, 3, and 4, does not cast any duty upon such a creditor, without notice of the relationship of principal and surety having been created, to preserve collateral security taken for the debt, for the benefit of the remaining partners.

Statement. THE plaintiff by his statement of claim alleged: (2) That on and for some time prior to the 2nd day of March, 1888, the defendant was in partnership with one Adam Allison in the banking business in the village of Belmont county of Elgin, and on the said 2nd day of March borrowed for the purpose of said business the sum of $1,000 from the plaintiff; (3) That on the said date the defendant and the said Adam Allison made their joint and several promissory note, whereby they and each of them promised to pay to the plaintiff $1,000 two years from the date thereof, and interest on same at the rate of ten per centum per annum; (4) That the said note became due and payable on the 5th day of March, 1890, but Adam Allison and the defendant had not paid the same or any part thereof, and the whole of the said sum so loaned, together with the interest thereon since the 2nd day of March, 1888, amounting to $1,400, remained justly due and owing to the plaintiff; (5) And the plaintiff claimed the sum of $1,400 and interest thereon and his costs of suit.

The defendant by his statement of defence (1) Admitted that for some time prior to the 2nd day of March, 1888, Adam Allison, who was a brother of the plaintiff

Statement.

and the defendant carried on business at the village of Belmont in partnership as bankers and grain merchants; (2) And alleged that on or about the 2nd day of March, 1888, Adam Allison arranged with his brother, the plaintiff herein, for a loan of the sum of $1,000, which said sum the plaintiff agreed to advance upon mortgage security upon two certain grain warehouses then owned by Adam Allison and the defendant at the village of Belmont; (3) That on the said 2nd day of March Adam Allison and the defendant duly executed and delivered to the plaintiff a mortgage upon the said grain warehouses to secure repayment of the sum of $1,000 as therein provided, and at the same time made and delivered to the plaintiff the promissory note referred to in the plaintiff's statement of claim, which note was a part and portion of the said mortgage, and the plaintiff thereupon and upon the strength and security of the said mortgage advanced the sum of $1,000; (4) That in the month of February, 1889, it was agreed by and between Adam Allison and the defendant that the defendant should withdraw from the partnership business carried on by them, and that Adam Allison should continue the same, and that he should take over the assets of the firm, among them being the warehouses mentioned above as mortgaged to the plaintiff, and that he should assume the liabilities of the firm, among them being the mortgage indebtedness to the plaintiff above mentioned, and such arrangement was duly carried out, and the defendant ever since said time had no knowledge nor control of, nor interest in, the affairs or business of the said Adam Allison; (5) And upon such dissolution it was agreed that if the defendant's name was allowed to remain upon the mortgage and note, and any liability to exist thereby, it was as surety only for the due payment of the moneys therein mentioned, by Adam Allison, as the liability of the defendant was nominal only, the property mortgaged to the plaintiff being amply sufficient to satisfy his claims; (6) That notice of the arrange-

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ment mentioned in the fourth and fifth paragraphs thereof was duly brought to the knowledge of the plaintiff, who assented to and concurred in the same, and he thereafter looked to his mortgage security for his claim, and dealt with his brother, Adam Allison, respecting the same, and had never at any time notified the defendant respecting it, nor dealt with him in any respect, but he had without the knowledge or consent of the defendant extended the time of payment of his said claim by the said Adam Allison, and had neglected to collect and get in the principal and interest thereof as the same matured, and had allowed the same to run far overdue; (7) That on the 19th day of May, 1891, the plaintiff executed a discharge of the said mortgage, whereby he certified that Adam Allison had satisfied all money due or to grow due on the mortgage, and the discharge was duly registered in the proper Registry office; (8) That the discharge was executed by the plaintiff, and the negotiations respecting the same were carried on by the plaintiff and Adam Allison, without the knowledge or consent of the defendant; (9) That the property described in the mortgage was subsequently mortgaged by Adam Allison, who, in the month of July, 1891, made an assignment for the benefit of his creditors and absconded from the Province; (10) That if the claim of the plaintiff was not paid, as by the said discharge he certified, then that by his course of dealing with his brother, Adam Allison, and by his discharge of the mortgage, the defendant was released from all liability therefor, and that it would be unjust, inequitable, and unfair that he should be called upon to pay any part of the plaintiff's claim.

The cause was tried at the Autumn Chancery Sittings at Sandwich, 1892, before BOYD, C.

The promissory note sued on was as follows:—"$1,000. Belmont, March 2nd, 1888. Two years after date we jointly and severally promise to pay to the order of David

Allison at our office here the sum of one thousand dollars, with interest at ten per cent. until paid;" and was signed by Adam Allison and the defendant. Statement.

The mortgage was dated the 2nd day of March, 1888, and was made between Adam Allison and the defendant of the first part, and the plaintiff of the second part, and contained the following recital:—"Whereas the said mortgagors are the owners of two certain warehouses erected upon a strip or parcel of land owned by the Canadian Pacific Railway Company, being part of lot number 24 in the 7th concession of the township of South Dorchester, in the county of Elgin, and the said lands are held by the said mortgagors at a tenancy at will."

"And whereas it has been agreed by and between the parties hereto that the said parties of the first part should grant and mortgage the said warehouses to the said mortgagee, for and in consideration of the loan to them of one thousand dollars this day made." And it also contained the following proviso: "Provided this mortgage to be void on the payment of the said sum of one thousand dollars, according to the tenor of a promissory note made and bearing even date herewith, made by the said mortgagors to the mortgagee for one thousand dollars, and interest thereon, as provided by the said note, and taxes and performance of statute labour."

This note and mortgage were both drawn by the defendant, the loan having been negotiated by Adam Allison with the plaintiff.

Adam Allison, who had previously been station agent at Belmont, some time in September, 1886, formed a partnership with the defendant for the purpose of carrying on a private banking business, the partnership being afterwards extended to include a grain business, for the purposes of which business they bought the said warehouses, and the partnership business was also afterwards extended to include a lumber business, and it was during the currency of the partnership that the money was borrowed from the plaintiff upon the security of the note and

Statement. mortgage, and the money so borrowed went into the partnership business. In February, 1889, the partnership was dissolved; the instrument of dissolution was not produced by the defendant, who was allowed at the trial to say, subject to objection, that by the terms of the dissolution the business was to be continued by Adam Allison, and he was to pay the liabilities; no public notice was given of such dissolution; the bank had a very heavy collateral account, and after that was paid Adam Allison took certain things, and the defendant took certain things.

The plaintiff said that he heard of the dissolution, and heard it talked about; but that he never dunned Adam Allison for the note.

It appeared from the evidence that the mortgage was discharged by the plaintiff in May 1891, on the representation contained in a letter, then written by Adam Allison to him, that the former was selling his property. No money was paid to the plaintiff for the discharge, Adam Allison inducing him to sign without payment on the understanding that the plaintiff was to draw for the money, which, however, he did not do. The note was left by the plaintiff in Adam Allison's private bank as a "deposit" with interest at ten per cent.

A month later Adam Allison negotiated a loan on the property through the defendant, producing to him the mortgage as discharged, and about the same time the defendant indorsed paper for the accommodation of Adam Allison.

Adam Allison made an assignment for the benefit of his creditors on the 14th day of July, 1891. It was shewn that the mortgaged property was good security for the amount of the note.

The learned Chancellor dismissed the action with costs, giving the following judgment:—

BOYD, C.:—

I think this case may be viewed in several ways. First of all, it is merely a question of joint debtors; the one

paying the whole has the right against the other *primâ facie*. If the plaintiff knew nothing more of the transaction than that, he knew that much, that when he was discharging this security, he was affecting the rights of the one whom he now calls upon to pay the full amount. Judgment. Boyd, C.

The evidence is that that security on these warehouses was worth the full amount of $1,000, so that if McDonald, paying the amount, had taken over the security which was in Allison's hands, he would have recouped himself fully for what he has paid, and on the state of accounts, looking at them as partners, he was entitled to be fully indemnified by his brother Adam against this claim.

So much if they are merely joint debtors. But I think the dealings between the brothers shew that the partners were more than joint debtors. I think sufficient evidence of suretyship arises. The note was given on the 2nd March, 1888; it was not due till March, 1890; before that there was the dissolution, in February, 1889. I am perfectly satisfied that the plaintiff knew of that dissolution. It was talked of in his family. It was a thing of importance that would be known. But beyond that inference, there is the correspondence put in, two years after the dissolution in 1891, where he gets the letter from his brother Adam, with a printed heading on it shewing that he alone is in the business; that this banking house had passed into the hands of Adam as the only proprietor; and in which he speaks about this property as his, and about this mortgage having been taken up, and in which he undertakes to pay the money on the note. I do not think it is at all important to consider that there may have been a distribution of matters by which McDonald took out some property, and the other man took out some property; if it was so, it only shews that this part of the property fell into the hands of Adam, and he was to make good all claims against it. I think there was a suretyship, and that Adam took the property, and he was to pay, and if McDonald was called on to pay it, he would have the right of indemnity. The transaction is one which works detriment, hardship,

Judgment.

Boyd, C.

and loss to McDonald, that was induced by the act of the plaintiff. The plaintiff discharged this surety. No cases have been cited; I think the principles of law are in favour of the plaintiff; I will dismiss the action, and the costs will follow. The case of *Walker* v. *Jones*, L. R. 1 P. C. 50, implies that you ought not to sever a case of this kind, where there is a personal liability and tangible security. If one part is extinct, the other part goes too. But I do not decide on that ground.

At the Michaelmas Sittings of the Divisional Court, 1892, the plaintiff moved to set aside the judgment and to enter it for the plaintiff for the amount of the note sued for, on the ground that the judgment was contrary to law and evidence, and that upon the facts established at the trial, the plaintiff was entitled to recover.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 2nd and 5th December, 1892.

Aylesworth, Q. C. (with him *J. W. Hanna*), for the plaintiff. It is said that the defendant was merely a surety for the other Allison, the plaintiff's brother. But there is no ground on which the plaintiff could be said to know the relations of the two *inter se*. He lent them $1,000. His security was a joint and several promissory note, with a mortgage as collateral, defeasible on payment ot the note, made by the two on property of which they were tenants in common. Look at the language of the Mercantile Amendment Act, R. S. O. ch. 122, sec. 2 (which is the same as the English Act of 1856). It does not say that a surety is entitled to an assignment of every security which *has been* held by the creditor, but which *is* held. Long prior to the statute it was well established law that a surety in paying the debt of his principal was entitled to all the securities which the creditor has. Add that he must preserve the securities. But that does not apply where there is no suretyship. There is nothing to raise the presumption that each was liable for half the debt as princi-

pal, and for the other half as surety. The remedy on the note is distinct from that on the collateral security: Colebrooke on Collateral Securities, p. 197, sec. 153; see also pp. 268, 308. The Chancellor held that there was in fact a suretyship, but he did not find that the plaintiff knew it, nor, I submit, is that the proper finding on the evidence. The evidence is not carried far enough to shew that the plaintiff knew the defendant was a surety. He knew as a matter of report or gossip that the partnership was dissolved, but that is all. There is no evidence of knowledge on the plaintiff's part that the defendant was not, as between him and Adam Allison, primarily liable. The defendant cannot take advantage of the fraud of his late partner; the terms on which the latter obtained the discharge shewed fraud. The discharge is to both partners; it relieved one as much as the other; they owned the property as tenants in common. There should, at least, be judgment for the interest accrued before the dissolution. Argument.

Wallace Nesbitt, for the defendant. The defendant was a surety in fact, and the Chancellor so found. The loan was to Adam Allison; the transaction was between the two brothers. The plaintiff had notice of the dissolution, and that was sufficient notice of the suretyship: *Hart* v. *Alexander*, 2 M. & W. 484. The plaintiff was present at the trial, but was not called to deny notice and knowledge. It appears from the correspondence that he had notice. He was bound to keep the security. I refer to *Bailey* v. *Griffith*, 40 U. C. R. at pp. 432-3; *Citizens' Insurance Co.* v. *Cluxton*, 13 O. R. at p. 394; *Cocks* v. *Nash*, 9 Bing. 341; *Ex p. Slater*, 6 Ves. 146; *Cheetham* v. *Ward*, 1 B. & P. 634; *Duncan* v. *North and South Wales Bank*, 6 App. Cas. at p. 18; *Ward* v. *National Bank of New Zealand*, 8 App. Cas. 755; *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372.

Aylesworth, in reply, referred to *Swire* v. *Redman*, 1 Q. B. D. 536; *Birkett* v. *McGuire*, 31 C. P. 430; 7 A. R. 53.

Judgment. Armour, C.J.

February 13, 1893. The judgment of the Court was delivered by

ARMOUR, C. J. :—

It is not set up or alleged by the defendant in his statement of defence that the relationship of principal and surety existed between Adam Allison and him, in respect of the note and mortgage given by them to the plaintiff at the time they were so given and the plaintiff advanced his money upon them.

And it is, perhaps, therefore, unnecessary for me to say that I think that the evidence establishes that no such relationship did at that time exist between them in respect of the said note and mortgage.

But if, by any arrangement between them, such a relationship did exist, the plaintiff had no notice or knowledge of it; and, although Adam Allison negotiated the loan, the plaintiff had no reason to apprehend that he was lending his money to Adam Allison and the defendant otherwise than upon the terms that they were both becoming his principal debtors in respect of the money loaned.

The defendant, however, sets up and alleges in his statement of defence that upon the dissolution of the partnership between Adam Allison and him it was agreed that if the defendant's name was allowed to remain upon the said mortgage and note, and any liability to exist thereby, it was as surety only for the due payment of the moneys therein mentioned by the said Adam Allison.

If notice of this alleged agreement had been given to the plaintiff, this case would then have been within the principle laid down in *Swire* v. *Redman*, 1 Q. B. D. 536, and followed in *Birkett* v. *McGuire*, 7 A. R. 53.

In the former of which cases, Cockburn, C. J., in delivering the judgment of the Court prepared by Blackburn, J., said:—"The contention is that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by

giving notice, to prevent the plaintiffs from doing what they lawfully might before—to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say that is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants derogating from the plaintiff's right without their consent." Judgment. Armour, C.J.

But there was no evidence in this case that the plaintiff had any notice of the alleged agreement between Adam Allison and the defendant.

He had heard of the dissolution, no doubt, but of the terms upon which that dissolution had taken place there is no evidence at all that he knew anything.

There is no evidence upon which it could be found that he had accepted the liability of Adam Allison in satisfaction and discharge of the joint liability of Adam Allison and the defendant.

The discharge of the mortgage was obtained from the plaintiff by the false pretence of Adam Allison, but such discharge affords no defence to this action.

The principal debt was the note, and the mortgage was but collateral security for the payment of the note, and the discharge of the collateral security could not work the discharge of the principal debt.

It is laid down in *Swire* v. *Redman*, above referred to, as clear law, that a creditor who has two principal debtors may bind himself to one of them, in any way short of an absolute release, to give him time, or even not to sue him, without in the least prejudicing his right of recourse against the other.

And it follows that the discharge of this mortgage, which was but collateral, could not prejudice the right of the plaintiff to have recourse against the defendant upon the note.

It was suggested that since the passing of the Act R. S. O. 1887 ch. 122, secs. 2, 3, and 4, every creditor who had two or more joint debtors, although he was not aware that any relationship of principal and surety existed among

Judgment.

Armour, C.J.

them, was bound to preserve all the securities which he held for such joint debt in order that any one of the debtors paying such debt might get the benefit of such securities, and that if he did not do so, he lost his remedy for the debt.

But this Act laid no such duty upon the creditor, either by express words or by necessary inference.

The plaintiff was, no doubt, negligent in discharging the mortgage without getting the money, trusting to the word of Adam Allison; but the defendant was guilty of greater negligence in handing over the assets of the partnership to Adam Allison without taking any security from him for the payment of the liabilities, and in conveying to him his interest in the equity of redemption in these warehouses, without which the difficulty as to the mortgage could not have arisen, in never communicating with the plaintiff on the subject of the note, and in never taking the pains to see that it was paid by Adam Allison, or giving himself any trouble whatever about it, until he was called upon to pay it.

It is, no doubt, a hardship, that he should be called upon to pay it, as it would be a hardship if the plaintiff had to lose it, but we see no escape for the defendant.

Judgment will, therefore, be entered for the plaintiff for the amount of the note and interest, with full costs of suit.

[QUEEN'S BENCH DIVISION.]

RE WASHINGTON.

Medical practitioner—College of Physicians and Surgeons of Ontario—Erasure of name from register—R. S. O. ch. 148—Disgraceful conduct in a professional respect—Advertising—False representations to patient—Publishing symptoms of disease—Committee of council—Evidence—Report—Procedure.

Upon an appeal by a registered medical practitioner, under R. S. O. ch. 148, sec. 37, the Ontario Medical Act, as amended by 54 Vic. ch. 26, sec. 5, from an order of the council of the College of Physicians and Surgeons of Ontario, directing that his name should be erased from the register, it appeared that he had advertised extensively in newspapers and by handbills, setting forth and lauding in extravagant language his qualifications for treating catarrh, shewing that that disease led to consumption, stating the symptoms of it, and giving testimonials from persons said to have been cured by him:—

Held, that mere advertising was not in itself disgraceful conduct in a professional respect; but that the advertisements published by the appellant were studied efforts to impose upon the credulity of the public for gain, and were disgraceful in a professional respect within the meaning of section 34 of the Act.

It appeared also that the appellant had represented to two persons, who were in fact in the last stages of consumption, that they were suffering from catarrhal bronchitis, and that he had the power to cure them, and that he had taken money from them upon the strength of such representations:—

Held, that this was conduct disgraceful in the common judgment of mankind, and much more so in a professional respect:—

Held, however, that publishing broadcast the symptoms of the disease known as catarrh, was not in itself disgraceful conduct in a professional respect.

The council referred the complaint against the appellant for inquiry and report to their discipline committee, who took evidence, and reported it with their conclusions thereon to the council:—

Held, that the report of the committee could not be set aside or treated as a nullity because they took unnecessary evidence or because they drew conclusions from the facts ascertained by them.

Proper procedure under the Act pointed out.

Statement.

THIS was a summons under R. S. O. ch. 148, as amended by 54 Vic. ch. 26, by way of appeal from the decision of the council of the College of Physicians and Surgeons of Ontario directing the erasure of the name of Nelson Washington, the appellant, from the register provided for by these Acts.

The appeal was founded, as provided by R. S. O. ch. 148, sec. 38, upon a copy of the proceedings before the committee of the council, the evidence taken, the committee's report, and the order of the council.

Statement.

From these it appeared that on the 22nd May, 1889, application was made by more than four medical practitioners to the council to erase from the register the name of the appellant for infamous and disgraceful conduct in a professional respect, setting forth:—Firstly, that the appellant was then and had for many months been using extensive advertisements inserted in all the daily newspapers in the city of Ottawa, in witness whereof they produced copies of newspapers; also for disgraceful conduct in a professional respect at the city of Kingston. See evidence of Dr. Henderson and others. Secondly, that the appellant advertised extensively by means of handbills and caused them to be distributed in the public streets of the city of Ottawa, in witness whereof they produced one of the handbills. Thirdly, that the appellant travelled from place to place in Ontario and published broadcast symptoms of a disease, viz., catarrh, which being read by the ignorant or weakminded might cause him or her to imagine that he or she was affected by the disease, and thereby produced unnecessary suffering among certain members of the community; that the result on certain minds of reading a description of the symptoms of a disease was to produce imaginary disease, with its accompanying suffering, was a fact well known to every practising physician. Fourthly, they believed it was degrading to the members of the profession in Ottawa and to the profession of medicine in the province of Ontario that a legally qualified and registered medical practitioner should carry on such practice. Fifthly, for the protection and maintenance of the honour, good standing, and welfare of the profession of medicine in Ontario, they applied to the council to erase the name of the appellant from the register.

For these reasons and such other reasons as might appear to the council, they prayed that the council might exercise the powers granted by sec. 34 of the Act, as amended, and cause inquiry to be made and the name of the appellant to be erased.

Statement.

One of the advertisements referred to as published in the daily newspapers of Ottawa was as follows, and the others were the same or similar:—

"DR. WASHINGTON,

M.D., L.C.P.S.O., and T.L.S., etc., of Toronto, is now at the Grand Union Hotel, where he will remain until further notice.

Dr. Washington has been compelled to open an office in the city, Grand Union, to fully supply the wishes of hundreds of patients who availed themselves of his successful treatment. His new method is based on the principle of conveying cold medicated vapour direct to the seat of disease, thus bringing the medication in direct contact with the diseased tissues. He does not claim to cure all patients who consult him, but he does claim to cure a much larger percentage than the general practitioners in general practice. It is not an unreasonable claim either, when it is considered that the doctor has devoted seven years to the study of the specialty, and improved on all the new systems which have been before the scientific world. His treatment has risen superior in its effects and results to that adopted by the most eminent specialists even in New York, as he has to day patients in that city who have been given up by New York's most distinguished throat and lung surgeons and have been cured by his treatment. The names of some of them have been published in this paper, on several occasions.

It must be remembered that Dr. Washington, who has been devoting years to the special study of throat and lung diseases, has to day been handsomely rewarded for his indomitable and indefatigable perseverance; and could there be more tangible recognition than the testimonials published in this paper from time to time? The doctor has built up an extensive practice throughout the Dominion, examining all patients personally; and will be wholly responsible to all who have an occasion to visit him. Another fact: it is well for all to remember who may be troubled with any

Statement.

of the following symptoms of catarrh, that in a very large majority of cases it is the incipient stage of consumption. In fact, ninety per cent. of all the cases of consumption have their origin in catarrh of the head and throat. A few of the most prominent symptoms of catarrh will be found below, and let those who have seen consumption in its first stages recall the terrible fact if the above is not correct, and why so many die of this terrible disease is that when hope and every chance of treatment to a successful issue is held out, the patient neglects till too late. To day is the golden opportunity: Take warning in time. *Tempus fugit.* Time flies. Procrastination is the thief of time.

SYMPTOMS OF CATARRH.

Susceptibility to catch cold in the head. A feeling of tightness across the bridge of the nose, with sometimes pain. Stuffing of the nasal passage. Accumulation of mucus, which is discharged by the nostrils, or drops back into the throat. A sense of pain or heaviness over the eyes, often in the back of the head and neck, sometimes in the top of the head. At times dizziness. Pain in eyeballs. In severe cases a dull, drowsy, sleepy feeling in the head. Swelling of the nose and eyes. Sometimes a protruding and distorted appearance is given to the upper part of the face. A tendency to sneeze frequently. Sometimes the secretions are collected together in hard masses, or chunks, which are with great difficulty removed. Sometimes the mucus membrane is broken, and scabs form, which are discharged with mucus.

In some cases the secretions are very copious, and are found in the back of the head and throat chiefly, and very little stuffing of the nasal passage, with a constant desire to clear the throat. Hawking or spitting or raising of tough phlegm, especially in the morning or after taking a warm drink. In other cases the amount of phlegm is very little, it is extremely tough, and almost impossible to remove.

A FEW FACTS TO BE REMEMBERED. Statement.

1st. Dr. Washington is the only throat and lung surgeon in the Dominion devoting his whole time to diseases of the passages.

2nd. He has devoted seven years to his specialty.

3rd. He has been compelled to open an office in Ottawa to meet the ever increasing demands.

4th. He consults, examines, treats all cases personally, and is solely responsible.

5th. He represents his own business.

6th. He has employed an eminent assistant, Dr. Sanderson, member of the Royal College of Surgeons (England).

7th. His assistant will carry out the principles of his treatment.

8th. He gives testimonials of the most reliable and prominent character of residents of Ontario of the most wonderful cures ever recorded, with who a large number are acquainted.

9th. He gives the name in full and P. O. address, not the mere initials, which might mean any Tom, Dick, or Harry, and invites any person interested to write for particulars.

10th. This is the best season to treat catarrh, which leads to consumption, and all the diseases of the head, throat, and lungs.

11th. Dr. Washington graduated in 1872 in Toronto, with honours; in 1880 he visited New York and Boston, taking a special poloclynic course on diseases of the throat and lungs.

12th. Dr. Washington will be in Ottawa personally superintending his own business every alternate week. Consultation free."

The handbill referred to contained the same matter as the foregoing advertisement, with the addition of a number of testimonials from persons said to have been cured by the appellant.

Statement.

The application above mentioned was presented to the council, and on the 15th June, 1889, the council passed a resolution, reciting the application, and referring it to the committee of discipline appointed under sub-sec. 2 of sec. 36 of R. S. O. ch. 148, to inquire and report.

This committee sat on the 17th and 19th October, 1889, at Toronto, and the appellant appeared before them with counsel on his behalf, he having been duly served with notice, and upon these days evidence was adduced in support of the charges, and one witness was called on behalf of the appellant.

The committee made a report in writing to the council, accompanied by the evidence taken, and stated their conclusions as follows:—

(*a.*) As to the facts, that your committee find the said Washington has been extensively advertising in newspapers published in the cities of Ottawa and Kingston as in the charge laid.

(*b.*) Your committee further find that the said Washington has been guilty of disgraceful conduct in a professional respect in his dealings with one Cochrane, of Kingston, to whom he gave a receipt in the following words:—"This is to certify that Thomas Cochrane, of Kingston, is to be treated, till cured, for catarrhal bronchitis, for the sum of $25, receipt of which is hereby acknowledged; (sgd.) N. Washington;" although the said Cochrane was, to the knowledge of the said Washington, in the last stages of consumption and beyond hope of cure. Your committee further find that the said Washington has been guilty of disgraceful conduct in a professional respect in his dealings with one Noble, of Kingston, to whom he gave a receipt in the following words:—"Received from Thomas Henry Noble, corner Block and Alford streets, $25 in full for catarrhal bronchitis treatment, till cured; (sgd.), N. Washington, 82 McCaul St., Toronto;" although said Noble was in fact obviously in the last stage of consumption.

The second charge: your committee find that the said Washington does advertise by handbills, and causes them to be distributed in the public streets.

As to the third charge, your committee find that the said Washington has been guilty of disgraceful conduct in a professional respect in publishing broadcast the symptoms of a disease, namely, catarrh, and that such advertisements are detrimental to the public as charged. Statement.

This report having been presented to the council, on the 17th June, 1892, the following resolution was offered and carried unanimously :—

Whereas the committee on discipline reported to the council in the case of Nelson Washington, M.D., as appears, etc.; and whereas the said Nelson Washington has been called upon to shew cause why the council should not act upon the report of the said committee, as appears by the notice served upon him; and whereas the said Nelson Washington, M.D., has appeared upon the said notice in person and by his counsel, etc., and the council has been addressed by the said counsel, etc., shewing cause to the said notice; and whereas the offences charged and reported are not within the provisoes contained in sub-section 2 of section 34 of the Ontario Medical Act, as amended; and whereas, as to the facts stated in the report of the said committee on discipline, the council now resolve to act and hereby adopt the said facts and report as the finding of facts in the case of the said Nelson Washington, M.D. :—

Be it therefore resolved, that upon the application herein and upon the inquiry herein before the said discipline committee, and upon the facts therein found and adopted by the council, that the name of Nelson Washington, now appearing on the register of the College of Physicians and Surgeons of Ontario, be and is hereby erased from said register; that the registrar is hereby instructed to amend and alter the said register accordingly.

The appeal was from this decision and resolution. The grounds were as follows :—

1. That the petition or complaint against the appellant in respect of which the proceedings and order were taken

Statement.

and made disclosed no offence and made no charge of conduct which gave jurisdiction to the council to entertain the same, etc.

2. That there was no evidence, or proper evidence, adduced to support or prove the charges made in the petition, and they were not proved, and the committee and council should have so decided.

3. That the committee, improperly and without any jurisdiction, warrant, or authority, entertained and assumed to take evidence upon and deal with and report upon charges or complaints not embraced in the petition.

4. That the committee improperly received evidence against objection of the appellant.

5. That the committee improperly rejected evidence tendered by the appellant.

6. That the charge or complaint set forth in the third ground of objection was not established, but, on the contrary, the evidence failed to prove the same, and the committee and council should have so decided.

7. That even if the acts alleged to have been done by the appellant, and set forth in the report as true, were proved in fact to have been done by the appellant, they did not constitute any offence, nor any infamous or disgraceful conduct in a professional respect, nor did they warrant the report or order complained of.

8. That the committee did not report the facts of the case to the council, as directed, but, in excess of their jurisdiction and without authority or warrant, assumed to find upon the evidence and report their proceedings to the council.

9. That the committee exceeded their jurisdiction in assuming to decide and declare that the appellant was guilty of disgraceful conduct in a professional respect, thereby assuming to determine what the council alone had authority to determine.

10. That the council did not determine and adjudge that the appellant was guilty of disgraceful conduct in a professional respect, and there was no adjudication or deter-

mination by the council in this respect; and upon the said order or decision of the council it is impossible to say in respect of which of the charges the appellant's name was erased. Statement.

11. That the decision of the council was *ultra vires*.

And upon other grounds.

December 7, 1892. *S. H. Blake*, Q.C., and *Moss*, Q.C., (with them *R. G. Smyth*) supported the summons. They referred to *Partridge* v. *General Council of Medical Education*, 8 Times L. R. 311, 453; *Allbutt* v. *Same Defendants*, 23 Q. B. D. 400; *Leeson* v. *Same Defendants*, 43 Ch. D. 366; *Partridge* v. *Same Defendants*, 25 Q. B. D. 90; *Ex p. Partridge*, 19 Q. B. D. 467; *State of Minnesota* v. *State Medical Examining Board*, 32 Minn. 324; *State* v. *State Board of Medical Examiners*, 34 Minn. 391; *State* v. *State Board of Health*, 103 Miss. 22; *People* v. *McCoy*, 125 Ill. 289; *Johnson* v. *Glenn*, 26 Gr. 162; *Hands* v. *Law Society of U. C.*, 17 A. R. 41; Anderson's Law Dictionary, pp. 364, 540; Black's Law Dictionary, pp. 375, 618.

Osler, Q.C., shewed cause.

February 6, 1893. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The decision appealed against was had under the provisions of R. S. O. ch. 148, the Ontario Medical Act, section 34 of which provides that: (1) Where any registered medical practitioner has either before or after the passing of this Act, and either before or after he is so registered been convicted either in Her Majesty's dominions or elswhere of an offence, which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register. (2) The council may, and upon the application of any four registered medical practitioners, shall cause enquiry to be

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made into the case of a person alleged to be liable to have his name erased under this section and on proof of such conviction or of such infamous or disgraceful conduct, shall cause the name of such person to be erased from the register.

And section 36 provides that: (1) The council shall for the purpose of exercising in any case the powers of erasing from and of restoring to the register the name of any person or any entry, ascertain the facts of such case by a committee of their own body not exceeding five in number, of whom the quorum shall be not less than three, and a written report of the committee may be acted upon as to the facts therein stated for the purpose of the exercise of the said powers by the council. (5) At least two weeks before the first meeting of the committee to be held for taking the evidence or otherwise ascertaining the facts, a notice shall be served upon the person whose conduct is the subject of enquiry, and such notice shall embody a copy of the charges made against him or a statement of the subject matter of the enquiry, and shall also specify the time and place of such meeting.

It will be seen from these provisions that it is imperative upon the council when application has been made to them by four registered medical practitioners, but otherwise it is discretionary with them, to cause enquiry to be made into the case of a person alleged to be liable to have his name erased from the register.

Such application to be so made might be in general terms, charging the person with having been convicted of a felony or misdemeanour, or with having been guilty of infamous or disgraceful conduct in a professional respect.

The council would then refer the charge so made to the committee to ascertain the facts in relation to such charge.

And it would be the duty of the committee, in giving the notice required to be given to the person charged, to embody in it, not only a copy of the charge if made in general terms, but also full particulars of the charge so made, in order that the person charged might be fully apprized of such particulars and be prepared to meet the charge.

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But it would be no objection to the application to be so made that the particulars of the charge should be set out in it, and this was what was attempted to be done in the application made to the council charging the appellant, and it was the application so made that was referred to the committee, and a copy of which was served upon the appellant, and it was the charges made in such application that the appellant was called upon to answer, and in respect of which the committee were to ascertain the facts, and in respect of which they reported to the council.

It is our duty to examine the charges so made, to see whether any and which of them is supported by the evidence, and to determine whether, if any of them is supported by the evidence, such one justified the erasure of the appellant's name from the register.

The first charge was that the appellant was then, and had for many months been, using extensive advertisements inserted in all of the daily newspapers published in the city of Ottawa, as evidence of which were produced a copy of the *Free Press* for May 11th, 1889, a copy of the *Daily Citizen* for May 11th, 1889, and a copy of the *Evening Journal* for May 11th, 1889. As to this part of the first charge the committee found, and I think that the evidence warranted them in so finding, that the appellant had been extensively advertising in newspapers published in the cities of Ottawa and Kingston, and they add "as in the charge laid;" but the charge laid was only of advertising in newspapers in Ottawa, but this would not affect their finding if extensive advertising was disgraceful conduct in a professional respect.

But the charge made and found by the committee was extensive advertising, and mere advertising could not be said to be in itself disgraceful conduct in a professional respect; but whether the conduct was disgraceful or not in a professional respect, would depend upon what was advertised.

The charge doubtless intended to be made, but which was not made, was that the appellant had been guilty of

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disgraceful conduct in a professional respect in publishing in the newspapers such advertisements as he did publish. And we do not hesitate to say that such advertisements as the appellant was proved to have published in the newspapers were studied efforts to impose upon the credulity of the public for gain, and were utterly disgraceful, if not in every respect, at all events in a professional respect.

Included in the first charge was also the charge of disgraceful conduct in a professional respect at the city of Kingston; see evidence of Dr. Henderson and others.

This charge was not sufficiently specific; it ought to have pointed out what the conduct was that was therein alleged to have been disgraceful.

But we cannot see that the appellant was at all prejudiced by the generality of the charge.

The evidence referred to in the charge was furnished to him as soon as he applied for it; the witnesses called in support of it were all cross-examined by his counsel; he had the opportunity, or the opportunity would have been afforded to him had he applied for it, to call witnesses to contradict their testimony; and he might have himself been examined as a witness in his own behalf had he been so minded.

It cannot, therefore, be said that he had not a fair trial upon this charge.

The committee found as to it that the appellant had been guilty of disgraceful conduct in a professional respect in his dealings with one Cochrane, to whom he gave a receipt in the following words:—"This is to certify that Thomas Cochrane, of Kingston, is to be treated, till cured, for catarrhal bronchitis for the sum of $25, receipt of which is hereby acknowledged; (signed), N. Washington;" although the said Cochrane was, to the knowledge of the appellant, in the last stages of consumption, and beyond hope of cure.

The committee also found as to it that the appellant had been guilty of disgraceful conduct in a professional respect in his dealings with one Noble, of Kingston, to whom he gave a receipt in the following words:—"Received from

Thomas Henry Noble, corner Block and Alford streets, $25 in full for catarrhal bronchitis treatment, till cured; (signed), N. Washington, 82 McCaul St., Toronto;" although said Noble was in fact obviously in the last stages of consumption. Judgment. Armour, C.J.

These findings of the committee as to the dealings of the appellant with Cochrane and Noble were fully warranted by the evidence, and it cannot be hopefully contended that these dealings did not constitute disgraceful conduct in a professional respect.

In these receipts there was a representation to the patients that they were suffering from catarrhal bronchitis, which the appellant must have known, assuming him to have had that proficiency in his profession of which he boasted in his advertisements, to have been false, and there was the assertion fairly to be inferred from the receipts that he had the power to cure the patients, upon the strength of which it is fair to assume that he obtained the money mentioned in them.

If this did not come up to the crime of obtaining money under false pretences, it came perilously near to it: *Regina* v. *Giles*, 1 L. & C. 502; *Regina* v. *Cooper*, 2 Q. B. D. 510.

It was certainly conduct disgraceful in the common judgment of mankind, and much more so in a professional respect.

The second charge was that the appellant advertised extensively by means of handbills, and caused them to be distributed in the public streets, as evidenced by a handbill produced; and the finding of the committee was that the appellant did advertise by handbills, and caused them to be distributed in the public streets.

The remarks I made with respect to the first part of the first charge, I need not here repeat, as they apply equally to this charge.

The third charge was that the appellant travelled from place to place in Ontario and published broadcast symptoms of a disease, viz., catarrh, which, being read by the ignorant and weakminded, might cause him or her, as the case might

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Armour, C. J.

be, to imagine he or she was affected by the said disease, and thereby produce unnecessary suffering among certain members of the community.

And the finding of the committee as to it was that the appellant had been guilty of disgraceful conduct in a professional respect in publishing broadcast the symptoms of a disease, namely, catarrh, and that such advertisements were detrimental to the public. The evidence shewed that the appellant had published the handbill produced, and ones similar to it, and to add to the proof of it, he called a witness to prove the truth of a certificate which the witness had given and which was printed in this handbill.

I have no doubt that the circulation of this handbill was, as was the publication of the advertisements above referred to, disgraceful conduct in a professional respect; but the charge was not the circulation of such a handbill, but of publishing the symptoms of a disease, viz., catarrh; and I cannot hold this of itself to be disgraceful conduct in a professional respect.

It may be of the utmost consequence to the public that, upon the occasion of an epidemic invading the country, the symptoms of the disease should be published in order that timely measures should be taken to treat it, and no one could say that any physician would be guilty of disgraceful conduct in a professional respect in publishing its symptoms.

It cannot be said, in my opinion, that because the committee took evidence that it was not necessary for them to take in ascertaining the facts, or because, besides ascertaining the facts, they drew conclusions from such facts, their report should be set aside or treated as a nullity.

They made their report to the council, and the evidence taken by them formed part of their report.

The council, if they did their duty, and we are not to assume that they did not do it, read the report and the evidence taken by the committee, and, after hearing counsel for the appellant, acted upon the report and erased the appellant's name from the register, and, as we think, rightly erased it.

The summons must be dismissed with costs.

[CHANCERY DIVISION.]

McBean v. Kinnear.

Lien—Mechanics' lien—Appropriation by lien-holder—Notice to owner not to pay contractor—Contract—Impossible date for completion—Construction—"Allow"—R. S. O. ch. 126, secs. 9, 11.

After proceedings commenced to enforce a mechanic's lien, a sub-contractor and material man, who finds that he is not able to support his claim to a lien as to certain items in his account cannot to the prejudice of the owner agree with the contractor to appropriate moneys received from the latter and for which he had given credit, to those items.

A material man giving notice to the owner under R. S. O. ch. 126, sec. 11, of an unpaid account against the contractor is not thereby entitled to dispute the validity of payments afterwards made by the owner to persons having claims for wages, or to persons furnishing materials to be used on the building, who would have refused to furnish the same if he had not, as he did, assumed a personal liability to them for the value thereof.

And this also was held to apply to a payment made by the owner by cheque payable to the order of the contractor, but for the specific purpose of the latter endorsing the same over as he did to certain persons who refused to supply material unless paid for, and also to a payment made for insurance which the contractor ought to have paid.

These sums were not payable to the contractor by virtue of any lien held by him as required by the section 11, but were virtually payments to sub-contractors with him who thereupon furnished the particular material for which the payments were made.

But *aliter* as to a payment made to an assignee of the contractor who had no lien or claim on the money coming from the owner except as such assignee, and this although the assignment from the contractor was prior in date to the giving of the notice under section 11.

Where under a building contract work was to be completed by "November 31st" under penalty of damages:—

Held, that this must be construed to mean November 30th.

Where a contract provided that upon noncompletion by a fixed date a contractor was to pay or "allow" ten dollars a day until completion:—

Held, that this authorized a deduction as liquidated damages of the amount so "allowed" from the contract price, even as against lien-holders claiming adversely to the contractor, other than those having liens for wages where such wages liens were less in the aggregate than ten per cent. of the contract price.

The amount required to satisfy the wages lien should be deducted from the contract price remaining unpaid after allowing for the reduction by reason of the noncompletion, and cannot be marshalled in favour of a material man by being thrown upon the part of the contract price representing such reduction.

Payments made by an owner to a contractor after notice under R. S. O. ch. 126, sec. 9, are only invalid when if not made they would have been liable for the satisfaction of the sub-contractor's lien or claim.

Statement.

THIS was an appeal from the report of Mr. G. S. Holmested, Official Referee, in a mechanics' lien matter under the Act to simplify the procedure for enforcing

Statement. mechanics' lien, 53 Vict. c. 37 (O.), which report was dated June 17th, 1892.

The question arose as to whether certain payments made by Patrick Kinnear, the owner of the lands on which the buildings were erected, to certain sub-contractors, should be allowed as against another sub-contractor.

The circumstances are fully set out in the following reasons for the report of Mr. Holmested:—

The plaintiff is a sub-contractor who claims to be entitled to a lien for materials furnished to the defendant J. H. Burch, the contractor for the carpenter work of a house erected for the owner, the defendant Kinnear. (a) From the evidence it would appear that Burch had no express contract with the plaintiff to furnish materials for this particular house, but that he had a running account with the plaintiff for the supply of lumber which was furnished to him from time to time as he required it, and used on any work he might think fit. During the time the materials were furnished for which the plaintiff's lien is claimed, Burch had other jobs going on concurrently with the one at Kinnear's house, and there appears to have been no account kept in writing to shew to which of these jobs the materials furnished were applied. Burch, however, swears that certain items in the plaintiff's account were applied on this particular work, and, according to his evidence, the last materials furnished by the plaintiff which went into the building in question were delivered on February 10th. Although Burch's evidence on this point is not altogether satisfactory, and although he labours under the disadvantage of being also an interested witness, yet I think his evidence on this point is, to some extent, corroborated by the architect, Mr. Fowler, from whose evidence it appears that some material of the kind included in this last item was in fact required and used upon the building after February 10th, the date of the alleged last delivery.

(a) The contract between J. H. Burch and Patrick Kinnear was dated August 3rd, 1891.

Statement.

On this point the case resembles that of *Lindop* v. *Martin*, 3 C. L. T. 312, a decision which I am bound to follow in preference to that of *Chadwick* v. *Hunter*, 1 Man. 39, with which it appears to conflict. I must, therefore, hold that the last item of the account having been delivered on February 10th, the plaintiff was entitled to a lien for the whole amount of the goods previously delivered which went into the building in question, and the lien having been registered on February 19th, and these proceedings having been commenced on April 8th, the lien has been kept in force, and still is in force.

With regard to the amount for which the plaintiff is entitled to a lien, a dispute also exists. The total amount of the account originally brought in shewed a balance due to the plaintiff from Burch of $460.61, after giving various credits. After these proceedings had commenced, however, it was discovered that this account included several items for goods which did not go into the building in question. The plaintiff sought to obviate the effect of this by agreeing with Burch to appropriate the payments which had been made, to those items for which no lien could be claimed. This attempted appropriation of payment thus made after action to the prejudice of Kinnear, I am of opinion is invalid, and cannot be supported: *Lindop* v. *Martin, supra*; see also cases collected, Holmested & Langton, Ontario Judicature Act and Rules, p. 231.

Applying these payments to the earlier items of the account, and deducting from the account those items which are proved not to have gone into the building in question, the balance for which the plaintiff would appear to be entitled to rank as a lienholder is $330.89.

In addition to the claim of lien on the land the plaintiff also claims to be a chargee on the money payable by the owner to Burch on February 19th, by virtue of a notice served on Kinnear under the provisions of section 11 of the Act (R. S. O. ch. 126). And under this notice he claims the right to dispute the validity of certain payments subse-

Statement.

quently made by Kinnear. It will be observed that this section entitles the sub-contractor giving it to a *pro rata* charge upon any amount payable by such owner under the said lien, *i. e.*, as I read the section the lien of the contractor, by whom the sub-contractor giving the notice was employed.

Beyond the fact that Burch did the work on the building in question, there is no evidence that he in fact had "a lien" within the meaning of this section. I assume, however, that under section 4 he had such a lien. Nearly all the payments in question were made either to persons having claims for wages, or to persons furnishing materials to be used on the building. I do not think that these moneys can be said to have been affected by the plaintiff's notice, they were not payable to Burch by virtue of any lien which he had. $1.20 was paid to Rice Lewis' & Co. for locks; $8.70 to Burch to procure weights for the windows; $110 to Miles & Slater for doors, and $4.50 for materials for the water-closet. These materials no doubt Burch was, under his contract, bound to supply They were not, however, payments made to Burch for his own benefit or by virtue of any lien which he had for them, but were in fact virtually payments to sub-contractors with Burch from whom were obtained the particular materials for which these sums were advanced. I hold therefore that as to these items the payments were justified. One other item paid for insurance which Burch ought to have paid stands on the same footing.

The payment to McCleary of $20 stands on a different footing, and must I think be disallowed as against the plaintiffs. This payment appears to have been made under an order from Burch given prior to the plaintiff's notice of February 19th; but I think such assignees cannot stand in any better position than Burch himself, and if Burch was not then entitled to be paid to the prejudice of the plaintiff neither was his assignee. It does not appear that McCleary had any lien or claim on the moneys coming from the owner except as assignee of Burch, and I do not

Statement.

think Burch was in a position to assign his interest in any part of the money coming to him, except subject to any rights which might arise in favour of his sub-contractors under the Mechanics' Lien Act. Had the payment been made *bonâ fide* before the notice it could not have been questioned, but having been made after the notice I think Kinnear must be taken to have paid it wrongfully as against the plaintiff.

In addition to the payments made on account of the contract price the owner also claims to deduct from the contract price $10 for omissions, and $180 for liquidated damages for noncompletion within the specified time.

The evidence, I think, sufficiently establishes the right of the owner to the deduction for omissions. And I also think he is entitled to the damages, notwithstanding "November 31st" is named as the day on which the work was to be completed (*a*.)

The reasonable intendment of the parties, I think, must be taken to be that the last day of November was intended, and the maxim *falsa demonstratio non nocet* applies. The plaintiff contended that this stipulation as to damages was to be regarded as a penalty which would only entitle the owner to recover such damages as he actually proved he had sustained; but the cases which have been cited to me, I think, clearly establish that the $10 per week must be regarded as liquidated damages: *Scott* v. *Dent*, 38 U. C. R. 30; *Fisher* v. *Berry*, 16 C. P. 23; *Tew* v. *Newbold-on-Avon United District School Board*, 1 Cab. & Ell. 260; *Jones* v. *St. John's College, Oxford*, L. R. 6 Q. B. 115. In these cases, however, the contract expressly provided that the damages were to be deducted from the contract price; here the contract is that

(*a*) The clause in the contract as to completion was as follows:—

Eleventh. Should the contractor fail to finish the work at or before the time agreed upon, he shall pay to or allow the proprietor, by way of liquidated damages, the sum of ten dollars per week for each and every week thereafter the said works shall remain incomplete, due allowance to be made for extension of time for additional work or alterations, as laid down in clause number three of this agreement.

Statement.

the contractor is to pay "or allow" the amount. Whether "to allow" is equivalent to an authority to deduct them from the contract price appears to me to be open to doubt. This point has not been argued before me, and its bearing on the case is important, for if the effect of this contract is to give the owner a mere counter-claim for damages against the contractor it is possible that though he may be entitled to the damages as against Burch, yet he may not be in a position to deduct them as against a lienholder claiming adversely to Burch. But I am of opinion that the word "allow" authorizes a deduction from the contract. The alternative expression used in the contract seems to amount to this: If the proprietor has overpaid the contractor what he is entitled to under the contract, then the contractor is to pay the stipulated damages to the proprietor; if, on the other hand, there remains any balance in the proprietor's hands, then the contractor is to "allow" the proprietor such damages, or, in other words, the latter, I take it, is to be at liberty to deduct them from the money in his hands. (a)

This being so, as against the plaintiff who is only entitled to a lien on what (if any thing) remains due by the owner to Burch, I hold that the owner is entitled to deduct the damages from the balance of the contract price remaining due. But as against the outstanding lien for wages Kinnear cannot make this deduction (see Mechanics' Lien Act, sec. 9), such liens being in the aggregate less than ten per cent. of the contract price.

The question of extras still remains to be considered. The contract provides as follows: "Should the proprietor or his architect at any time during the progress of the said works, require any alterations of, or deviations from, additions to or omissions in, the plans or specifications, he shall have the right and power to make such change and changes, and the same shall in no wise affect or make void the contract, but the value of work omitted shall be deducted from the amount of contract by a fair and reasonable valuation.

(a) See *McNamara* v. *Skain*, *ante*, p. 103.

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And for additional work required in alterations, the amount to be paid therefor shall be agreed upon before commencing additions, and such agreement shall state the extension of time, if any, which is to be granted by reason thereof, etc."

Certain extras amounting to $63.75 are admitted by the owner, but there are other extras amounting in the aggregate to $139.92, which are claimed by Burch, which it is admitted cannot be claimed under the contract by reason of the price not having been agreed upon as therein provided, but which are claimed to be due by virtue of a separate and independent contract made by the owner therefor with Burch; and in support of this claim the cases of *Diamond* v. *McAnnany*, 16 C. P. 9, and *Melville* v. *Carpenter*, 11 U. C. R. 128, were relied on.

Being asked for a ruling on this point at the close of the plaintiff's evidence, I ruled that the contract governed, and that no extras could be claimed for which the price had not been agreed on. And upon this ruling the owner refrained from giving any evidence on the items which were thus excluded from the account. Had the cases above referred to been cited to me then (which they were not), I am inclined to think I should have withheld my ruling on that point and left the owner to give such evidence as he might see fit, to controvert the evidence of the plaintiff on the items of extras in question. And under the circumstances should the plaintiff desire to appeal from my decision on that point, I think it is desirable and reasonable that the owner should even now be permitted to adduce any further evidence he may have as to these particular items affected by my ruling. Whilst saying this, I do not think the cases referred to, though very much in point, go quite far enough to support the plaintiff's contention here. The present contract provides that "any" additions required, "and for additional work" (which I think must be read to apply to the "any additions" previously referred to) the price is to be agreed on. The word "any" appears to me necessarily to include "all" additions that might be required to be

Statement. made, and I do not think it is open to the contractor to say under this contract that the stipulation in question refers to some only and not to all of the additions. It is true there are here no negative words such as were referred to by the Court in *Diamond* v. *McAnnany*, but if the interpretation I have given to this contract is that it in terms includes all additions, then it seems necesarily to follow that no extras are excluded from its operation. I therefore, though not without some hesitation, adhere to my ruling given during the progress of the evidence on this point: see *Oldershaw* v. *Garner*, 38 U. C. R. 37. As regards the last item in the bill of extras (independently of the above consideration) it would appear to be governed by the case of *Diamond* v. *McAnnany*, where a similar claim was made and disallowed.

The result of the matter therefore appears to me to be this:

McKinnear has in his hands applicable to the payment of liens for wages: $1,674.75 less the sums I hold he has properly paid, in all $1,407.81 = $266.94, from this must be deducted the amount of the liens for wages of Hall & Murray, $66.59, together with their costs on the lower scale, including the costs of registering their liens. From the balance then remaining must be deducted the penalty $180 and $10 for omissions. I am unable to see that there is any ground here for applying the doctrine of marshalling of assets as suggested by the plaintiff. The liens for wages are no doubt entitled by virtue of a special statutory provision to rank upon the contract price in priority to any claim by the owner against the contractor for or in consequence of the failure of the latter to complete his contract, but this priority does not give the lienholders for wages any lien on two funds. The statute in effect provides that even though the ten per cent. of the price may not have been earned by the contractor by reason of his failure to complete his contract, the lienholder for wages shall nevertheless be entitled to be paid his lien out of such ten per cent.; (*a*) but I think it would be an

(*a*) See *vide* per Patterson, J. A., 10 App. R. 9.

altogether unwarrantable extension of this provision of the Act, to treat the penalty and omissions as a separate fund out of which the wages lien should be paid so as set free the balance which remains after deducting the penalty and omissions from the contract price, for the benefit of other lienholders. Statement.

After deducting the wages lien, the balance (if any) which will remain in the owner's hands should, I think, be applied on account of his costs of these proceedings, and the balance of such costs should be paid by the plaintiff.

If the parties desire it I think the plaintiff and Batho (*b*) are entitled to a certificate for judgment against Burch for the amount of their claims and the costs of their proceedings.

Defendant Kinnear is entitled on payment of the liens for wages, to have those and all other liens proved in the proceedings discharged.

The plaintiff now appealed from the report of the learned Referee, upon the following grounds:—

1. That the defendant Burch had a lien on the building and land in question on February 19th, 1892, and the notice given by the plaintiff to the owner on that day entitled him to a charge *pro ratâ* on all moneys unpaid at the said date.

2. That the said notice on February 19th, 1892, operated as a notice under section 9 of the Mechanics' Lien Act, R. S. O. 1887, ch. 126, and that payments made thereafter cannot be set up as against the plaintiff.

3. That the owner had not on the said 19th day of February assumed any personal obligation as between him and the payees to pay the parties whom he afterwards paid out of the contract moneys.

4. That the owner is not entitled to deduct from the contract moneys any claim under the penalty clause in the contract, inasmuch as (*a*) there is no date fixed in the contract for the completion of the work; (*b*) the owner per-

(*b*) This was a lienholder who proved a claim of $23. REP.

Statement.

sonally interfered with the progress of the work, ordered extras, and caused delay; (*c*) the delay was caused by the contractors for the other trades over whom the owner had and the defendant Burch had not control; no allowance is, but should have been made in the report for such delay; and (*d*) the architect named in the contract could not give a certificate extending the time inasmuch as the owner had dismissed him.

5. The contractor is entitled, notwithstanding they were not ordered in writing or afterwards certified by the alleged architect, to extras as follows, not allowed, namely, items 7, 10, 11, 16, 19 and 25.

6. If the owner is entitled to deduct $180 penalty, the lien for charges should be paid out of such moneys and not deducted from other moneys as to which the plaintiff has a lien.

7. The costs of other lienholders should be paid by the owner and not by the plaintiff, which in fact is done under the mode of settling the accounts adopted.

8. There is no power under the statute to award costs against the plaintiff in any case where the owner is held liable to any of the lienholders for any sum of money.

9. The plaintiff is entitled to costs, having recovered through the suit what is found due by the owner in the report.

The appeal came up for argument before FERGUSON, J., upon September 15th, 1892.

G. B. Gordon, for the appellant. November 31st, 1891, being an impossible date, the period—eighteen weeks—did not run at all: The Touchstone, 109; Co. Litt. 466; Elphinstone on the Interpretation of Deeds, p. 125. On February 19th Burch had a lien for all unpaid moneys and McBean serving his notice on that day becomes then entitled to share *pro ratâ* in this with all other lienholders: R. S. O. 126, sec. 11. Nothing short of actual payment by the owner to the order-holders as assignees could discharge him from liability to the lien-

holders: *Bourget* v. *Donaldson*, 47 N. W. R. 326; *Mechanics' and Traders' National Bank* v. *Winant*, 25 N. E. R. 262. The notice of February 19th is good under section 9, though given under 11. On fourth ground of appeal see *Russell* v. *Viscount Sa da Bandeira*, 13 C. B. N. S. 149; Emden on Building Contracts, 2nd ed. p. 167: *Papps* v. *Melville*, 16 U. C. R. 124; *Hamilton* v. *Moore*, 33 U. C. R. 520; *Roberts* v. *The Bury Improvement Commissioners*, L. R. 5 C. P. 310. As to the sixth ground of appeal, there should be marshalling: Phillips on Mechanics' Liens, 2nd ed. secs. 257-8; *Kendig* v. *Landis*, 19 A. R. 1058. As to the seventh ground, the costs should not have been added to the claim of the wage earners. As to the eighth ground, if it appears that anything is due by the owner the plaintiff should have it and should not be made to pay his costs. Argument.

Hodgins, for Kinnear, contra. As to the first ground of appeal, we cite *Briggs* v. *Lee*, 27 Gr. 464; R. S. O. ch. 126, secs. 9, 11-13; *Jennings* v. *Willes*, 12 C. L. T. 350. By giving the notice of February 19th the plaintiff no doubt got a charge on whatever was owing to Burch. As to the date and penalty, we refer to Kerr on Fraud and Mistake, 2nd ed. pp. 490, 493. [FERGUSON, J., I will treat November 31st as if it were November 30th.] As to the extension of the time, see Emden on Building Contracts, 2nd ed. pp. 171, 183-4. The extras disallowed were so because it was held they were not extras at all. There cannot be any marshalling. Wages have priority: R. S. O. ch. 126, sec. 9, sub-sec. 3. As to ground 8, section 14, makes the costs discretionary.

After the above argument, on October 21st, 1892, it was on the application of Kinnear referred back to the referee by FERGUSON, J., to take additional evidence as to certain items, and if deemed proper by him to vary his report accordingly.

The learned referee, accordingly, took the additional evidence, on October 28th, 1892, and did not think it proper to vary the report for the following written reasons:—

Statement.

The additional evidence which has been adduced before me on the part of the defendant Kinnear, by consent of the plaintiff, has merely confirmed the impression of the facts which I had formed from the evidence given in the first instance, and I therefore do not see any reason for altering my report.

With regard to the four payments by Kinnear, to which this additional evidence has been directed, it appears that they were all of them made by Kinnear, not in respect of any money due and owing to Burch, but in discharge of a personal obligation which Kinnear had assumed to pay for certain goods which would not have been otherwise delivered. It is true that these goods ought to have been furnished by Burch under his contract, and he ought primarily to have paid for them, but as to the larger items of $8.71, and $110, the evidence seems tolerably clear, that owing to his pecuniary embarrassments, he was unable to furnish the money, and that the material men with whom he had sub-contracted would not deliver these goods except upon the terms of Kinnear assuming a personal liability to them for the value thereof. This Kinnear did before notice was served on him by the plaintiff, and these items were accordingly protected payments within the principles laid down by the learned Chancellor in the recent case of *Jennings* v. *Willis*, 22 O. R. 439. It was urged that there was no valid guaranty of these two items within the Statute of Frauds, and that the payment made was not in respect of a legal liability; but the evidence to my mind as to the doors, establishes the fact that they were delivered upon the faith of Kinnear having assumed a personal liability to pay therefor, which liability on the evidence was a legal liability, and one that could have been enforced against Kinnear (notwithstanding it was not in writing) within the principle of *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374; *Petrie* v. *Hunter*, 2 O. R. 233; 10 A. R. 127.

It was not a mere guaranty of the debt of another, but it was the assumption of a primary liability supported by a good consideration. "If you will deliver the goods I

will pay for them," was in effect Kinnear's agreement. The delivery being made on the faith of that promise, I do not doubt that Kinnear could have been compelled to make it good. But with regard to the other items, although they too relate to goods which Burch was bound to supply, the case seems even stronger. Before the weights were delivered the moulders required payment; this payment was made by Kinnear, by means of a cheque to Burch's order, which he indorsed over to the moulders' order, as appears by their indorsement. It was a payment, it is true in one sense, to Burch, but for such a specific purpose that it would have been a fraud on his part to have applied it to any other, and must therefore, it seems to me, stand in exactly the same position as if Kinnear had paid it direct to the moulders himself without the intervention of Burch. As to the other items, the goods were ordered personally by Kinnear and furnished on his own credit, and therefore if ordered prior to the plaintiff's notice clearly within the rule laid down in *Jennings* v. *Willis*, and if ordered by Kinnear after that notice, still protected as payments *bonâ fide* made and in respect of goods for which Burch never could have any lien, for the simple reason that he never furnished the goods. Statement.

Some discussion has taken place as to the respective effect of sections 9 and 11.

The object of section 9 is no doubt to protect sub-contractors, and to prevent money earned by a contractor through whom they claim from being paid to him to their prejudice. The test therefore whether payments made by an owner to a contractor are invalid within that section must be, I think, this "would the payment if it had not been made have been available for the satisfaction of the sub-contractor's lien or claim?" If this be a correct test, then it is abundantly clear that these four items are perfectly valid and legitimate payments as against the plaintiff, because if Kinnear had not assumed the liability and paid for these goods represented by these four items, they would never have been delivered and Burch would never have been entitled to any money in respect thereof, and

Statement.

Burch not being entitled, neither would the plaintiff his sub-contractor either; therefore it appears to me the plaintiff has been in no wise damnified under section 9 by the payments. But under section 11 the case is no different, for that section expressly limits the charge of the sub-contractor (as I formerly pointed out) to any amount payable by the owner to the contractor by virtue of any lien; but in regard to these four items Burch never could have any lien, therefore no money being due to him in respect thereof, the plaintiff is not injured.

I do not think any order should be made as to the costs of the additional evidence.

Total amount of contract, including extras		$1,674 75
12½% =	209 34	
87½% =	1,465 41	
Payments allowed excluding disputed amount		$1,283 40
Balance after deducting this sum		391 35
Against this owner claims to set off:		
1. Disputed payments	$124 41	
2. Omission from contract	10 00	
3. Damages for non-completion	180 00	
4. Wages lien and costs	87 70	
	$402 11	
Contract price		$1,611 00
Extras		63 75
		$1,674 75
87½% of this	$1,465 41	
Total contract price		$1,674 75
*Deduct goods furnished by Slater, etc.	$124 41	
Omissions	10 00	
Damages	180 00	314 41
Total amount due Burch		$1,360 34
12½% on this amount	$170 04	
Payments allowed to Burch on account		$1,283 40
Balance due Burch		$76 94
Wages lien and costs		$87 70
*Being	$1,407 81	
Less	124 41	
	$1,283 40	

The matter being accordingly again brought before FERGUSON, J., he gave judgment upon the appeal as follows:—

November 4th, 1892. FERGUSON, J.:— Judgment. Ferguson, J.

It now seems clear that these items are in the same position as if the owner had to pay the amount of them to complete the work that the contractor should have done but did not do. The order will go dismissing the appeal with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

HENDERSON v. THE BANK OF HAMILTON.

Jurisdiction—Redemption action—Foreign lands—Locus standi of plaintiff—Application of statute law of foreign country.

The defendants, domiciled in this province, took from a customer a mortgage upon lands in the province of Manitoba as security for an indebtedness which arose in Ontario. The plaintiff, who also resided in Ontario, subsequently recovered a judgment for the payment of money against the mortgagor in a Manitoba Court and registered a certificate of it against the mortgaged lands, the effect of which was by the C. S. Man. 1880 ch. 37, sec. 83, to make the judgment a lien and charge upon the lands. The plaintiff brought this action to redeem the mortgaged lands:—

Held, that the Court had jurisdiction to entertain the action, and was bound to apply the law of Manitoba to determine whether the plaintiff had the right to redeem; and, in determining that the registration of the judgment gave the plaintiff that right under the Manitoba statute, was not giving an extra-territorial effect to the judgment.

THIS was an action tried before ARMOUR, C. J., without a jury, at the Stratford Spring Assizes, 1892. The facts material to the present judgment, shewn at the trial, were as follows:— Statement.

One Peter Lillico in February 1890, and for some time before, had carried on a private banking business at Listowel, in the county of Perth, and had a line of discount of $10,000 with the Listowel branch of the defendants' bank. It was one of the terms of his account with the defendants that his indebtedness to them upon his account should always be covered by satisfactory collaterals

Statement.

to the amount of twenty per cent. beyond the indebtedness. On the 20th February, 1890, he signed an instrument in the following words:

"To the Bank of Hamilton, Listowel.

Sir,—In consideration of advances made or that may hereafter be made to me by the Bank of Hamilton, I agree that any and all bills, notes, acceptances, cheques, bonds, debentures, coupons, and all securities and moneys now held by the bank, or that may hereafter be so held, as security for the said advances, and all securities of a like kind which the said bank now hold, or which may hereafter be held by the bank, for collection or for any other purpose whatever, on my account or behalf, shall be a general collateral security and applicable to any claims due or accruing due that are or may be held against me by the said bank. Yours truly,

PETER LILLICO."

On 28th March, 1890, Lillico, at the request of the bank, executed to them a mortgage upon certain lands in Manitoba as collateral security for the payment of his note for $9,675, then due them; and upon the same day, by way of further security for the same debt, he assigned to them his interest in certain other lands in Manitoba which he had agreed to purchase from the Canadian Pacific Railway Co., to whom certain small payments were still due. Upon the 2nd April, 1890, the manager of the defendants at Listowel wrote to Lillico a letter in the following words:

"P. Lillico, Esq., Listowel.

DEAR SIR,—Referring to security on Manitoba or North-West lands, which security you gave to the bank on 28th ultimo, I beg to say that (in accordance with the agreement) upon your account being covered by other collaterals satisfactory to the bank to the extent of twenty per cent. in excess of your liability, the security on the lands referred to will be reconveyed to you. The lands mentioned in said securities are as follows," (then the lands were set out).

"Yours faithfully,

O. S. CLARKE,

Acting Manager."

Statement.

Shortly afterwards Lillico failed and went to Manitoba. The plaintiff in the present action was a creditor of Lillico when he failed, and on 15th December, 1890, he recovered a judgment against him in the Court of the Queen's Bench for Manitoba for $4,091.36 debt and $27.83 for costs. A certificate of this judgment was registered in the Registry Office of the county of Shoal Lake, Manitoba, being the county in which the said lands were situate, on the 17th December, 1890, under sec. 83 of ch. 37 of the Consolidated Statutes of Manitoba of 1880. The effect of recording such a certificate is by that statute declared to be that "from the time of the recording of the same the said judgment shall bind and form a lien and charge on all the estate and interest aforesaid in the lands of the judgment defendant in the several registration divisions in the Registry offices of which such certificate is recorded, the same as though charged in writing by the defendant under his hand and seal."

The plaintiff then brought the present action in this province against the defendants seeking to set aside the mortgage and conveyance to the defendants as a fraudulent transfer, or, in the alternative, asking that he might be allowed to redeem.

The defendants admitted that they held the securities as mortgagees only, to secure the debt due by Lillico to them and the amount they had paid the Canadian Pacific Railway Co. as the balance of purchase money, but they denied the plaintiff's right to redeem them in this action, and they denied that the transfer to them was fraudulent.

The learned Chief Justice delivered the following judgment:—

ARMOUR, C. J.:—

The initial question to be determined in this case is whether the plaintiff has any right to maintain this action, in respect of any of the relief therein claimed, in this Court; and I have come to the conclusion that he has no such right.

Judgment.

Armour, C.J.

The parties to this suit both reside in this province, and the debt which is the foundation of the plaintiff's proceedings was contracted in this province, while the debtor and creditor were both resident in this province, but the lands in respect of which relief is sought are in the province of Manitoba, and the plaintiff founds his claim for relief upon the fact established by him at the trial that he has recovered a judgment against Lillico, the owner of the equity of redemption of these lands, in the Court of Queen's Bench for the province of Manitoba, and has registered a certificate of such judgment against the said lands in the proper registry office in the province of Manitoba, under the provisions of the Consolidated Statutes of the province of Manitoba 1880 ch. 37, sec. 83, by virtue of which the said judgment forms a lien and charge on all the estate and interest of the said Lillico in the said lands, and he seeks by virtue of this lien and charge to maintain this action in respect of these lands.

But the judgment so recovered exists as a judgment, only in the province of Manitoba, and has no force or effect as a judgment outside of that province, and the lien and charge upon the said lands effected by the registration of the said judgment exist only in the province of Manitoba, and do not exist outside of that province, and such lien and charge cannot be enforced in this province, but can only be enforced in the province of Manitoba.

There is no privity or contractual relationship between the plaintiff and the defendants, and there is nothing in this province upon which to found a decree for the plaintiff against the defendants.

It is quite clear that the transfer of these lands by Lillico to the defendants is not liable to be set aside as a contravention of R. S. O. 1887 ch. 124, for that Act does not affect the transfer of lands outside of this province; and if the plaintiff could maintain this action in this Court, he could only maintain it to the extent of obtaining a decree for the redemption of the said lands; but, as I have already intimated, he has no lien or charge

upon the said lands existing in this province upon which to found it. Judgment. Armour, C.J.

The cases on the subject up to 1887 are to be found in the notes to *Mostyn* v. *Fabrigas*, 1 Sm. L. C. (9th ed.) 628; and in *Penn* v. *Lord Baltimore*, 2 W. & T. L. C. (6th ed.) 1047. See also *Stuart* v. *Baldwin*, 41 U. C. R. 446; *Strange* v. *Radford*, 15 O. R. 145; *Burns* v. *Davidson*, 21 O. R. 547; *De Sousa* v. *British South Africa Co.*, 8 Times L. R. 369; *Mercantile Investment Co.* v. *River Plate, etc., Co.*, 36 Sol. J. 427.

I have found no case upon the precise point raised in this case, but the conclusion I have drawn from the decided cases, and from reasoning founded upon them, is that this action cannot be maintained in this Court, and must therefore be dismissed; but, as this question could have been raised and decided on a demurrer, it will be dismissed with such costs only as would have been incurred had the defendants demurred only and succeeded on demurrer.

The plaintiff moved against this judgment at the Michaelmas Sittings of the Divisional Court, 1892, and the motion was argued on 28th November, 1892, before the Divisional Court (FALCONBRIDGE and STREET, JJ.).

Mabee, for the plaintiff, referred to *Burns* v. *Davidson*, 21 O. R. 547; *Companhia de Mocambique* v. *British South Africa Co.*, [1892] 2 Q. B. 358, reversing the judgment of a Divisional Court, reported 8 Times L. R. 369; *Mercantile I. & G. T. Co.* v. *River Plate, etc., Co.* [1892], 2 Ch. 303.

J. J. Scott, for the defendants, referred to *Barned's Banking Co.* v. *Reynolds*, 36 U. C. R. 256; *McFarlane* v. *Derbishire*, 8 U. C. R. 12; *Davidson* v. *Cameron*, 8 P. R. 61; *North* v. *Fisher*, 6 O. R. 206.

February 13, 1893. The judgment of the Court was delivered by

Judgment. STREET, J.:—

Street, J.

Upon the argument of the motion before us the counsel for the plaintiff abandoned the ground taken in his notice of motion that he should have had judgment declaring the transfers of 28th March, 1890, to be a fraudulent preference. We have, therefore, only to consider the other point raised, namely, whether the plaintiff should have a judgment for redemption. The defendants do not deny that they are mere mortgagees and that they are, therefore, subject to be redeemed; but they deny the plaintiff's right to enforce redemption against them by an action in the Courts of this province, because his right is founded upon the effect given by the law of Manitoba to the recovery and registration in that province of the judgment which he has obtained there.

The principle upon which the English Courts and the Courts of this province have acted is that which is thus laid down in sec. 172 of the 3rd (1890) edition of Westlake's Private International Law:—

"A proprietor of foreign immovables, or person interested in such, may be compelled by the English Court, if it has personal jurisdiction over him, to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort." And in sec. 174 the same writer says: "The redemption or foreclosure of mortgages of foreign lands, deserves separate notice. The fact that a debt is secured by such a mortgage can be no objection to taking the account between a debtor and creditor, and decreeing payment by the former of the balance found due from him, in any Court having personal jurisdiction over him. Nor would it be inconsistent with sec. 173 that on payment by the debtor of the amount found due from him, the creditor should be decreed, by any Court having personal jurisdiction over him, to reconvey the land or otherwise clear it of the mortgage."

In Foote's Private International Jurisprudence, 2nd ed.,

Judgment.

Street, J.

p. 178, the law is thus summarized: "Where a personal equity, resulting either from a trust or a contract over which an English Court has jurisdiction, and not excluded by the law of the *situs* attaches to an individual who is before the English Court, or can be brought before it, the English Court will indirectly affect foreign land by acting *in personam*, *i. e.*, upon the conscience of its own justiciable." See also Story's Conflict of Laws, sec. 544; *Beckford* v. *Kemble*, 1 Sim. & Stu. 7; *Penn* v. *Lord Baltimore*, 2 W. & T. L. C. (6th ed.) 1047; *Bent* v. *Young*, 9 Sim. 180; *De Sousa* v. *British South Africa Co.* [1892], 2 Q. B. 358; *Paget* v. *Ede*, L. R. 18 Eq. 118.

The plaintiff in the present action is a resident of this Province, and the head office of the defendants' bank is here. The accounts to be taken arose entirely here, and must be investigated here, so that it appears desirable that the relief asked for should be given, if the giving of it appears warranted by the principles governing the Courts in such cases.

The defendants here are subject to the equity of being redeemed by Lillico and the persons claiming under him, by reason of the terms of the mortgage and of the letter of their manager, constituting a contract made within the jurisdiction. What is disputed is the *locus standi* of the plaintiff in this Province. It seems to have been conceded at the trial that the law of Manitoba was that appearing in the statute, section 83, ch. 37, Con. Stat. of Manitoba for 1880; and the case was argued before us in the Divisional Court by both parties upon that assumption; but it was argued that we could not give the plaintiff the benefit in this Province of his rights under the Manitoba law without giving to his Manitoba judgment an extra-territorial effect. I am unable to come to this conclusion. Having before us the defendants, whose domicile is in this Province, and being called on to determine to whom they are accountable for their dealings with a mortgage of Manitoba land, we are bound to apply the law of Manitoba: *Harrison* v. *Harrison*, L. R. 8 Ch. 342; and it is not

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Street, J.

disputed that, according to the law of Manitoba, the plaintiff is entitled to redeem, and that it is to him that the defendants are accountable. We are not giving an extra-territorial effect to his judgment in doing this; we are merely ascertaining the person who, by the law of Manitoba, is entitled to certain rights which are governed by that law, and which are properly in question in this action.

The plaintiff at the trial gave evidence for the purpose of restricting the defendants' claim under their mortgage to a particular class of liabilities. We should not, however, in the absence of Lillico, determine the basis upon which the mortgage account is to be taken. Although not a necessary party to the issue which we have dealt with between the plaintiff and the bank, he should be a party to the taking of the accounts, as he will have a right to redeem the plaintiff.

In my opinion, the plaintiff is entitled to the usual redemption judgment, and to a reference to the Master at Stratford. There should be no costs to the hearing, for the plaintiff has failed upon the branch of his case to which the greater part of the evidence was directed, and the defendants have failed in successfully disputing the plaintiff's right to redeem. The plaintiff should have the costs of the motion in the Divisional Court at the final taxation; and further directions and subsequent costs should be reserved.

[CHANCERY DIVISION.]

HEADFORD v. THE MCCLARY MANUFACTURING COMPANY.

Master and servant—Employer's liability—Workman going out of his way—Contributory negligence.

The plaintiff, in going to that part of the defendants' building where his work was, had to pass through a long room, the passage being nearly straight until within ten or twelve feet of a hoist, where it turned to the left. He was quite familiar with this passage, which was well lighted, but on the occasion in question, while looking at a man at work repairing the hoist, instead of turning toward his workroom he walked straight into the hole and fell to the cellar below, thus causing injury. As a rule there was a bar protecting the entrance to the hoist, but on the occasion in question this bar had been removed on account of the repairs:—

Held, That the action must be dismissed upon the ground of contributory negligence on the part of the plaintiff.

Statement.

THIS was an action of negligence brought by Henry Headford against the defendants for injuries sustained by him while in their employment as a carpenter. The statement of claim alleged that the defendants were manufacturers in the city of London: that on May 16th, 1892, the plaintiff while going to his employment with the defendants as a carpenter, at their place of business, fell into an unprotected hoist hole upon the premises, and sustained the injuries complained of: that the hoist hole had previous to the accident been protected by a bar which had been removed prior to the accident without the knowledge of the plaintiff, and at the time of the happening of the injuries complained of it was unprotected, and in a dangerous condition for the plaintiff: that the said injuries were caused by the negligence of the defendants in removing the bar and leaving the hoist hole unprotected: and that the defendants' premises were a factory within the meaning of the Factories Act, and it was their duty to protect the hoist way by good and sufficient trapdoors or self-closing hatches, and that they were required by such Act to keep the said trapdoors closed at all times except when in actual use; but that the defendants wholly neglected to protect the hoist way or to keep the trapdoors closed, by reason of

Statement.

which neglect the plaintiff sustained his injuries: and the plaintiff claimed $5,000.

In their defence the defendants, while denying negligence on their part, alleged contributory negligence on the part of the plaintiff.

The action was tried at the Autumn Assizes in London, before ROSE, J., and a jury, upon October 5th and 6th, 1892.

At the close of the plaintiff's evidence, a motion was made for a nonsuit, but the learned Judge reserved the same until evidence for the defence was in and the opinion of the jury was taken, so as to avoid the necessity for another trial in case it should eventually prove necessary to assess damages.

At the conclusion of the evidence, the learned Judge, without prejudice to the motion for the nonsuit, sent the case to the jury, whose findings were as follows:—

1. Was the defendants guilty of negligence? A. Yes.

2. If so, state in what such negligence consisted? A. Unprotected elevator.

2*a*. Was there any defect in the condition or arrangement of the ways, works, machinery, plant, building or premises? A. Yes.

2*b*. If so, what was such neglect? A. Having no man in charge, and elevator unprotected.

3. Could the plaintiff have avoided the accident by the exercise of reasonable care? A. No, having used usual care.

4. In the event of the plaintiff being entitled to recover, what sum do you think fair for the defendants to pay? A. $500.

Afterwards the learned Judge gave judgment in favour of the nonsuit, as follows:

ROSE, J.:—

This case is like in principle to *Finlay* v. *Miscampbell*, 20 O. R. 29. There the plaintiff went out of his way to

assist a fellow labourer and fell into a hole through the floor. Here the plaintiff went out of his way through carelessness or inadvertence and fell into a hole. There was no defect in the way here. The plaintiff had a perfectly safe path from the street to the room where he was working—the way in which he was accustomed to walk. Had he remained in that way no accident would have happened him. There is nothing in the evidence which showed that the employer could reasonably have anticipated the plaintiff going out of his way to where the hole in question was. He had no business there. If he had gone there for idle curiosity to observe the men working at the hoist, and then fallen in, it would hardly have been argued that he could have recovered. Is he in any better position, having walked there while observing the men at work and unmindful of where he was going? The case is clearly not within R. S. O. ch. 141 (*a*), and the amending Act 52 Vic. ch. 23, sec. 3. Nor do I think it is brought within the Factories Act, R. S. O. ch. 208. Sub-sec. 1 of sec. 15 of that Act provides that all openings in floors shall be, as far as practicable, securely guarded. This opening in the floor was used for the purpose of the hoist. The men were at work upon the hoist. The evidence is uncontradicted that it was impossible to guard the hole while the men were at work. The fact of the men working on the hoist was present to the plaintiff's mind because it was while observing them that he went into the hole. There is no evidence at all upon which it could be reasonably held that the hole was not guarded as far as it was practicable under the circumstances.

Judgment.

Rose, J.

Assume a case of a hole being cut in a floor for the purpose of putting in a hoist, and while the men were at work upon the hole a man looking at them should carelessly walk into it. Could it be said that such hole should have been securely guarded as against him? It would be securely guarded as far as it was practicable. In other words, would it have been practicable to have guarded the

(*a*) The Workmen's Compensation for Injuries Act.

Judgment.

Rose, J.

hole while the men were at work cutting it out and placing in the hoist? Must not one keep away from such a place, or if he go to it, take the risk of being there?

Nor do I think it is brought within sub-sec. 3, which provides for closing the openings of every hoistway, hatchway, elevator or well-hole by good and sufficient trapdoors, or self-closing hatches and safety catches, or by such other safeguards as the inspector directs, and further providing that such "trapdoors shall be kept closed at all times except when in actual use by persons authorized by the employer to use the same." This hoist could not have been guarded by trapdoors or a self-closing hatch. It had a safeguard, viz., a bar on a hinge, which could be let down on ordinary occasions, but which, on the uncontradicted testimony, was necessarily raised for the purpose of enabling the men to do the work of repairs. But as against the plaintiff under the circumstances I do not think it was incumbent upon the defendants to have guarded this hole for the reasons given in *Finlay* v. *Miscampbell*, and the cases to which I have been referred by counsel in the written arguments handed in to me from which I have derived the greatest assistance, that of the defendant company being extremely full and satisfactory. These arguments will remain with the papers for reference if the case is further considered.

I think it manifest that no case was made out of negligence at common law. I therefore give judgment for the defendant company on motion for nonsuit with costs, judgment having been reserved on such motion on the hearing.

The plaintiff now moved before the Divisional Court by way of appeal from the judgment of nonsuit, and the motion was argued on January 18th, 1893, before BOYD, C., and ROBERTSON, J.

Gibbons, Q. C. for the appeal. The Judge founded his nonsuit on *Finlay* v. *Miscampbell*, 20 O. R. 29. But here the

plaintiff was lawfully on the premises going to his work, which distinguishes our case. The plaintiff had a perfect right to be in the passage way. It was the usual way; the only way to his work. R. S. O. ch. 208, sec. 15, sub-sec. 3, provides for the protection of hoistways, etc. The jury find that the defendants should have had something equivalent to the statutory protection, and this I submit is undoubted. His lordship's findings are findings of fact in direct contravention of those of the jury. [BOYD, C.—The nonsuit proceeds on the ground of contributory negligence.] Yes, but after the jury had found the other way. See also *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423; *McCloherty* v. *The Gale Manufacturing Co.*, 19 A. R. 117, at p. 122; *O'Brien* v. *Sanford*, 22 O. R. 136; *Willetts* v. *Watt & Co.* [1892] 2 Q. B. 92; *Smith* v. *Baker & Sons* [1891] A. C. 325; *Brannigan* v. *Robinson* [1892] 1 Q. B. 344; *Morgan* v. *Hutchings*, 6 Times L. R. 219. The jury found a defective arrangement, a defect in the condition of the hoist. If they could not comply with the statute, they were bound to supply an equivalent: *Hollinger* v. *The Canadian Pacific R. W. Co.*, 21 O. R. 705; *Lett* v. *The St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545. As to contributory negligence, that was for the defendants to prove, there cannot, therefore, be a nonsuit on that ground. [BOYD, C.—The plaintiff may himself prove contributory negligence, and then the Judge may on that nonsuit.] Well, there was nothing of that sort here. The defendants caused the accident by the direct breach of the statutory provision. Argument.

A. Monro Grier, for the defendants. If the plaintiff had been acting with the most reasonable care he could not have met with this accident. The man failed in his duty. He deliberately walked twelve feet out of the way. When he came to the angle of the last shelving, he should have turned,—it was his duty. The plaintiff was out of his way when he met with the accident. We are here in the same position as if the Judge had granted the nonsuit in the first instance instead of sending the case to the jury. [BOYD, C.—The passage-way was all the space between

Argument.

the hoist and the shelving.] Any want of protection to the elevator was because it was under repair at the time. It has not been contended that there is any common law liability upon us: *Seymour* v. *Maddox*, 16 Q. B. 326. All *Finlay* v. *Miscampbell*, 20 O. R. 29, shews is that a breach of the Factories Act is evidential. The case does not enlarge the common law liability. Now we fully carried out the duty imposed on us by sub-sec. 3 of sec. 15 of R. S. O. ch. 208, of the Factories Act. The inspector had directed nothing more. [ROBERTSON, J.—But if an employer wishes to claim the protection of the Factories Act, he should call in the inspector to examine the premises and say if sufficient protection is provided.] I cite *Black* v. *Ontario Wheel Co.*, 19 O. R. at p. 584. Here whatever devices there were for the protection of the hoist it was absolutely impossible to have them closed at the time. The plaintiff cannot claim the benefit of the Workmen's Compensation for Injuries Act until he shews that he was in his proper way: *Finlay* v. *Miscampbell*, 20 O. R. 29. A defect must be a permanent defect: *McGiffin* v. *Palmer's Shipbuilding and Iron Co.*, 10 Q. B. D. 5; *Walsh* v. *Whiteley*, 21 Q. B. D. 371; *Willetts* v. *Watt & Co.* [1892] 2 Q. B. 92. There was not any defect by reason of the hoist not having a bar across it: *O'Neil* v. *Everest*, 8 Times L. R. 426. Nor was it a defect within the Employers' Liability Act, not having a man to warn off people. The plaintiff is only in the position of any ordinary litigant. He must be free from blame himself: *McShane* v. *Baxter*, 7 Times L. R. 58. If the plaintiff had had his eye where it ought to have been, on his path, he must have seen that the hoist was open. If a man in broad daylight walks into a hole with his eyes open, he is guilty of negligence. The danger was open and visible. There was no trap: *Bolch* v. *Smith*, 7 H. & N. 736; *Burchell* v. *Hickisson*, 50 L. J. Q. B. 101; *Tolhausen* v. *Davies*, 58 L. J. Q. B. 98. On the whole case I cite *Follett* v. *The Toronto Street R. W. Co.*, 15 A. R. 346; *Davey* v. *The London and South-Western R. W. Co.*, 12 Q. B. D. 70; Beven on Negligence, p. 11.

Gibbons, in reply. There is really no pretence by the defendants that they had any person there to warn people. The hole was immediately adjoining the passage-way. Argument.

February 16th, 1893. BOYD, C.:—

I have read the evidence and agree with the trial Judge, that the plaintiff should not succeed. The injury happened as he was going to his place of work through the factory of the defendants. He fell into an open hoistway which was out of his usual course. There was plenty of light to see where he was and where to go, but instead of turning at the angle of shelving which would have taken him direct to the door of his workshop, he deflected his course onwards to the hoist, led apparently by curiosity to see what some men were working at, and forgetting to notice that he was walking into the open hole. The hoist was provided with bars which would have protected the opening had they not been let down on this morning for the purpose of having some repairs made. This work of repair could not have been done with the bars in position. The doorway on the other side of the hoist was open through which much light came, as well as from the windows in the side of the factory, so that there was not the slightest difficulty in seeing that the bars were down, had the plaintiff turned his eyes in the way his feet were going. But going on heedlessly, and going past the usual and proper place of turning he walked into the open danger, and so failed to exercise ordinary and reasonable care of himself. His business did not take him to the hoist, and there was ample room for passage without going near it. The way through the building was about four feet wide between the shelves on one side and the machine fixtures on the other, and at the turn between the last shelving and the hoist it widened to ten or twelve feet. But the plaintiff instead of making the turn at this point went over this space of ten or twelve feet, and so came upon and went into the open hoist. Assume want of care in the defen-

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Boyd, C.

dants not having some guard stationed near the open hoist, yet the plaintiff's want of care took him into the danger. The case is one of contributory negligence which, as defined by Bowen, L. J., rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendants' negligence and the accident which has occurred, so that the latter's negligence can no longer be considered the true proximate cause of the injury: *Thomas* v. *Quartermaine*, 18 Q. B. D. 685.

The cases cited of *McShane* v. *Baxter*, 7 Times L. R. 58 and *O'Neil* v. *Everest*, 8 *ib.* 426, are in point; and on the question of light and care the Scotch case of *Forsyth* v. *Ramage*, 18 Rettie 21 (1890).

The judgment of nonsuit should be affirmed, with costs.

ROBERTSON, J.:—

At the close of the plaintiff's case the defendants moved for a nonsuit. The learned trial judge thought it better in the interests of all parties, to reserve the motion until the defence was in, and take the opinion of the jury as to certain facts, to avoid the necessity of another trial, in case it should prove necessary to assess damages. The case proceeded, and the result was that the jury found in favour of plaintiff, and assessed the damages at $500 subject to the motion for nonsuit. The order for judgment was therefore reserved until the motion for nonsuit was disposed of. After due consideration the learned Judge held that the plaintiff on his own evidence and that of his witnesses, could not recover, and he therefore dismissed the action with costs.

The question therefore comes up on a motion by way of appeal against that order. The facts of the case are simple enough. The plaintiff was in the employment of the defendants, who are a manufacturing company in the city of London, and on his going to his work on the morning of May 16th, he fell down through a hole or opening

Judgment. Robertson, J.

on the first floor, through which a hoist passes, into the cellar below, and received considerable injury. The hoist at the time was up, and was being repaired, and not in use. When in use there is a bar to guard the hole. The room to which the plaintiff was going was at the opposite end of the building from the entrance, which is at the west end of a large room called the mounting-room, about sixty-five feet in length, which is lighted by eight windows in the south side. The hoist is at the extreme easterly end of this room. The entrance to the carpenter shop, to which the plaintiff was going, is about six feet to the north of the hoist, and in proceeding from the entrance door of the long room to the carpenter's shop the passage is nearly straight until within ten or twelve feet of the hoist or hole, where it turns to the left, and runs diagonally to the door or entrance to the carpenter shop. The plaintiff was quite familiar with this passage; in fact had used it several times every day for two or three months. It was the way to and from the room in which he was daily engaged. Instead of turning to the left, as he should have done, when he reached within ten or twelve feet of the hoist, his attention was arrested by seeing a man at work up near the ceiling, repairing the hoist, and he walked straight on into the hole, and fell to the cellar floor below, thus causing the injury complained of. There can be no doubt, therefore, that the accident was caused by the plaintiff's own unfortunate negligence. He, no doubt, unthinkingly walked on, instead of turning to the left. I think this is clear from the evidence.

It is contended, however, that it was the duty of the defendants to have this hole protected by a bar or some other device, to prevent any one stepping into it. There had been such a bar when the hoist was in use, but on its being up for repairs the bar could not be there. A great number of cases were cited, as well as R. S. O. 1887, ch. 208, sec. 15, sub-sec. 3, the Factories Act. But this Act provides a penalty for the contravention of it, and although it may be taken as evidence of the defendants' negligence,

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this want of the protection in that sub-section provided for, yet I do not think, that excuses the negligence of the plaintiff. This was not the case of a child playing about and by accident falling into the hole. It was the case of a man, who was perfectly familiar with the fact of the existence of this hole. The light was abundant, not only from the windows on the side of the mounting-room, but from the doorway which is used in connection with the hoist from the carpenter's shop. That was open, and a flood of light was thrown through it on the hole, and had the plaintiff not been looking up at the man in the hoist above, and had he turned to the left, as he well knew he should have done, had he been thinking of where he was going, this unfortunate accident would not have happened.

The plaintiff was going out of his way—if he had thought at all he must have known that—he in fact was thoughtlessly walking along, by the turn in the passage which he should have taken. I think this case is on all fours with *Finlay* v. *Miscampbell*, 20 O. R. 29, and the learned Judge in my judgment was right in dismissing the action.

Some stress is laid upon the findings of the jury. I do not think we can regard these findings as being a part of this case. The motion for nonsuit was made at the close of the plaintiff's case, and certainly had the learned Judge then given effect to it, the jury would not have been in a position to find anything. Of course it is said, and perhaps with some force, that they, notwithstanding the evidence for the defence, find for the plaintiff. I do not think that is an answer. The learned Judge is moved to decide whether the plaintiff has made out a case, such as should be submitted to the jury. It is for him, and entirely within his province to dispose of that motion. He has done so, and we cannot say that he is wrong. In fact I do not see how he could well come to any other conclusion. Contributory negligence is a good defence. No matter how negligent the defendants may have been, the plaintiff must recover on the strength of his own case, not on the weakness of the defence.

Judgment. Robertson, J.

Again, this was not the case of one unacquainted with the premises; it was not a case where a person enters on business, and falls down a hole unprotected. This plaintiff knew well that in his passage through the mounting-room, his only way of getting to his own workroom was by turning to the left, before he got within eight or ten feet of the hoist; he did not do so, and he is the author of his own injury.

I think the action was properly dismissed. I refer to *Walsh* v. *Whitely*, 21 Q. B. D. 371; *Willetts* v. *Watt & Co.*, [1892] 2 Q. B. D. 92; *O'Neil* v. *Everest*, 8 Times L. R. 426; *McShane* v. *Baxter*, 7 Times L. R. 58; *Finlay* v. *Miscampbell*, 20 O. R. 29; *Blamires* v. *Lancashire & Yorkshire R. W. Co.*, L. R. 8 Exch. 283; *Caswell* v. *Worth*, 5 E. & B. 849.

A. H. F. L.

[CHANCERY DIVISION.]

COLEMAN V. THE CORPORATION OF THE CITY OF TORONTO.

Verdict—Jury—Dispersal before verdict—Waiver of irregularities—Verdict on single issue.

Where a jury were allowed to disperse without arriving at a verdict, but on reassembling in the jury box next morning were treated by Judge and counsel as the same jury, and being interrogated declared themselves agreed upon one of several issues in the action, but not upon the others, and the Judge recorded their verdict on the one issue, and discharged them:—

Held, that all irregularities in regard to the dispersal over night had been waived, and the issue upon which the jury had agreed must upon any further prosecution of the litigation be regarded as having been fully disposed of by their verdict.

Statement.

THIS was an action brought for damages resulting from the illness of his children, which the plaintiff alleged was occasioned by reason of negligence of the city in connection with the insanitary condition of Ashbridge's Bay, a part of lake Ontario facing that portion of Toronto in the vicinity of which the plaintiff had been living at the time of the injuries complained of.

Statement. The action was tried before MACMAHON, J., and a jury at Toronto, on November 10th, 1892, and resulted in a verdict recorded upon the following day to this effect: "The jury find that the illness mentioned in the sixth paragraph of the statement of claim, was not caused by any nuisance created by the defendants."

The plaintiff now moved by way of appeal before the Divisional Court for a new trial upon the ground that the verdict was irregular, having been arrived at and recorded in the manner and under the circumstances which for the purposes of the present report are sufficiently set out in the judgment of BOYD, C.

The motion was argued on December 10th, 1892, before BOYD, C., and MEREDITH, J.

Ritchie, Q. C., and *Boultbee*, for the plaintiff, cited *Stilwell* v. *Rennie*, 11 A. R. 724.

Biggar, Q. C., for the defendants, cited *Donaldson* v. *Haley*, 13 C. P. 87, and *Campbell* v. *Linton*, 27 U. C. R. 563.

January 16th, 1893. BOYD, C.:—

What occurred at the close of the Judge's charge, appears to be as follows: About six o'clock, p.m., of Thanksgiving day, 10th of November, the jury withdrew after the charge, and were instructed to bring in a sealed verdict. The sheriff's officer upon private inquiry was told by the judge that he was to keep the jury in the jury-room until nine o'clock, and then let them go if they did not agree. After nine the officer went into the jury and found that they evidently did not agree. He was asked where they were to go—they supposing that they were to be taken somewhere and kept for the night. He told them they could go anywhere they liked, and so discharged or dispersed them rather, for at the same time he told them they had better go into the jury-box the next morning. They

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Boyd, C.

gave no sealed verdict, because they had not agreed (that is, as subsequently appeared, upon all the issues), but they did return to the jury-box next morning at the opening of the Court—the same men, it is supposed by the officer, though their names were not called as of this jury. I think it was assumed by judge and counsel that it was the same jury, and so they speak and are interrogated. A juror addresses the Bench: "The jury have not been able to agree, your Lordship." Then Mr. Ritchie, of counsel for the plaintiff: "Will your Lordship ask them if they agree as to whether it is a nuisance or not, and then your Lordship might dispose of the balance of it." Further conversation follows between counsel and judge, which evidently suggests the next statement from the jury: "We were agreed as to the diphtheria that it was not caused by the nuisance." Whereupon counsel for plaintiff says: "Are they agreed as to the nuisance, as to the unsanitary state, that is the question?" The judge asks for the record, and Mr. Ritchie says: "Of course, the finding must be a whole finding or none at all." The judge does not assent to this, and then to avert the reception of a finding upon part of the case, Mr. Ritchie prefers, in view of the apparent disagreement on the main issue, that the jury should be discharged. The judge not assenting, Mr. Ritchie says, your Lordship will recollect they simply came in and said, "we disagree altogether." The judge: "I think what they meant by that was, that they could not agree upon all the issues; they say they have agreed as to one of the issues, and it will be just a question as to how that finding should be dealt with." Mr. Ritchie then objects to the acceptance of a partial finding, and the matter is formally put to the jury, and recorded that the jury find that the illness mentioned in the sixth paragraph of the statement of claim was not caused by any nuisance created by the defendants.

Any irregularities in the course of proceedings, such as the omission to identify the constituents of the jury, and the dispersing over night, so as to interrupt the "guarded

Judgment. Boyd, C.

seclusion" which should environ a jury pending their deliberations, were, in my opinion, waived upon and after their reassembling in the morning. The plaintiff does not raise the point that their failure to agree, followed by their dispersion, operates as a discharge, and that they were *functi officio*. They were treated on all hands as not discharged, and as competent to deal with the case. The only objection made is, that it was not proper to receive a partial finding, and that is the substantial objection still open to the plaintiff. But this one point they had agreed upon before separating on the previous evening, and to this they adhere unanimously in open court, down to the formal recording of the verdict.

There has been, I think, a complete waiver of what might otherwise have been a formidable obstacle to the reception of this partial deliverance: *Metcalf* v. *McNee* (a), *Goose* v. *Grand Trunk R. W. Co.*, 17 O. R. 721; and a case from the Year Book, 14 Hen. VII. ch. 30 in the Exchequer Chamber given in Viner, Trial, G. g. 25.

The judge then rightly accepted the finding on the matters complained of in the sixth paragraph of the statement of claim, and these must be regarded as finally disposed of by the verdict, so as not to be open on the further litigation of this case. The precise point is covered by authority in the case of *Marsh* v. *Isaacs*, 45 L. J. C. P. 505, in which it was held competent for the trial Judge without consent to accept the verdict upon those issues on which the jury were able to agree, and to discharge them upon the others without invalidating the trial; thus leaving the parties, if so advised, to prosecute the other undetermined issues. (See Rules 791 and 792, and *Ainslie* v. *Ray*, 21 C. P. 152.)

I think that the costs of this issue should not be taxed till the action is finally disposed of.

The application should be refused with costs.

(a) This case and one of *Tiffany* v. *McNee* were argued together before the Chancery Divisional Court, on June 29th, 1892, and judgment was given on September 16th, 1892, unreported. The judgments proceeded upon and approved *Widder* v. *The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 533. REP.

MEREDITH, J. :— Judgment. Meredith, J.

The jury being unable to agree upon the whole issues, and without agreeing upon any verdict, were, in accordance with the Judge's directions given to the officer in charge, permitted to separate and go at large on the Thursday evening. It is quite inaccurate to say that they were discharged. It was necessary for them to appear in Court as they did on the following morning to be discharged in consequence of their disagreement.

Though they may have been all of one mind upon the one subject, before separating, there was no agreement to return any verdict; and it is not impossible that before so agreeing a change of opinion in some or one of them upon that subject, might have taken place.

A verdict taken and recorded under such circumstances would, in my opinion, be quite irregular, and ought not to stand if attacked by a party who had not precluded himself from objecting. So that there is but the one question: Is it open to the plaintiff now to object?

With a knowledge of the facts that the jury had been allowed to separate, because they were not agreed upon any verdict, and had been at large, indeed, apparently under the impression that they had been discharged, Mr. Ritchie, with a commendable desire to prevent the waste of the great cost of the prolonged trial which had taken place, was willing to treat the jury as yet properly constituted and competent to render a verdict; and anxious that they should pass upon some crucial question that might have that effect.

There was, therefore, a waiver of the irregularities, and the plaintiff is precluded from objecting, unless it appear, as contended for by Mr. Ritchie, that what was done was something out of the scope of his request or consent.

Having regard not to the very words which in one sentence happened to be used by him, but to all that took place, and looking at the nature of the case, the way in which it went to the jury, the evident purpose of Mr. Ritchie, and bearing in mind that all that took place was

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Meredith, J.

the result of his voluntary action without any suggestion or observation from the other side, it is but reasonable and fair to conclude, as I do, that what the plaintiff desired, and what was in effect requested on his behalf, was a finding, by that jury, which would effectually dispose of some branch of the case, and save the expense and trouble of another trial of it, the double cost for any one purpose. And that he got upon his claim for damages in respect of the contagious disease with which his family had been afflicted. For it is not, as was contended, only a partial dealing with the assessment of damages, without any determination of the question of liability; but is a finding on that crucial question, for however great a nuisance, there is no liability for any injury not caused by it. And having got that which he really sought, cannot be permitted to repudiate it because it is not what he expected,—merely because it is unfavourable.

This conclusion disposes of all the points raised against the regularity of the verdict; the plaintiff chose to treat the jury there present as properly constituted, and to accept a verdict respecting one portion only of the matters submitted to them: and, apart from any question of irregularity, the case is essentially one in which a verdict once found ought to stand.

Upon the question of the propriety of accepting, without the consent of the parties, a verdict upon certain issues upon which the jury are agreed, and discharging them as to part upon which they are unable to agree, I refer to *Marsh* v. *Isaacs*, 45 L. J. C. P. 505; *Scott* v. *Bennett*, L. R. 5 H. L. 234; and the cases collected in Archbold's Practice, 13th ed., p. 379: Holmested and Langton's Rules and Order, pp. 662-3: and the Annual Practice, 1893, p. 732; and to C. R. 792.

I would dismiss this motion with costs in the action to the defendants in any event; and would stay the entry of judgment upon the verdict in question, until the final disposition of the action upon the other issues, or further order.

A. H. F. L.

[CHANCERY DIVISION.]

McMILLAN V. McMILLAN.

Mortgage—Payments by stranger—Subsequent assignment to him—Second mortgage—Priority.

Payments made on a mortgage by a person who at the time of making them was not interested in the mortgaged premises, and who had then no intention of becoming so, but who subsequently paid the balance due on and became assignee of such mortgage, are not entitled to priority over a subsequent mortgage.

Statement.

THIS was an appeal by one R. R. McLennan from the report of the local Master at Cornwall, dated January 11th, A. D. 1893, in this action, which was brought by Allan J. McMillan upon a mortgage on the east-half of the south-half of the west-half of lot 30 in concession 3 of the township of Lochiel, from one Ewen McMillan, to the Western Canada Loan and Savings Company, dated October 27th, A. D. 1876, and assigned by the said company to the plaintiff on December 22nd, 1890. The defendant by original action, Hugh J. McMillan, was the present owner of the equity of redemption in the land, but on September 23rd, 1886, he had mortgaged the said lands to R. R. McLennan to secure payment of $550 and interest.

Prior to the assignment from the Western Canada Loan and Savings Company to the plaintiff above mentioned, several payments had been made in respect to the mortgage which the plaintiff claimed to have been made by him, but which the appellant contended had been made by Hugh J. McMillan and not by the plaintiff, excepting as to one payment of $97.35, which the plaintiff made on December 11th, A.D. 1890, and which was mentioned in the assignment as the consideration thereof. The plaintiff contended in the Master's office that he was entitled to prove for all the other payments which had been made upon the said mortgage, the same having been, as he contended, made by him, whereas it was contended on behalf of R. R. McLennan, that the plaintiff could only prove for the $97.35.

Statement. The mortgage from Hugh J. McMillan to R. R. McLennan was registered in the registry office for the county of Glengarry, on September 30th, A.D. 1886. The Master held in favour of the plaintiff's contention, and thereupon the present appeal was brought.

The appeal came up for argument on February 9th, 1893, before MEREDITH, J.

W. H. Blake, for the appeal. The plaintiff was a volunteer. He made the payments for no motive that can be guessed at. As to what he paid to procure the assignment ultimately he is entitled to priority, it may be, but he has no right to tack prior payments made by him. The plaintiff in taking the assignment without notice to the mortgagor or his representative, or their assent, took it subject to the equities: Coote on Mortgages, 5th ed., p. 719. There is nothing so formidable in the fact of his having the assignment that we cannot go behind it. The right the assignee acquired is limited by the amount he paid to get the assignment. In 1886, moreover, our mortgage was registered. That constituted notice of it to Allan McMillan. As he seeks a species of equitable relief,—to be permitted to rank against the land for certain payments he has made,—that might possibly form the ground work of an action by him against R. R. McLennan, asking to be subrogated in respect of the payments he had made; but can he get such relief in a summary proceeding like this in the Master's office? Again he made the payments not with the ultimate object of getting an assignment, but for some reason we cannot divine. He made them more than six years ago, can he elude the Statute of Limitations by taking an assignment? The Master cites *Watson* v. *Dowser*, 28 Gr. 478; but it is not an authority of a conclusive kind against us. I would rely on it as to some extent a case in our favour: also on *Imperial Loan and Investment Co.* v. *O'Sullivan*, 8 P. R. 162.

Hoyles, Q. C., for the plaintiff, contra. The reason for the payments being made was, it would seem, for the very pur-

pose of getting an assignment. We got the assignment and can now hold it for the payments. The facts do not warrant the application of the principle invoked: *Moffatt* v. *Bank of Upper Canada*, 5 Gr. 374: Fisher on Mortgages, 5th ed., p. 931; *Wright* v. *Leys*, 8 O. R. 88; *Bridges* v. *Real Estate Loan and Debenture Co.*, *ib.*, 493, 497. The broad principle that an assignee is bound by all the equities, is no longer law. There is no question of tacking here. The assignee is entitled to stand in the place of the mortgagor. Argument.

[MEREDITH, J.—It is a case of payment or of purchase of the mortgage; a question of fact.]

That they were payments, is conceded. There was nothing improper in the making of the assignment. As to *Watson* v. *Dowser*, and *Imperial Loan and Investment Co.* v. *O'Sullivan*, they are clearly distinguishable, because there the payments were made without any proper protection being secured. I refer also to *Trust and Loan Co.* v. *Gallagher*, 8 P. R. 97; *McIntyre* v. *Thompson*, 6 O. R. 710.

Blake, in reply. It is not any representation as to the readiness of the company to assign that is of moment; there was a distinct statement of what is due.

[MEREDITH, J.—But how is the plaintiff prevented from saying that is not true?]

But it was true. The question comes down to whether the assignee is assignee for more than he paid to get the assignment. In the Master's office, a claim of an entirely different nature has been made.

February 11th, 1893. MEREDITH, J.:—

Whatever question there may have been as to the source from which the money really came, there was none as to it having been paid, with the exception of the last amount, upon and in reduction of the mortgage debt, simply; it was so received and credited by the loan company. The pass book and the receipts make it plain; indeed there

Judgment. Meredith, J.

was no contention to the contrary; and it was said by the defendant McMillan, and not contradicted, that the receipts were held by him and handed over to the solicitor for the defendant R. R. McLennan when the mortgage to him in question was given.

Why the plaintiff should have paid the moneys to his mother, and why she should have had them paid upon the mortgage, has not been brought out in evidence: the provision, in the will, for the use of the chattel property bequeathed to her for the benefit of the place and those children to whom the land was devised, might have furnished a clew.

But by whomsoever paid, and whatsoever the reason, the payments, with the exception of the last, were made, as I have already mentioned, and at the time of the assignment of the mortgage, there were but the $97.35, "owing or that might thereafter become due in respect of the said mortgage;" and such moneys only were, by the express terms of the assignment, transferred to the plaintiff. The last payment was made for the purpose of obtaining the assignment, and not in satisfaction of the residue of the mortgage moneys; and to that extent, but to that extent only, in my opinion, is the plaintiff entitled to priority. Having regard to all the facts proved, it must be as to this payment, and this payment only, that the agreement referred to in the fifth paragraph of the plaintiff's affidavit was made. (*a*)

The case is nothing like those in which the moneys to pay off the mortgage or lien were advanced for that purpose upon an agreement, or with the intention, that the lender should have a first charge upon the land as security for repayment.

The appeal is allowed, with costs.

(*a*) The 5th paragraph of the plaintiff's affidavit was as follows:—

5. That on the 22nd day of December, 1890, I procured from the Western Canada Loan and Savings Company an assignment of said mortgage, said company having agreed that upon my paying said mortgage they would give me an assignment thereof.—REP.

A. H. F. L.

[CHANCERY DIVISION.]

DUROCHIE V. THE CORPORATION OF THE TOWN OF CORNWALL.

Municipal Corporation—Negligence—Defective sidewalk—Ice—Accident.

At a certain point in a frequented street in the defendants' town the sidewalk having settled through age and decay formed a depression where water lodged and ice gathered, and the plaintiff slipped upon it and was injured. The place had been in as bad condition as at the time of the mishap for a fortnight.

Held, MEREDITH, J., *dissentiente*, that the plaintiff was entitled to damages.

Per BOYD, C.—The walk was out of repair, because not safe at this point, having regard to the travel upon it and the resources of the municipality. Defect in a way or in the condition of a way may arise from superinduced causes which make it dangerous or unfit for travel.

Per ROBERTSON, J.—This was a case of disrepair and decay of a sidewalk which it was within the power of the municipality to prevent by ordinary care and watchfulness.

Statement.

THIS was an action brought by Annie Durochie against the Corporation of the town of Cornwall, claiming damages for injuries received by her by reason, as she alleged, of the negligence of the defendants in not keeping a certain sidewalk in proper repair and in allowing ice to form on it, under circumstances which are stated in the judgments.

Upon June 28th, 1892, a new trial of the action had been ordered by the Chancery Divisional Court, and took place before ARMOUR, C. J., at Cornwall, on October 11th, 1892, and resulted in a verdict for the plaintiff.

The defendants now moved before the Divisional Court to set aside this verdict, and the motion was argued on December 2nd and 3rd, 1892, before BOYD, C., ROBERTSON, and MEREDITH, JJ.

B. B. Osler, Q. C., for the defendants. It is impossible for a city with such a snowfall as Cornwall is subject to, to do more than keep the sidewalk free from deep snow. Of course, this incidentally makes a canal of the sidewalk.

Argument.

A by-law of the defendant corporation was improperly admitted as evidence of what the defendants considered should be the proper standard for keeping the sidewalk free from snow and ice: *Ringland* v. *The Corporation of the City of Toronto*, 23 C. P. 93. *Gordon* v. *The City of Belleville*, 15 O. R. 26, is, no doubt, a strong case in favour of the plaintiff's right to recover here. *Forward* v. *The Corporation of the City of Toronto*, 15 O. R. 370, is a case of ice on the sidewalk, where there was held to be no negligence on the defendants' part.

Leitch, Q. C., on the same side. The by-law was tendered at the first trial and was not admitted. It was used as the standard of the defendants' liability. In *Burns* v. *The Corporation of the City of Toronto*, 42 U. C. R. 560, the snow was allowed to accumulate for nearly the whole winter, and the city commissioner passed the street every day, but it was nevertheless held that notice to him was not notice to the corporation. Here there was no sufficient evidence of notice to the defendants for a sufficient time to enable them to remedy the defect.

Moss, Q. C., for the plaintiff. There was a continuance here of a state of things of which the corporation knew: *Congdon* v. *City of Norwich*, 37 Conn. 414. The jury were fairly asked in this case whether having regard to all the circumstances of the case, the road was in a reasonable state of repair. If there is evidence here which would shew a want of repair due to the corporation, and that evidence has been submitted to a jury, the Court ought not, especially after a second trial to interfere with it. The verdict is not one which no twelve reasonable men could arrive at. On the question of liability for ice and snow: See *Paulson* v. *Town of Pelican*, 48 N. W. R. 715; *Morse* v. *City of Boston*, 109 Mass. 446; *Pomfrey* v. *The Village of Saratoga*, 104 N. Y. 459. The part of the street in question, is the main thoroughfare, and the side of the street in question, the favourite side. See also *Kent* v. *The Worthing Local Board of Health*, 10 Q. B. D. 118.

Maclennan, Q. C., on the same side. The case differs from other ice cases in an important point, viz., that the plaintiff here was not familiar with the sidewalk. Argument.

Osler, in reply.

January 16th, 1893. BOYD, C.:—

The present case appears to me upon the evidence to be one peculiarly for the jury; it was left to them fairly and fully in a lucid charge to which no objection was taken in any particular, and the evidence warrants their decision, which ought to be conclusive.

It is not the mere ordinary case of a sidewalk slippery with occasional ice, resulting from natural climatic causes and of temporary duration, but one in which the sidewalk having settled through age and decay formed a depression where water lodged and ice gathered so as to impair the safety of pedestrians more or less throughout the winter. The snow from the sidewalk and from the adjacent hotel, was shovelled on the street, filling the ditch and making a heap some three or four feet higher than the walk; as this from time to time thawed, the water would submerge the planks till it froze, with the result, that on March 7th, 1891, when the accident occurred, about seven inches thick of ice had formed at this place. No outlet was provided for the water thus gathered upon the place of passage. People were in the habit of getting round the difficulty by going up along the steps of the hotel verandah, or by taking to the travelled road in the middle of the highway. There had been much complaint to the corporation about the state of affairs around this place, but no remedy applied. Various expedients were mentioned in the evidence by which the way could have been made safe; either by a catch-water drain (which is effective across the road), at an expense of from $50 to $100, or by keeping the ditch alongside open at an expense of $20 or $30 or by raising the sidewalk, or by putting temporary planking over the water. This particular spot was in

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a bad condition, and as bad as at the time of the mishap for over a week. It was part of the principal and most frequented street in Cornwall, and in the busiest portion of the town. It is graphically, though not grammatically described by the cabman, whose stand was close by, as a place where "every time any person would walk there they would break through the ice and it would leave a rough place." Where the plaintiff slipped and fell, the walk was covered with rough lumpy ice, with occasional smooth places which was extremely dangerous. The partial thaws during the day tended to increase the hazard by rendering the underlying ice more slippery, and the fresh freezing at night presented a glare surface that would be most treacherous to go upon. Now this condition of the sidewalk was not unforeseen and unique, but a thing to come inevitably upon the lowering of the temperature. This condition of affairs had continued substantially the same for days and weeks, so that the mere continuance and lapse of time would *per se*, affect the municipality with notice of the danger at this point. The sidewalk was not safe to travel upon; the corporation knew it and did nothing. All this presents aspects of negligence in the care of the street, which could not have been withheld from the jury: *Shepperd* v. *Midland R. W. Co.*, 20 W. R. 705, and *Hill* v. *The City of Fond du Lac*, 56 Wisc. 242, (both cases of ice).

I am not troubled by the supposed limitation of statutory liability in cases of disrepair or want of repair. Distinctly want of repair existed structurally in the settled sidewalk which caught and held the water till it froze. But besides this, the walk was, in my opinion, out of repair, because not safe at this point, having regard to the nature of the travel over it, and the resources of the municipality. The defect in the way or in the condition of the way, may arise from superinduced causes which make it dangerous or unfit for travel. What I refer to has been thus expressed by Field, J., in *McGiffin* v. *Palmer's Shipbuilding, etc., Co.*, 10 Q. B. D. at p. 8: "The case has been put

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of a way perfectly well constructed, but upon which on a frosty December morning water falls, so that it gets into a dangerous state. I cannot help thinking that that would be a defect in the condition of the way, because the way is the thing which people walk upon, and the thing itself is actually altered."

Again, as put by Bowen, L. J., in a late case, repair of a road includes "whatever is necessary to keep it in a proper condition for the traffic, having regard to the character and original manufacture of the road:" *Leek Improvement Commissioners* v. *Justices of Stafford*, 20 Q. B. D. at p. 797. That definition covers what was needed to make this sidewalk reasonably safe.

Equally pertinent is the language of Wilson, J., in *Caswell* v. *St. Mary's*, 28 U. C. R. at p. 257: "If a particular part for two or three rods in length happens to be in a very dangerous condition, exceptionally and particularly dangerous as distinct from the rest of the road, and it can be put in a safe state, and at a reasonable expense, there is no reason why it should not be made safe for travel, although it was caused by rain, snow, or ice, or what may be called natural means."

So that I think that the formation of ice on a good sidewalk by which it becomes unsafe to walk upon, constitutes a defect which it may or may not be incumbent upon the municipality to remedy according to circumstances: *Lucas* v. *Corporation of the Township of Moore*, 3 A. R. 602.

The evidence of the continued accumulation of water, slush, and ice on the one depressed spot as a receptacle, marks the salient point of distinction between this and the cases of *Skelton* v. *Thompson*, 3 O. R. 11, and *Forward* v. *The Corporation of the City of Toronto*, 15 O. R. 370. To permit the continuance of this source of danger, was evidence of negligence: *Corbett* v. *The City of Troy*, 53 Hun 228 (a case of leakage from hydrant whereby ice formed); and to the same effect: *Olson* v. *The City of Worcester*, 142 Mass. 536. Liability arises where the

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dangerous condition is due not so much to natural as to artificial causes: *Gillrie* v. *The City of Lockport*, 122 N. Y. 403 (1890). The decision in *Adams* v. *Inhabitants of Chicopee*, 147 Mass. 440 (1888), is broad enough to support the verdict, even if the ice formed had been only smooth and slippery; and it is the last of a series of decisions, trending the same way, therein cited. The history of the development of law regarding municipal liability for ice and snow on sidewalks, is given by Loomis, J., in *Cloughessey* v. *The City of Waterbury*, 51 Conn. 405 (1883). A case not identical with but much like the present, is *Gaylord* v. *The City of New Britain*, 58 Conn. 398.

As to the reception of the by-law, I do not think the Chief Justice erred. It was referred to by witnesses in reply to the defendants' counsel before it was put in, and it was admissible for the limited purpose indicated by the trial Judge. (*a*)

The verdict should stand and the judgment be affirmed with costs.

ROBERTSON, J.:—

I think there was abundance of evidence of negligence on the part of the defendants to warrant this case being

(*a*) What the learned trial Judge said as to this by-law in his charge to the jury was as follows:—

"They make a provision in their by-law for the cleaning of the snow off the sidewalk and sufficiently far to clean the ditch. That by-law does not form the basis of their liability. It is only put in here to show you the view the corporation take of what they should do for the benefit of the public in regard to the sidewalks. It does not make them liable, their liability is on the statute; it is used for the purpose of showing what the corporation itself thought was reasonable to do in the interest of its ratepayers. This by-law provides snow and other things should be cleared off the sidewalk within four hours after a downfall of snow; it requires persons to clear the ditch by a foot so as to leave the ditch clear on the side of the sidewalk. It provides if a party does not do it the corporation shall do it and charge it against the party. It may be that the by-law is illegal. It is not used here for the purpose of founding liability upon it at all, but just to show what the corporation itself thought should be done in respect to the sidewalks for the accommodation of the inhabitants of the town."

submitted to the jury. The fact is apparent that the side- Judgment.
walk at the place in question was in disrepair. The sur- Robertson, J.
face of it had sunk down to a level with the surface of the ground; the sleepers, on which the planks were laid, had sunk down into the ground, and the under sides of the plank were resting on it. Then the witness for the defence, Mr. Chipman, an engineer, says, that by raising the sidewalk four or five inches at this corner, the water would flow to the north, and it would be better to raise it, as that would keep it clear in the winter time. It also appears that when the sidewalk was originally constructed, it was several inches higher at this point than it was at the time of the accident.

The case was sent back to a second trial for the reason that certain facts were not made out to the satisfaction of the Court. Much more evidence was given at the last trial, and among other things it appears that the bad and unsafe condition of the sidewalk at this point, and the accumulation of water there on the recurrence of every thaw, was notorious; all this should be taken and received as evidence of notice to the defendants; and while it might have been a difficult matter to repair the walk at that season of the year, it was incumbent on the defendants to keep the ditches and water-courses open, so as to prevent the accumulation of water, three or four inches in depth. This water settling there with the accumulation of a few inches of snow, which became frozen and tramped upon, created a roughness on the surface which made it much more dangerous to pedestrians than an even surface, however slippery,—by the use of ashes, salt, or sawdust, the slippery character could be destroyed,—but the uneven character of the surface would make it much more difficult to walk upon; and the ashes, etc., would not in that case, cure the difficulty.

It cannot be said there was not a case made out for the jury. The learned Chief Justice who tried the case is satisfied with their finding, and there being no objection to the charge, and moreover this being a second trial, result-

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ing too, in an increase of damages awarded, I cannot understand how it would be possible to disturb the verdict. Whatever deficiency there was in the evidence at the first trial, that deficiency was removed on the last—in fact there was evidence of negligence supplied by the witnesses called for the defence; notably the small outlay requisite to construct a catch-water basin at the corner, would no doubt have prevented the gathering of water at this point; or the raising of the sidewalk a few inches would have caused it to flow down its natural course to the north. This is not the case of a sudden thaw and the equally sudden change of temperature to freezing, where the whole of the sidewalks, in the municipality would become slippery and dangerous to walk upon, in which case no reasonable attention or care on the part of the authorities could avert the state of things, and in which case it would be unreasonable to hold that the municipality would be answerable, but the case of disrepair and decay of the sidewalk, which it was within its power, to say nothing of its duty, to prevent, by ordinary care or watchfulness.

I agree with the learned Chancellor that the motion should be discharged and with costs.

MEREDITH, J.:—

This case comes before us again upon the same state of facts, and upon substantially the same evidence in support of the claim.

If the verdict could not be supported then, how can it now? Indeed, having regard to the very strong expressions of opinion by the learned trial Judge, during the progress of the trial, against the defendants, is there not greater reason for setting it aside now? *Lucas* v. *Moore*, 3 A. R. 602.

I am unable to perceive how we can, consistently with the former judgment of the Court, refuse to interfere now. What new facts, favourable to the plaintiff, have been elicited? How have the findings of the jury been made

more definite or certain? What has been gained by the new trial?

But dealing with the case as if it were now before us for the first time, can the verdict in the plaintiff's favour be sustained upon the evidence? I think not.

The burden of proof of neglect by the defendants of their duty, imposed by statute, to keep in repair the street in question, and that such negligence was the proximate cause of the plaintiff's injury, was plainly upon the plaintiff. And in cases of this character, where a knowledge of the facts upon which the claim is based is with the plaintiff rather than the defendants, and having regard to the natural sympathy for the sufferer, especially where the defendants are a municipal corporation, the Courts, in my opinion, ought not to be slow to interfere upon the ground that there was no reasonable evidence in support of the claim, or that the verdict is against the weight of evidence within the meaning of the rule now adopted.

Then of what actionable negligence have these defendants been proved guilty?

It is said (1) that the sidewalk was out of repair; or, (2) that it was not high enough; or, (3) that there should have been a catch-water basin at the corner near to the place in question, and that a ditch should have been opened to it, or elsewhere, to take off water from the sidewalk, and prevent it flowing there; or, (4) that planks should have been laid across the place in question; or, (5) that some other undefined, and even unsuggested, means should have been adopted so that no water could form, or flow, on the walk and remain there till frozen.

But questions were not submitted to the jury; the verdict was a general one, without any indication of the reasons for it. And so we are unable to know which, if any, of these suggestions were adopted by the jury.

Now, in a case of this character, surely the plaintiff was bound to point to some particular neglect of duty, by the defendants, which was the proximate cause of her injury; and was not entitled to present her case to the jury in an

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undefined way, and cannot hold the verdict she has obtained, unless she can point to some reasonable proof of some such defined negligence sufficient to sustain it.

It surely cannot be sustained because of the ordinary "settling" of the sidewalk proven, it being yet a serviceable walk not out of repair, or in any sense dangerous, or even insufficient. With wooden structures such sinking is unavoidable, is anticipated and allowed for in the construction. But if that were not so, if it could be said that the walk was in a state of disrepair, how can it be reasonably contended that that was the cause of the lodging of the water and the formation of the ice. It is plain upon the evidence, as it must be upon a bare statement of the height of the snow and ice upon the road, that raising the walk even higher than any one suggested, could not have prevented the formation of the ice; the bank of snow and ice upon the road prevented the escape of the water in that way, as is the case every where in a like climate with such a depth of snow, and where the removal of the snow from the sidewalk is attempted. It may sound well at first hearing to suggest the raising of the walk, but it must be thought what would be the effect when the snow and ice had gone; what would be the effect upon the shops and buildings on the street, as well as upon the general traffic, in having the walk so high above the ditch in the road; possibly the raising of it as suggested, considerably above its original height, would prove a fruitful cause of litigation, better founded in this respect, than this action. It cannot be the right of a jury upon such evidence as was adduced in this case, if at all, to fix a standard for the sidewalks of the municipality, to determine that the walk in question is in a state of disrepair, because not five or six inches, or more or less, higher: see *The Corporation of the City of London* v. *Goldsmith*, 16 S. C. R. 231. If they had said the sidewalk was not in a state of repair, the answer would be, there is no reasonable evidence of that; and, even if there were, it was plainly not the proximate cause of the accident.

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Then to contend that there should have been a catch-water basin near to the place in question, is surely to contend for something obviously wrong. A catch-water basin at the summit, with a "down grade" each way, is a suggestion which hardly needs the testimony of the engineers to condemn. One nearer than the next cross-street each way, surely, having regard to the requirements of the locality and the resources of the town, would be an unnecessary expense. Unless we are to hold that a jury would be justified in finding that the street was out of repair because there was not such an inlet to the sewer near every spot where water might accumulate in any of the brief thaws occasionally occurring in winter, I am unable to perceive how the verdict can be fairly rested upon this suggestion, leaving out of consideration the want of proof that such an inlet would have been effectual.

Then can it be held that at Cornwall, with such extreme degrees of cold and such depths of snow and ice, it was the duty of the corporation to do more than was their usual custom in opening out drains, in the snow and ice, towards the end of the winter, and when something more than a sudden thaw, followed quickly by hard freezing and snow falls, came. It requires no more than common knowledge and experience to make plain the futility of opening ditches through snow and ice, only to have them broken in and filled up again, not to speak of the danger meanwhile to horses and vehicles and persons, a nuisance indeed, not only at the intersection of streets, but, though less so, all along. But even when the water would run enough to carry it into the basins, the certainty of freezing there and effectually sealing its way to the sewers if the thaw were followed by extremely cold weather, as is most usual until the breaking up of the winter, must be borne in mind; freezing which might, and probably would, prevent the running off of the water at the most needful time of a general thaw or the end of the winter. I cannot but think that if the verdict be rested upon this suggestion, it

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must fail for want of reasonable evidence of a breach of the defendants' statutory duty to keep the street in repair, if not also for want of reasonable evidence that the opening of such drains would have removed the water or have made the place less slippery, bearing in mind the tramping of the crowds which must have broken it down, as well as have changed the condition of the walk, that day.

The suggestion of the plank gives no assistance to the plaintiff's case: however useful it might have been while the water was yet there, what use would it be, what safety could it afford, when the place was frozen hard again? Would it not, indeed, have been a source of additional danger at night? Slippery itself and an obstruction.

The case has been argued, and, indeed, dealt with as if the water had remained upon the walk for two weeks or so, but surely that is a fallacy. It would at once strike one as strange, most improbable, that that could be in that locality at that season of the year; that ice must have formed and snow fallen, quite changing the surface during that time; and so I understand the evidence, which is made plain by the record of the temperature kept by the witness John Kippen. As one would expect there was a thaw, the temperature going as high as fifty degrees Fah. on the 25th of February, some ten days before the day of the accident, followed by cold weather and snow, a heavy fall, but two or three days before the accident. So that the case cannot be dealt with as if there had been a pool of water standing there from day to day; a state of affairs which would certainly call for some complaint, of which there was none to any one concerned in the care of the streets; and I do not so deal with it.

No doubt the jury was influenced to some extent by the evidence as to the cost of one catch-water basin, and of removing the snow from the place in question and near it; but it is not to be forgotten that if a catch-water basin were needed there, it was quite as much, if not more, needed in many places throughout the town; and the like observations apply to the removal of snow.

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It is not for the jury to dictate how the corporation shall construct and repair its streets and highways; that is the right and duty of the municipal council; and when exercised by such council in good faith, and apparently for the best interests of all concerned, it certainly should require very reasonable evidence of neglect of the statute imposed duty to repair, before that question is submitted to the jury, especially when, as here, what was done accords with what is generally done in other well regulated places, based upon much experience, and under the direction of, competent engineers.

But assuming that there was enough evidence to sustain a finding that the street was not "kept in repair by the corporation," can it be said that there is sufficient evidence to sustain a finding that the injury to the plaintiff was sustained by reason of such default?

In this respect the plaintiff's case stands upon just the same footing as after the first trial. The evidence is that the fall was caused by mere slipperiness of the walk; slipperiness which, it does not need the evidence given at the trial to let us know after such a thaw followed by such hard freezing as occurred there that day, must have extended over many parts of, if not more or less over all the walks, causing doubtless some danger, but danger which is inseparable from them often during the winter, on the best regulated and cared for street, even where the climate is much less rigorous than at Cornwall.

Upon this question, I am of opinion that the cause of the accident must, upon the whole evidence, be said to be quite as consistently attributable to such slipperiness as to any greater danger caused by the water remaining on the walk at the place in question on that day; and therefore the plaintiff has failed to establish her case. Proof merely of want of repair and of an accident, are not enough; the want of repair must be shown to be the proximate cause of the accident. Of the many persons who doubtless fell—for where the streets are in such an ordinary state of slipperiness we all know that many persons fall but few are

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hurt—the one who happened to fall at this particular place was unfortunate enough to be the only one seriously hurt; but had she fallen elsewhere the injury might have been the same.

I refer to such cases as *Ringland* v. *The Corporation of the City of Toronto*, 23 C. P. 93; *Burns* v. *The Corporation of the City of Toronto*, 42 U. C. R. 560; *Forward* v. *The Corporation of the City of Toronto*, 15 O. R. 370; *Bleakley* v. *The Corporation of Prescott*, 12 A. R. 637; *Gordon* v. *The City of Belleville*, 15 O. R. 26; *Hutton* v. *The Corporation of the Town of Windsor*, 34 U. C. R. 487; *Wakelin* v. *London, etc., R. W. Co.*, 12 App. Cas. 41; *District of Columbia* v. *Woodbury*, 136 U. S. R. 450, 466; *Sharp* v. *Powell*, L. R. 7 C. P. 253; *Goldsmith* v. *The Corporation of the City of London*, in Court of Appeal, (not reported) and 16 S. C. R. 231; *Williams* v. *The City of Portland*, 19 S. C. R. 159; *The Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256; and *The Sanitary Commissioners of Gibralter* v. *Orfila*, 15 App. Cas. 400, for the principles upon which this case ought to be dealt with. I am unable to obtain any assistance from the chance expressions in cases of an entirely different nature.

For these reasons, I would allow the motion, and, in accord with what seems to me to have been the opinion of the presiding Judge at the first trial and of this Court on the former motion, direct that judgment be entered for the defendants.

But if the defendants be not entitled to so much, would, at the least, set aside the verdict and send the case down for another trial, at which the natural sympathies of the jury might not receive so great encouragement, and at which, if they still find for the plaintiff, the grounds of their finding might be made plain.

A. H. F. L.

[CHANCERY DIVISION.]

McINTYRE v. CROCKER.

Dower—Assignment of—Assessment of a yearly sum in lieu of—"Peculiar circumstances"—Dwelling-house partly on dowable land—R. S. O. ch. 56, sec. 12.

Where dower was claimed in land upon a portion of which stood two-thirds of a dwelling house, the remaining third being upon the adjoining land which was not dowable:—

Held, that this was not a case within sub-sec. 3 of sec. 12 of the Dower Procedure Act, R. S. O. ch. 56, in which the commissioners had power to assess a yearly sum in lieu of assigning dower by metes and bounds. The commissioners were not bound necessarily to assign a portion of the building upon the property, but might give an equivalent. They were bound, however, to assign one-third of the whole property, having regard to value as well as to quantity.

Statement.

THIS was an appeal by the plaintiff, Amelia McIntyre, from the report of dower commissioners.

The report appealed from was dated January 17th, 1893, and was as follows:—

"After viewing the premises, and hearing the evidence, we are of the opinion that under the peculiar circumstances of there being two-thirds of a dwelling-house on the property, we cannot make a fair and just assignment of dower by metes and bounds. We therefore assess a yearly sum to be paid to the said Amelia McIntyre, which sum we fix at $24. We arrived at this amount in the following manner: We consider the premises would rent without improvements for the sum of $100 annually. We deduct from this amount $26.25 for taxes, and $1.75 sidewalk tax, leaving a net yearly rental of $72. We allow one-third of this sum as dower, namely, $24."

It appeared that by a judgment of the Court dated November 2nd, 1892, it was declared that the plaintiff was entitled to dower in the lands in question, which were the east half of park lot number three, in the city of St. Thomas, in the county of Elgin. Pursuant to this judgment, a writ of assignment of dower was directed to the sheriff of the county of Elgin, who thereupon appointed

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the commissioners from whose report the present appeal was taken. The whole of the park lot, in the east half of which alone the plaintiff was entitled to dower, had a frontage on Anne street of two hundred and twenty feet, by a depth of one hundred and ninety-eight feet. There was upon the lot a dwelling-house, eleven feet nine inches of which were on the west half of the lot, and twenty-eight feet ten inches on the east half. There were eighty-one feet two inches of land on the east half of the lot east of the east side of the house, which it was contended on the plaintiff's behalf was sufficient to award her dower out of the lands by metes and bounds.

The grounds of the present appeal were:—

1. That the commissioners from the evidence and location of the property should have awarded dower by metes and bounds instead of assessing a yearly sum.

2. That the evidence was such as to make sub-sec. 3 of sec. 12 of the Dower Procedure Act inapplicable to the present case.

The appeal was argued February 9th, A.D. 1893, before MEREDITH, J.

W. H. Blake, for the appeal. The statute says the commissioners, where circumstances are peculiar, may give the dowress two-thirds of the net yearly rental. It defines, to some extent, what are peculiar circumstances. These are not peculiar circumstances within the class referred to by the statute: Park on Dower, p. 115. Matters physically incapable of division, and of effective division, are what is referred to. Therefore the commissioners were bound in the usual way to set the dower off by metes and bounds: Cameron on Dower, p. 318; Draper on Dower, pp. 63, 64; *Fisher* v. *Grace*, 28 U. C. R. 312.

E. D. Armour, Q. C., contra. Two-thirds of the house being on the dowable land, you cannot attribute to it any particular land. The commissioners did what was proper, and what was best under the peculiar circumstances. This

is a building lot in a city, and this fact had to be taken into consideration. If the plaintiff insists on having her share in specie, she must have part of the house. Argument.

W. H. Blake, in reply. We are content to take one-third of the house and one-third of the land, if insisted on; but if the other side want the whole house, we are willing to assist in an adjustment being arrived at, and take dower out of the rest of the property. What the statute points at is something physically incapable of division: Cameron on Dower, at p. 310.

February 11th, 1893. MEREDITH, J.:—

That the course adopted by the commissioners was a just one, and the wiser course in the interests of all parties, seems to me very plain; and their report should be confirmed unless the plaintiff's contention, that there were no peculiar circumstances requiring or warranting the assessment of a yearly sum in lieu of an assignment by metes and bounds, is right: see *Robinette* v. *Pickering*, 44 U. C. R. 337.

And, having regard to the evidence of the annual value of the land without the building, there would seem to be some ulterior undisclosed object in this appeal; but, if the plaintiff be right in law, effect must be given to her contention whatever the consequence; and I feel obliged to hold that she is right in such contention.

As to the matters here involved, the commissioners' duties are, under the Act, as they were prior to it, purely ministerial. The Act does not afford them any discretion. They "shall" assess a yearly sum in the case provided for in sub-sec. 3 of sec. 12 (R. S. O. ch. 56: "The Dower Procedure Act").

Now in what cases are they obliged to proceed in that way? Where "from peculiar circumstances, such as there being a mill or mills or manufactory upon the land, the commissioners cannot make a fair and just assignment of dower by metes and bounds." That is to say, where from

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the necessity of the thing they must adopt some other course, not merely where convenience, expediency, or the interests of the parties justify it. The instances given, "mills or factories," shew this. It is but meeting, and providing for in this way, practically insuperable difficulties, in the way of assigning by metes and bounds, which had to be met, and were overcome, by assigning a third of the profit or alternate possession of the whole property, at common law. Indeed an assignment by metes and bounds in such peculiar circumstances was not at common law, any more than now under the Act, permitted: see *Gilpin* v. *Cookson*, 1 Lev. 182; Roper on Husband and Wife, 2nd ed., pp. 392, 395, 396; Stewart on Husband and Wife, secs. 292, 293; Scribner on Dower, 2nd ed., ch. 21, and Park on Dower, *252 to *261. And as to what are "special circumstances" in a matter of practice, see *Tewkesbury Election Petition*, 5 C. P. D. 544, and *Cirencester Election Petition*, W. N. 1893, p. 5.

There was plainly nothing in this case to prevent an assignment by metes and bounds: it is a case in which at common law such an assignment only would have been valid.

I am unable to perceive anything in the contention of Mr. Armour that the commissioners were bound to assign a part of the house—a part of which only was upon the land in question, the other part being upon the adjoining half of the lot—that that was practically impossible, and therefore the commissioners were justified in "fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds."

The commissioners are not, in my opinion, bound always to assign a portion of the buildings upon the property: they may give an equivalent: they must assign one-third of the whole property having regard to value as well as quantity: see authorities before mentioned, and Bacon's Abridgment, vol. 4, p. 211, referring to Moore's Reports, 12 and 19; and Kent's Commentary, 12th ed., vol. 4, p. 64, referring to Perkins on Conveyancing, sec. 406. Or, as

the Act (R. S. O., ch. 56, sec. 12, sub-sec. 1) puts it, one-third of the lands and premises, having always due regard to the value and character of the buildings and erections. Judgment, Meredith, J.

In this particular case the building is shewn to have been of little or no value at the time of the alienation by the husband: *ib.* sec. 12, sub-sec. 2; and the plaintiff now offers to take two thirds of the land without having regard to the building at all. But that she is not bound to do.

The appeal must therefore be allowed, with costs; and the report will be referred back to the same commissioners who must reassign the dower in the way in which I have indicated they should have assigned it in the first place.

A. H. F. L.

[CHANCERY DIVISION.]

ALDRICH V. ALDRICH.

Division Court—Jurisdiction—Action on judgment of High Court—"Final judgment"—Abandoning excess—R. S. O. ch. 51, sec. 70, (b).

Division Courts have jurisdiction to entertain an action brought upon a judgment of the High Court, where the judgment of that Court is a final judgment.

Re Eberts v. *Brooke*, 10 P. R. 257, 11 P. R. 296, referred to and followed.

In an action for alimony, the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and in the usual form for alimony, at the rate of $226 per year, payable in equal quarterly instalments at specified times:—

Held, that the judgment, so far as it related to the costs, was a final judgment, whatever might be the case with regard to the payments of alimony, and that a Division Court had jurisdiction under R. S. O. ch. 51, sec. 70, *(b)*, to entertain a suit by the plaintiff for $100 in respect to the costs, as being a claim for a debt owing to the plaintiff by the defendant, she expressly abandoning the balance of the taxed costs awarded.

Statement. THIS was a motion for a writ of prohibition to the Judge of the 1st Division Court of the county of Carleton, under the circumstances which are fully set out in the judgment.

The motion was argued on November 28th, 1892, before FERGUSON, J.:—

Beck, for the motion. A decree for alimony is first called a judgment by the Judicature Act; such a judgment does not amount to a contract, and is not altogether final: *Bailey* v. *Bailey*, 13 Q. B. D. 855; *Abraham* v. *Abraham*, 19 O. R. 256. The defendant has the right to set up the defence that the plaintiff has not lived separately: *Donnelly* v. *Stewart*, 25 U. C. R. 399; *In re Riddell*, 20 Q. B. D. 318. The plaintiff is splitting the judgment and suing for instalments: *McPherson* v. *Forrester*, 11 U. C. R. 362. In view of the special remedies given, such a judgment cannot be sued on in the Division Court.

Riddell contra, referred to *Hodsoll* v. *Baxter*, E. B. & E. 884; *Nunn* v. *Nunn*, 8 L. R. Ir. 298, 303; *Linton* v. *Linton*, 15 Q. B. D. 239; *Re Eberts* v. *Brooke*, 11 P. R. 296; *Oliver* v. *Lowther*, 28 W. R. 381; *Berkeley* v. *Elderkin*, 1 E. & B. 805; *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53.

February 23rd, 1893. FERGUSON, J.:— Judgment Ferguson, J.

The motion is for a writ of prohibition staying further proceedings upon a judgment entered in an action in the First Division Court of the county of Carleton for the sum of $100 and costs.

The plaintiff has a judgment against the defendant for alimony whereby it is declared that the plaintiff is entitled to alimony from the defendant so long as she shall continue to live separate from the defendant or until the Court should make any order to the contrary.

By the judgment it is then ordered and adjudged that the defendant do pay to the plaintiff as alimony the sum of $226 per year by equal quarterly payments of $56.50 each, directing the particular times and manner of payment.

And by the judgment it is lastly ordered and adjudged that the defendant pay the plaintiff's costs as between solicitor and client forthwith after taxation thereof.

These costs have been taxed at the sum of $211.39 and it is not disputed that this sum remains wholly unpaid, or that there are, as well, two instalments or periodical payments of the alimony that have fallen due and are wholly unpaid, so that at the time the action or suit in the Division Court was commenced the plaintiff's whole claim against the defendant, according to the judgment in the alimony action which was in the Chancery Division of the High Court, was $324.39, no interest being spoken of.

In the affidavit used by counsel for the plaintiff on this motion it is stated that executions against the goods of the defendant have been returned *nulla bona*, and that according to the information and belief of the deponent the defendant has no goods or lands out of which the plaintiff can realize any part of the moneys aforesaid or of the moneys to accrue due upon the judgment of the High Court; that unless this judgment in the Division Court is sustained the plaintiff will lose the benefit of the judgment in the High Court for her alimony and costs, and

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that the defendant is in the employment of the Dominion government at a salary, as the deponent was informed, of $1,200 per annum, payable monthly. These statements are wholly uncontradicted.

The plaintiff by her summons in the Division Court sues for $100 only as shewn by the statement of claim attached to the summons. In this statement of claim she sets forth the costs taxed in her favour, the $211.39, and the two payments of alimony then overdue and unpaid; and then says that she abandons the whole of the amounts for alimony and also the excess over $100 of the amount of the costs, and claims the $100 only. She thus abandons $224.39 for which she has a judgment of the High Court in her favour for the purpose of making this claim in the Division Court for $100.

Although a cause of action cannot properly be divided into two or more portions for the purpose of bringing the same within the jurisdiction of the Division Court, it was not contended that in a proper case a plaintiff cannot sue for a part only of his real claim, he abandoning the excess and giving proper notice of such abandonment.

The Division Court has jurisdiction in the cases of "claims and demands of debt, account or breach of contract or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100," R. S. O. ch. 51, sec. 70, (*b*).

It was contended that an action does not lie in the Division Court upon a judgment of the Superior Court and the cases *McPherson* v. *Forrester*, 11 U. C. R. 362, and *Donnelly* v. *Stewart*, 25 U. C. R. 398 (each of which refers to the case *Berkeley* v. *Elderkin*, 1 E. & B. 805), were referred to. These cases, however, only decide that an action does not lie in the Superior Court upon a judgment of the Division Court, the leading or principal reason given (apart from the ordinary one that where new rights are given by statute with specific remedies the remedy is confined to those specifically given, a proposition that, I think, does not apply in the present case), is that a judgment of

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the Division Court is not a final judgment, because the statute gives the Judge the power to vary it and order payment by instalments or to rescind his own order.

In the case *Re Eberts* v. *Brooke*, 10 P. R. 257, it was held by the learned Chief Justice that an action does not lie in the Division Court upon a judgment of the County Court, but this holding was reversed by the Queen's Bench Division, 11 P. R. 296, and, as it appears to me, that case, in principle applies to the case of an action in the Division Court brought upon a judgment in the Superior Court; and I think it is authority for saying that the Division Court has jurisdiction to entertain an action brought upon a judgment of the High Court, the judgment of the High Court being a final judgment.

It was also contended that the judgment sued upon here is not a final judgment. This may be quite correct so far as payments of alimony that have not fallen due have concern, and in the view that I have taken I need not here refer to any difference there may be between these and the payments that had accrued due before the commencement of the action in the Division Court. As already stated, this action is brought for $100 of the costs of the action in the High Court, the plaintiff abandoning all the payments of alimony that had fallen due and the surplus of the costs.

It will be observed that the qualifications, limitations or restrictions on the face of the judgment of the High Court are confined to the payments of the alimony only. These are adjudged to be paid by the defendant to the plaintiff so long as she should continue to live separate from the defendant or until the Court should make order to the contrary. But there is a positive and unqualified adjudication that the defendant should pay to the plaintiff the costs forthwith after taxation.

The present case seems to me to be one differing much from *In re Riddell*, 20 Q. B. D., 512. In that case what was relied on as a "final judgment," within the meaning of the Bankruptcy Act of 1883, 46-47 Vic. ch.

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52, sec. 4, sub-sec. 1 (*g*), was an order for the payment of costs upon the dismissal of an action of ejectment for want of prosecution. In that case the learned Judges (in appeal) strongly emphasized the fact that there had been no determination of the rights between the parties and some of them stated a distinction or difference still to be recognized between an order and a judgment. By the judgment sued in the present case the then present rights between the parties were finally determined in the sense in which these learned Judges seem to use the word "final," that is to say, the claim was for alimony and the determination was in the plaintiff's favour, so that, except by way of an appeal (which did not take place) there could not be further litigation for the purpose of determining the right to alimony. The then present rights between the parties were fully and finally determined, although the judgment as to the continuance of the payment of the alimony is qualified as I have stated. Any change that could be reasonably contemplated as one to take place by virtue of the qualification in the judgment respecting the payment of alimony would necessarily be by reason of these future acts, facts or circumstances, and would not interfere with the adjudication that the plaintiff was then—at the date of the judgment—entitled to alimony from the defendant. Besides, the learned Judges in the case *In re Riddell* gave a strict construction to the words "final judgment" in the Bankruptcy Act, and they say so. Yet, in my view, this judgment for alimony would fall under the definitions of a "final judgment" given by the learned Judges or some of them.

The present case is, I think, widely different from *Bailey* v. *Bailey*, 13 Q. B. D. 855, for in that case the application was for an order to sign final judgment for arrears of alimony *pendente lite* payable under an order of the Probate Division of the Court. I have not overlooked the reasoning of the learned Judges in that case, but I think it does not apply to the present case. The decision there was really under the provisions of the Imperial Act, 20

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and 21 Vic. ch. 85, sec. 52, the Act being an Act to Amend the law relating to Divorce and Matrimony cases in England. It was held that the remedy given by this section was the only one. This remedy is that the decrees, orders, etc., of the Court should be enforced in the same manner or the like manner as the judgments, orders, and decrees of the High Court of Chancery. That Act was passed before the passing of the Judicature Act in England. This section of it referred to the then Court of Chancery and the section seems yet to remain in full force. In the case *Linton* v. *Linton*, 15 Q. B. D. 239, it was held that overdue instalments of alimony and the costs of the action for the alimony ordered to be paid constituted a debt provable in bankruptcy; but not so with instalments not due at the date of the bankruptcy. This decision, depended, however, more or less upon the provisions of the Act known as The Debtors' Act, section 5. I cannot say that this case or the case *Hewitson* v. *Sherwin*, L. R. 10 Eq. 53, deciding that an order for the payment of costs constitutes a debt within the meaning of the Debtors' Act has any application here. I am of the opinion that they have not.

What the plaintiff relies upon in the present case is a judgment of the High Court. It is only by accident that this judgment is in the Chancery Division. There is but the one High Court and the plaintiff has the judgment of that Court. The form of this judgment I have already fully stated. It is in form as final and absolute as any judgment can be in respect of the costs of the action, but contains the qualifications that I have mentioned respecting the payment of the alimony, and, as I have said, the then present right was fully determined in the plaintiff's favour.

In the very late case *In re Binstead, ex parte Dale*, [1893], 1 Q. B. 199, a suit by a husband against his wife for dissolution of marriage, the decree *nisi* contained an order for the payment of the petitioner's costs by the co-respondent. The decree was afterwards made absolute and an order made that the co-respondent should pay the

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amount of these costs within a specified time, which he failed to do. It was held that there had not been within the meaning of sec. 4, sub-sec. 1 (*g*) of the Bankruptcy Act of 1883 a "final judgment" for the amount to enable the petitioner to issue a bankruptcy notice against the co-respondent in respect of it. This decision, however, seems to me to have been arrived at by the strict construction given to the section of the new Bankruptcy Act and the position assigned to a decree or order of the Probate Court. At page 206 Kay, L. J., says: "It is also settled that a judgment against a defendant for costs may be final, though other parts of the judgment direct accounts or inquiries the result of which may be to find money due to him," the learned Judge referring to *Ex parte Moore*, 14 Q. B.D. 627, and *In re Alexander* [1892], 1 Q. B. 216. Further on that learned Judge said: "If the decree had been a judgment in an action in the Chancery Division or in the Queen's Bench Division it cannot be denied that it would be a good foundation for a bankruptcy notice." And in conclusion this learned Judge said: "I most reluctantly come to the conclusion that 'judgment in an action' (the words of the Bankruptcy Act) do not strictly describe or include a decree in a suit for divorce."

The plaintiff's position in the present case I have before stated. She has a judgment of the High Court, Chancery Division, for these costs, and after the best consideration I have been able to give the subject I am of the opinion that this judgment, so far as it relates to the costs, is a final judgment, whatever may be left to be said or argued in respect to the payments of alimony, with which I have, as I think, here no concern.

Then assuming that the judgment for the costs is a final judgment the law implies a promise or contract by the defendant to pay the amount of these costs. *Hodsoll* v. *Baxter*, E. B. & E. 884; *Grant* v. *Easton*, 13 Q. B. D. 302, and it seems that this implication arises even in the case of a foreign judgment.

Then, all this being so, it seems to me that the nature of the plaintiff's claim in this suit in the Division Court is that of a debt owing to her by the defendant, and assuming this to be so, the case would fall under the provisions of section 70, sub-sec. (*b*), of the Division Court Act above referred to, and the plaintiff having the right to abandon the excess as she has done, the Division Court has, I think, jurisdiction to entertain and dispose of the suit for this $100 parcel of the costs of the action for alimony.

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I am, for the reasons I have endeavoured to give, of the opinion that the motion for the prohibition should be refused, and it is refused with costs.

A. H. F. L.

[CHANCERY DIVISION.]

OSBORNE v. THE CORPORATION OF THE CITY OF KINGSTON.

Municipal Corporations—Way—Noxious weeds—Removal of—Non-appointment of Inspector and Overseer—R. S. O. ch. 202.

Municipal corporations are not "owners" or "occupants" of highways in their municipalities within R. S. O., ch. 202, "An Act to prevent the spread of noxious weeds," etc., nor does the word "land" therein include street or highway.

The appointment of an inspector under the Act being discretionary with the council unless petitioned for by the necessary number of ratepayers, and that of an overseer being altogether discretionary; in the absence of such appointments no duty is cast on the council to cut down noxious weeds growing in the streets.

Statement. THIS was a demurrer to the plaintiff's statement of claim in an action brought to compel the defendants under R. S. O. ch. 202, an Act to prevent the spread of noxious weeds, etc., to cut down thistles and weeds growing in streets in their municipality and for damages for having allowed them to grow and spread to the plaintiff's land.

It was alleged in the statement of claim, *inter alia*, that the defendants were, as owners or occupants of the streets in question, bound to cut down noxious weeds growing thereon, and not having done so were liable in damages: also that the defendants had made default in the performance of their duties under the statute, in that they had not appointed an overseer of highways or other officer to discharge the duties imposed by section 9 of the Act; and were therefore liable in damages. A mandamus was also asked to compel the defendants to cut down the noxious weeds in future.

The demurrer set up, *inter alia*, that no action lay against the defendants for the matters referred to, and that they were under no obligation to appoint an overseer of highways, inspector or other officer for the purpose of discharging the duties imposed by the statute.

The demurrer was argued on March 14th, 1893, before BOYD, C. Argument

Langton, Q. C., for the demurrer. The Act R. S. O. ch. 202, places the defendants under no obligation to cut down weeds. The defendants are not "owners" or "occupants" within the meaning of the Act. Those words mean private persons, not the municipality. The duty of an owner or occupant is defined in section 2. Section 4 provides for notice to be given by an inspector appointed by the municipality to the owner or occupant: that cannot mean that he is to give notice to his employers. Again by section 5, if the "owner or occupant" does not pay the expense of cutting down, the council is authorized to pay. By section 10, the "owner or occupant" is subject to a penalty, which by section 11 is payable to the municipality. The defendants are not liable as owners or occupants of the streets. The freehold of the highway is in the Crown, R. S. O. ch. 184, sec. 525; *The Corporation of the Town of Sarnia* v. *The Great Western R. W. Co.*, 21 U. C. R. 59. If not liable under the statute, there is no right of action or other remedy against defendants: *Wilson* v. *The Mayor and Corporation of Halifax*, L. R. 3 Ex. 114, at p. 119; *Gibson* v. *The Mayor, etc., of Preston*, L. R. 5 Q. B. 218, at pp. 220, 221; *Cowley* v. *The Newmarket Local Board*, [1892] A. C. 345. They are liable only by statute for repair even of highways; *Sherwood* v. *The Corporation of the City of Hamilton*, 37 U. C. R. at p. 415. The Act does not cast any duty upon the corporation, so that no action lies for breach of any duty. The statement of claim as amended seeks to make defendants liable for not appointing an inspector or overseer of highways, who would have duties under sections 4 and 9 respectively, if appointed. The appointment of an inspector is discretionary unless fifty ratepayers petition for the appointment, which is not alleged to have been done: section 3 (2) and R. S. O. ch. 184, sec. 489 (22). So the appointment of overseer of highways is discretionary: R. S. O. ch. 184, sec. 479 (2.) The

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corporation has seen no necessity for the appointment, and is under no obligation to appoint: *Julius* v. *The Bishop of Oxford*, 5 App. Cas. 214; therefore, there is no case for a mandamus even to appoint officers which is not asked, and certainly none for a mandamus to the corporation to cut down the weeds itself. Besides plaintiff can cut them down himself, and has done so on other occasions. Having therefore the remedy in his own hands, there is no case for a mandamus: Shortts' Information on Mandamus, and Prohibition, 237. Then another remedy is provided by the Act where it applies, viz., by a summary prosecution. This remedy being provided, there is no other: *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441; *Cowley* v. *The Newmarket Local Board* [1892], A.C. 345, and that summary remedy being only against owners, occupants, inspectors, or overseers, it is clear that the corporation is not liable in any of the ways indicated by the statement of claim.

Meredith, Q. C., contra. But for *Giles* v. *Walker*, 24 Q. B. D. 656, it would be reasonable to assume that there was at common law a duty on an owner of property to cut weeds or be liable for damage occasioned to a neighbour. Ever since the year 1863, the course of legislation shews by the statutory provisions against the evil of thistles, etc., that it was intended to prevent injury to individuals by reason of their being allowed to grow. It was never intended that a municipality should allow them to grow, when other owners cannot, to the detriment and damage of individual owners. A fair reading of the statute must include a municipality. A municipality is an owner. The streets are vested in the municipality: R. S. O. ch. 184, sec. 527. The whole Act should be looked at, and section 9 provides for overseers of highways seeing to the cutting down of the weeds growing on highways. [BOYD, C.—But could the plaintiff not cut them down and claim to be paid for it?] No, he has no right to go upon the highway for the purpose, as the growing was not made a nuisance by the statute. Section 12 provides that the

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corporation must require inspectors and overseers to discharge their duties, and the statute implies that an overseer *should* be appointed. There is a higher duty imposed on the municipality than on an owner, as section 9 provides for the destruction of all noxious weeds. I refer to *Cowley* v. *The Newmarket Local Board* [1892] A. C. 345; *The Guardians of the Holborn Union* v. *The Vestry of the Parish of St. Leonard, Shoreditch*, 2 Q. B. D. 145; *Ellis* v. *The Strand District Board of Works*, 8 Times L. R. 739; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Gray* v. *Pullen*, 5 B. & S. 970; *Re Moulton Canborough and Haldimand*, 12 A. R 503.

Langton, Q. C., in reply.

March 16th, 1893. BOYD, C.:—

The word "owner" or "occupant," used in the "Act to Prevent the Spread of Noxious Weeds, etc.," R. S. O. ch. 202, does not mean the municipality or the municipal council of the locality; nor does the word "land" therein mean street or highway. That is evident from a reading of the Act and marking the contrast between sections 9 and 12, which relate to highways and road allowances, with the other clauses of the statute.

The Act may be enforced within municipalities by an officer called "the inspector," if fifty ratepayers petition therefor (sec. 3, sub-sec. 2): and by sec. 9, it shall be the duty of overseers of highways to see that the provisions of the Act are carried out by cutting down and destroying all noxious weeds growing on the highways. And by section 12, the municipal council is to require such officers to discharge faithfully all their duties under the Act.

In the case of Kingston, where there are, it is alleged, various streets overgrown with noxious weeds, the ratepayers have not asked for the appointment of an inspector, and the council have not thought fit to appoint an overseer of highways, so that the weeds complained of flourish unchecked.

Judgment

Boyd, C.

The action is by the plaintiff, owning property abutting on these streets, for damages and for a mandamus ordering the defendants to cut down the weeds yearly.

I do not think such an action lies against the defendants. Apart from the Act, no remedy existed at law for permitting the growth of weeds: *Giles* v. *Walker*, 24 Q. B. D. 656, and the rights of persons injuriously affected by such growth must be measured by the terms of the statute. In the case of municipal corporations, their duty is to require their officers to see that the weeds are kept from growing in the streets; and the officers charged with such duty are to see that the cutting and destruction is effected, under penalty of being fined if they fail.

But if no such officers are appointed, the machinery contemplated and provided by the Act, is not in working order: for which redress may be sought, by electing another [illegible] of councillors, who will appoint an overseer, or possibly by an application of the ratepayers for the appointment of an inspector. But as the present action is framed, I do not see that any other course can be taken than to allow the demurrer with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. HAZEN.

Justice of the Peace—Summary conviction—Information—Two offences—Liquor License Act—R. S. O. ch. 194, sec. 105—R. S. C. ch. 178, secs. 26, 28, 80, 87, 88—Defect in substance—Objection not taken before magistrate—Quashing conviction—Costs.

An information laid before a police magistrate charged that the defendant did on the 30th and 31st days of July, 1892, sell intoxicating liquor without the license therefor by law required. Upon the hearing evidence was adduced to shew that the defendant had sold intoxicating liquor on those days; the magistrate adjudged the defendant guilty, and made a minute thereof and of the punishment imposed; a few days afterwards he returned a conviction of the defendant for having sold liquor without a license on the two days named; and a month later returned a second conviction as for an offence committed on the 31st only:—

Held, that the information charged two offences, and it and the proceedings thereon were in direct contravention of sec. 26 of the Summary Convictions Act, R. S. C. ch. 178; and that the misjoinder of the two offences was not a defect in substance within the meaning of sec. 28.

Rodgers v. *Richards*, [1892] 1 Q. B. 555, not followed.

Hamilton v. *Walker*, [1892] 2 Q. B. 25, referred to.

Held, also, that the objection to the information and subsequent proceedings was open to the defendant upon motion to quash the convictions, although it was not taken before the magistrate.

Held, lastly, that, under the circumstances, neither sec. 105 of R. S. O. ch. 194, nor secs. 80, 87, and 88 of R. S. C. ch. 178, as amended by 53 Vic. ch. 37, applied to the convictions.

And the convictions were quashed with costs to be paid by the prosecutor.

Statement.

AN information was on the 22nd day of August, 1892, laid by one Asa Miller, license inspector of the county of Elgin, before William A. Glover, police magistrate for the town of Aylmer, charging that he had just cause to suspect and believe, and did suspect and believe, that Hattie Hazen, of the township of Yarmouth, in the county of Elgin, "within the space of thirty days last past, to wit on the 30th and 31st days of July, 1892, at the township of Yarmouth, in the county aforesaid, did unlawfully sell intoxicating liquor without the license therefor by law required."

Upon this information the defendant was brought before the magistrate on the 25th August, 1892, and upon her pleading not guilty to the charge, evidence was adduced to shew that she had sold intoxicating liquor on both the 30th

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and 31st days of July, 1892, and the hearing was adjourned till the 3rd September, 1892, when evidence was adduced for the defence; at the conclusion of which the magistrate made the following minute:—"I find the defendant guilty of having sold intoxicating liquor without the license therefor by law required, and impose a fine of fifty dollars and costs, to be paid in one week, and if not paid to be recovered by distress and sale of the defendant's goods and chattels, and, in default of sufficient distress, that the defendant be imprisoned in the county gaol for three months, if the said fine and costs are not sooner paid."

The magistrate thereupon on the 12th September, 1892, returned and filed with the clerk of the peace the following conviction: "Ontario, county of Elgin, to wit: Be it remembered that on the 3rd day of September, A.D. 1892, at the town of Aylmer, in the said county of Elgin, Hattie Hazen is convicted before me, W. A. Glover, police magistrate in and for the town of Aylmer, for that the said Hattie Hazen, on the 30th and 31st days of August, A.D. 1892, at the township of Yarmouth, in the said county of Elgin, in her premises, unlawfully did sell liquor without the license therefor by law required; Asa Miller, license inspector for the east riding of the county of Elgin, being the informant; and I adjudge the said Hattie Hazen for her said offence to forfeit and pay the sum of $50, to be paid and applied according to law, and also to pay to the said Asa Miller the sum of $9.60 for his costs in this behalf; and if the said several sums be not paid forthwith, or within one week, I order the sums to be levied by distress and sale of the goods and chattels of the said Hattie Hazen; and, in default of sufficient distress in that behalf, I adjudge the said Hattie Hazen to be imprisoned without hard labour in the common gaol for the county of Elgin, at St. Thomas in the said county, and there to be kept for the space of three calendar months, unless the said sums and the costs and charges of conveying the said Hattie Hazen to the said common gaol shall be sooner paid."

Given over my hand and seal the day and year first above mentioned at the town of Aylmer, in the county aforesaid. Statement.

W. A. GLOVER, *Police Magistrate.*" [L. S.]

The magistrate afterwards, on the 10th day of October, 1892, returned and filed with the clerk of the peace the following conviction: "Ontario, county of Elgin, to wit: Be it remembered that on the 3rd day of September, A.D. 1892, at the town of Aylmer, in the said county of Elgin, Hattie Hazen is convicted before me, W. A. Glover, police magistrate in and for the town of Aylmer, in the said county of Elgin, for that she, the said Hattie Hazen, on the 31st day of July, A.D. 1892, at the township of Yarmouth, in the said county of Elgin, in her premises, unlawfully did sell liquor without the license therefor by law required; Asa Miller, license inspector for the east riding of the county of Elgin, being the complainant; and I adjudge the said Hattie Hazen for her said offence to forfeit and pay the sum of $50, to be paid and applied according to law, and also to pay the said Asa Miller the sum of $9.60 for his costs in this behalf; and if the said several sums be not paid within one week, I adjudge the said Hattie Hazen to be imprisoned in the common gaol for the county of Elgin, at St. Thomas in the said county, for the space of three calendar months, unless the said sums and the charges of conveying the said Hattie Hazen to the said common gaol shall be sooner paid."

Given under my hand and seal the day and year first above mentioned at the town of Aylmer, in the county aforesaid.

W. A. GLOVER, *Police Magistrate.*" [L. S.]

The information, depositions, evidence, convictions, and proceedings being returned into this Court in obedience to a writ of *certiorari* bearing date the 23rd November, 1892, on the 5th December, 1892, *Tremeear*, on behalf of the defendant, obtained a rule *nisi* to quash the said convictions upon the following amongst other grounds: 1. That the complaint or information was for more than one offence,

Statement. contrary to section 26 of the Summary Convictions Act, and the same and the convictions thereunder were therefore void.

2. That the said magistrate illegally heard the evidence upon each of the said separate charges in the consideration and adjudication upon the other.

3. That the said magistrate illegally made two convictions upon one information.

4. That the said convictions and each of them were void for uncertainty, it not appearing which was intended to be enforced nor which was first made, and because the same were contradictory to each other, and it did not appear for which offence the conviction was made.

5. That neither of the said convictions conformed to the actual adjudication.

6. That one conviction having been published, the said magistrate had no jurisdiction to make another upon the same information.

7. That in the conviction of the alleged offence on the 31st day of July, 1892, the magistrate illegally imposed and included the costs of the other charge; and for other reasons not material for this report.

February 6, 1893. *Tremeear* supported the rule; and *Langton*, Q. C., shewed cause.

March 4, 1893. The judgment of the Court was delivered by

ARMOUR, C. J. :—

Section 26 of the Summary Convictions Act, R. S. C. ch. 178, provides that "every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences."

And section 28 provides that "no objection shall be allowed to any information, complaint, summons, or war-

rant, for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons, or warrant, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint."

Judgment. Armour, C.J.

The information in this case clearly charged two offences, one committed on the 30th and the other on the 31st day of July, 1892, and was consequently in direct contravention of section 26.

It is said, however, that charging two offences in one information is a defect in substance within the meaning of section 28, and that no objection should therefore be allowed to the information on this account.

In this I cannot agree.

There is no defect in substance in the charging of either offence; each offence is in itself sufficiently charged in the information; but it is their joinder in the same information which is prohibited by section 26, and I cannot bring my mind to the conclusion that such misjoinder is a defect in substance within the meaning of section 28.

For I think it would be absurd to suppose that the legislature intended by section 26 to prohibit the charging of two offences in one information, and by section 28 to forbid the allowance of any objection to the information on that account.

The case of *Rodgers* v. *Richards* [1892], 1 Q. B. 555, if it were binding on us would compel us to hold otherwise; it, however, seems inconsistent with *Hamilton* v. *Walker* [1892], 2 Q. B. 25.

No objection was taken by the defendant to the information, nor to the subsequent proceedings thereon by the magistrate, but we do not think that this prevents the defendant objecting now that the information and proceedings thereon by the magistrate were not warranted in law.

The magistrate in this case proceeded upon the information, and heard the evidence adduced in respect of both offences and convicted the defendant of both offences, and

Judgment. returned and filed the conviction above set out with the
Armour, C.J. clerk of the peace.

It is true that the magistrate imposed only the pecuniary penalty as for a first offence, but I do not see that this made that legal which was unwarranted in law.

The magistrate subsequently drew up and returned and filed with the clerk of the peace the conviction also above set out, convicting the defendant of one offence, namely, an offence committed on the 31st day of July, 1892, and altering the adjudication of punishment in default of payment of the fine imposed.

The reason for the enactment of the 26th section above quoted was to prevent the person charged from being embarrassed in his defence by more than one offence being charged against him in the same information, and to prevent his being prejudiced by evidence being given against him of the commission of more than one offence.

We think that the information and proceedings thereupon were in direct contravention of section 26, and, as was said by Pollock, B., in *Hamilton* v. *Walker* [1892], 2 Q. B. 25, violated a well known principle of the criminal law "that each case ought to stand on its own merits, and should be decided on the evidence given with relation to that particular charge."

We do not think that, under the circumstances of this case, section 105 of R. S. O. 1887 ch. 194, or sections 80, 87, and 88 of R. S. C. ch. 178, as amended by 53 Vic. ch. 37, apply to the convictions herein.

The convictions will, therefore, be quashed with costs to be paid by the prosecutor to the defendant.

[QUEEN'S BENCH DIVISION.]

SCOTT V. SUPPLE ET AL.

Will—Construction—Specific devise of incumbered land—Exoneration from incumbrance—Devolution of Estates Act—Distribution of estate.

The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was incumbered. To the plaintiff she gave a legacy of $5,000. The remainder of her estate, consisting of personalty and other lands, she did not dispose of or in any way refer to in her will, except in this clause: "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death:—"

Held, that the residue of the estate was charged with the mortgage debts to the exclusion of the land specifically devised.

Such residue was to be treated as one fund and as if it were all personalty, under sec. 4 of the Devolution of Estates Act, R. S. O. ch. 108; and out of it the debts, including the mortgage debts upon the land specifically devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin.

Statement.

MOTION for judgment upon the pleadings and admissions.

The action was brought to declare the rights of the parties under the will of Esther Supple, who died 3rd June, 1891. The will was dated 30th September, 1875, and was in the following words:—

"First, I give and bequeath to my grandson, Joseph Alfred Supple, son of the late Joseph R. Supple, part of lot No. 1, in Block A., on Main street, in the town of Pembroke aforesaid.

"Second, I give and bequeath to Harriet E. Supple, widow of the late Joseph R. Supple, the sum of $5,000, if the same shall not have been paid to her by me during my life time.

"Third, in the event of my said grandson dying before attaining the age of twenty-one years, I will and direct that the lands above devised shall become the property of my grandson John V. N. Supple, son of the late John Supple, junior, and that the rents and profits arising therefrom shall be applied to his education and maintenance until he shall attain the age of twenty-one years; and I further will and direct that in the event of his dying

Statement.

before he shall have attained the age of twenty-one years, the said lands shall be divided between the children of my son William H. Supple, share and share alike.

"Fourth, I hereby charge my estate with the payment of all incumbrances upon the said lands at the time of my death.

"Fifth, I hereby appoint James Rowan, of, etc., executor of this my last will and testament."

James Rowan, the executor named in the will, renounced probate, and the plaintiff, Harriet Ermina Scott, (called in the will Harriet E. Supple, and the legatee named therein) was appointed administratrix with the will annexed.

John V. N. Supple, named in the will, died an infant and unmarried. Joseph Alfred Supple, named in the will, was an infant defendant.

The children of William H. Supple were defendants; one of them, Gertrude Supple, being an infant. The testatrix left personalty of the value of some $900, and real estate, including that mentioned in the will, to the value of some $8,000. Some of the real estate was mortgaged. The mortgage and other debts of the testatrix amounted to some $3,000.

The land mentioned in the will, and devised to the defendant Joseph A. Supple, was valued at $1,500.

The defendants were the heirs at law and next of kin of the testatrix.

The questions arising were whether any portion of the mortgage or other debts should be charged against the lands devised to Joseph A. Supple; and whether the legacy of $5,000 to the plaintiff was payable out of the real or the personal estate of the testatrix, and if so, in what proportions; and whether she was entitled to have the estate marshalled in her favour to the extent to which the personalty had been applied in payment of debts.

The defendants submitted to have the will construed and their rights declared.

The motion was argued before STREET, J., in Court, on the 17th February, 1893.

J. H. Burritt, for the plaintiff.
J. Hoskin, Q. C., for the defendants.

Judgment.
Street, J.

March 4, 1893. STREET, J.:—

The land specifically devised by the will must have been deemed to have been devised subject to the mortgages upon it, under section 37 of ch. 109, R. S. O., were it not for the fourth paragraph of the will, which I think must be construed as charging the remainder of the estate with those mortgage debts to the exoneration of the land specifically devised. There is no difficulty in the administration and distribution of the residue of the real and personal estate; it is all to be treated as one fund and as if it were all personalty: section 4, ch. 108, R. S. O.; *Re Reddan*, 12 O. R. 781.

The debts will, of course, first be paid, including the mortgage debts upon the land specifically devised, as well as upon that not disposed of by the will; then the legacy to the plaintiff will be paid; and the balance, if any, will go to the defendants, who are the heirs at law as well as next of kin of the deceased.

The costs of all parties should be paid out of the estate.

[QUEEN'S BENCH DIVISION.]

HOWARTH v. MCGUGAN ET AL.

Negligence—Obstacle left on highway by contractor with municipal corporation—Accident—Want of repair by corporation—Improper user—Corporate assent—Liability of contractor—New trial—Surprise—Corroborative evidence.

A contractor with a municipal corporation for the repair of a highway of theirs, who negligently leaves an obstacle thereon in such a position as to frighten a horse being driven on the highway, thereby causing injury to the driver, is liable in an action for the improper use of the highway, and is not relieved from liability by the fact that the corporation may have otherwise negligently allowed the highway to get out of repair.

In such a case the corporation are not liable for the accident caused by the improper use, unless their assent thereto can be shewn.

Per ROSE, J.—A corporation is under such circumstances liable for non-repair of the highway.

New trial, on the ground of surprise and discovery of new evidence, refused, where the evidence was merely in corroboration.

Statement.

THIS was an action tried at the St. Thomas Autumn Assizes, 1892, before ROSE, J., with a jury.

The plaintiff was the wife of one John Howarth, a farmer living in the township of Southwold, and brought this action to recover damages from the defendants, John McGugan and the corporation of the township of Southwold, under the following circumstances. The defendants the corporation had let to their co-defendant, McGugan, in December, 1891, a contract for the building of a new bridge upon a travelled highway in the township of Southwold, called the Back street. Early in January, 1892, McGugan brought some materials for his work to the spot, including a pile driver and the iron hammer belonging to it, the latter being a block of iron some fourteen inches square. He deposited this iron block at the top of an embankment forming the roadway and approach to the bridge, some nine or ten feet to the east of the bridge, where the embankment was less than thirteen feet in width, and secured it from sliding down the bank by driving stakes around it. He proceeded no further with his work until the month of March, and the hammer was left

in this position during the interval. In the month of February, and, as the jury found, on the 17th day of the month, although the date was one of the matters in dispute, the plaintiff was driving from the east towards the bridge, and, on approaching the hammer, her horse shied and went over the embankment, breaking the buggy and injuring the plaintiff. Statement.

The action was commenced on the 23rd of May, 1892. The statement of claim alleged that on the 25th of February, 1892, the accident happened "owing to the bad condition of the road, and owing to certain obstructions placed upon and near the said road by the defendant John McGugan, with the consent and knowledge of the defendants the corporation of the township of Southwold;" and, further, that the road was in a very dangerous condition by reason of the obstructions placed upon it by the defendant McGugan; and that the defendants were guilty of negligence in not keeping the obstructions away from the road in such a manner as not to frighten the horses of persons travelling over it.

The defendants the corporation admitted the first paragraph of the statement of claim, which included the date therein alleged, viz., the 25th of February, as that upon which the accident happened. At the opening of the trial, however, they were allowed to withdraw this admission, and evidence on both sides was admitted and gone into as to the real date. They denied the obstruction and want of repair, and denied that the obstruction was with their consent or knowledge; they set up contributory negligence on the part of the plaintiff; that the action was not brought within three months from the time the accident happened; and they claimed, if liable to damages, a remedy over against McGugan. The defendant McGugan denied the damage complained of; denied that the obstruction was of a character to frighten horses; and alleged the accident to be due to the temper of the plaintiff's horse and to her want of skill in driving it. Evidence was given at the trial shewing that a number of other horses

Statement. had been frightened at the sight of the hammer before the accident happened; and as to the length of time during which it had been allowed to remain there. The jury were asked the following questions, and returned the answers appended to them:

1. What was the cause of the accident? A. The hammer.

2. Was it a negligent act to leave the hammer on the highway? A. Yes.

3. Had the corporation notice in sufficient time to have it removed prior to the accident? A. Yes.

4. Was the corporation guilty of negligence in not erecting a railing at the sides of the road? A. Yes.

5. Would a railing have prevented the accident? A. Yes.

6. Could the plaintiff have avoided the accident by the exercise of reasonable care and exertion? A. No.

7. On what date did the accident happen? A. 17th of February.

8. What damages do you allow? A. $600.

Upon these findings the learned Judge dismissed the action as against the defendants the corporation with costs, and ordered judgment for the plaintiff as against the defendant McGugan for $600 with costs, delivering the following judgment:—

September 30, 1892. ROSE, J.:—

The finding of the jury that the placing and leaving of the hammer upon the highway was the cause of the accident was right: *Hill* v. *New River Co.*, 9 B. & S. 303. That was the primary cause: *Toms* v. *Whitby*, 35 U. C. R. at p. 215, where *Hill* v. *New River Co.* is cited. If the accident had been caused by the vehicle or horse coming in contact with the hammer, the municipality would have been liable for an injury arising from nonrepair: *Duck* v. *City of Toronto*, 5 O. R. 295; *Barnes* v. *Ward*, 9 C. B. at p. 412, cited in *Toms* v. *Whitby*, at pp. 206-7; *Rounds* v. *Stratford*, 25 C. P. 123, and 26 C. P. 11.

Judgment.
Rose, J.

The above cases shew that there is liability to damages arising from an accident caused by a horse taking fright at an object unlawfully placed upon the highway: and I think also shew such damages are by reason of neglect of the corporation to keep the highway in repair.

The fact of such an object being on the highway, to quote the language used in *Barnes* v. *Ward*, may "be in effect rendering the way impassable;" and "may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway."

I am, therefore, of the opinion that the action not having been brought within three months after the damages had been sustained, the municipality cannot be compelled to pay the sum assessed.

There must be judgment for the plaintiff as against the defendant McGugan for $600 and costs, and for the defendants the corporation dismissing the action with costs.

At the Hilary Sittings of the Divisional Court, 1893, the plaintiff moved for a new trial, or that judgment might be entered for the plaintiff against the defendants the corporation, upon the ground of surprise in regard to the evidence on the part of the corporation as to the date at which the accident happened; and upon grounds disclosed in certain affidavits filed upon the motion as to the date of the accident; and upon the ground that the limit of three months given by the statute did not apply to the plaintiff's cause of action.

During the same sittings the defendant McGugan also moved to set aside the verdict and judgment entered against him, on the ground that the jury had not found him guilty of negligence; that the finding of negligence was not sufficient to make him liable, as no duty was cast upon him towards the plaintiff, and the jury had not found that he was not making a reasonable use of the highway; that there was no finding by the jury that the

Argument.

hammer in question was an obstruction upon the road, or that the obstruction was such as would be reasonably likely to frighten horses; that if any culpable negligence was disclosed in the answers of the jury, it was by the double default of the corporation in not erecting a railing and in allowing the hammer to remain, and not from the latter alone, and the jury's answer was referable only to such combined default; and as no obligation or duty lay upon the defendant McGugan in regard to railing the sides, he was not liable upon the findings; that he was acting under the authority of the corporation in furtherance of their duty to repair, and was not liable, and should be indemnified by them.

The motion was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.), on 15th of February, 1893.

E. D. Armour, Q. C., for the plaintiff. This is not a case of want of repair. The plaintiff does not put it in that way in pleading; she alleges a negligent placing of an obstruction on the highway. This is not affected by the three months' limitation imposed by section 531 (1) of the Municipal Act. I refer to *Maxwell* v. *Clarke*, 4 A. R. 460; *Rowe* v. *Leeds*, 13 C. P. 515. If, however, the case comes within that section, the plaintiff asks for a new trial. The affidavits shew that the accident occurred on the 25th of February, and the plaintiff was surprised by evidence being produced to shew that it occurred on the 17th, the statement of defence having admitted the 25th as the date.

W. B. Doherty, for the defendants the corporation. This is want of repair: *Castor* v. *Uxbridge*, 39 U. C. R. 113. Anything which renders a highway unsafe or inconvenient for travel constitutes want of repair. As to the application for a new trial, I refer to *Miller* v. *Confederation Life Ass'ce. Co.*, 11 O. R. 120. There was no application at the trial for a postponement. If the three months' limit does not apply, these defendants ask a remedy over against McGugan under sub-sec. (4) of sec. 531.

Tremeear, for the defendant McGugan. The findings of the jury do not warrant a judgment against McGugan. Although a contractor, he was a servant or agent of the corporation, and they can have no remedy over against him. The findings do not shew that he was guilty of any breach of duty. The negligence, if any, was not in leaving the hammer on the road, but in not fencing, and the jury so found. The proximate cause was not the act of McGugan, but the default of the corporation. If there is judgment against McGugan, he should have a remedy over against the corporation. Argument.

Armour, in reply. There is a common law obligation apart from the statutory one: *Harrold* v. *Simcoe*, 16 C. P. 43; *Corporation of Wellington* v. *Wilson*, 14 C. P. 299. The provisions of sub-sec. (1) of sec. 531 are controlled by the provisions of sub-sec. (4): *Ricket* v. *Metropolitan R. W. Co.*, L. R. 2 H. L. at p. 207.

March 4, 1893. The judgment of the Court was delivered by STREET, J. (who dealt first with the plaintiff's motion for a new trial, and, after referring to the affidavits, continued):—

It is evident from the affidavit of the plaintiff's solicitor that there was no surprise to him in the dispute made by the defendants at the trial over the date, or, at all events, that he foresaw the probability of a dispute, and endeavoured before the trial to procure evidence in support of his client's story as to the date of the accident, but was unable to obtain it. Since the trial he has obtained some corroborative evidence, but it is not a whit stronger than the further corroborative evidence procured by the corporation, and I can see no ground for departing from the established rule not to grant a new trial upon the ground that evidence merely in corroboration has been discovered.

The jury having found that the accident took place on the 17th of February, and the action having been begun on the 23rd of May following, upwards of three months afterwards, is the plaintiff's action against the corporation

Judgment. Street, J.

barred by the 531st section of the Municipal Act? It provides that "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained."

It is contended on behalf of the plaintiff that the action is not necessarily to be treated as founded exclusively upon the statutory duty of the corporation to keep the road in repair, carrying with it the three months' limitation, but that it may be treated as founded upon an improper user of the highway by them, for which they would be liable apart altogether from the statute, and as to which, therefore, they could not set up the limitation in the statute. But the plaintiff appears to be upon the horns of this dilemma: if she alleges that the accident was due to technical want of repair, she is defeated by the statutory limitation; if she goes outside the statute, she is unable to shew any concurrence by the corporation in the improper use made by McGugan of the highway, or any authority, express or implied, from them to his using it as he has done by leaving his hammer upon it. If she were relying upon their statutory duty to repair, she has shewn notice to them of the alleged want of repair; but that is an entirely different thing from shewing a corporate assent to his leaving his hammer upon the highway. I am of opinion, therefore, that the judgment of my brother Rose was right, and the plaintiff's motion should be dismissed with costs.

The motion of the defendant McGugan is upon different grounds; he is chargeable with the positive act of obstructing or making an improper and unreasonable use of the highway by leaving his hammer upon it. The jury have found that this was the cause of the accident, and that it was a negligent act to leave it there. The learned

Judgment.

Street, J.

Judge, in submitting to the jury this question of negligence, explained to them what he meant them to consider. He says: "What is contended here is that, the roadway being narrow, the block of iron left upon the grade, upon the road, as it is said, was so close to the track that it became a prominent object. Of course the fact that it took up a certain portion of the roadway, and thus narrowed the track, is nothing in this case, because nothing happened from it. It would only be as an object which would frighten a horse that you would have to consider the leaving of it there with reference to negligence, having regard to the use of the highway, to the use of such horses as are ordinarily driven. * * Then having regard to * * the use that it was put to, was it an improper thing to leave that piece of iron on the highway?" And he proceeded to instruct them, in effect, that if it was likely to frighten, horses, they should find that it was a negligent act to leave this block of iron there.

I think the jury having found, upon this charge and explanation, that the leaving of the iron on the highway was a negligent act, their finding must be treated as establishing that the defendant McGugan, having left it there as he did, was making an improper and unreasonable use of the highway.

The fact that the jury have found that a railing upon the embankment would have prevented the accident, cannot relieve the defendant McGugan from the consequences of his own wrongful act. The absence of the railing should have rendered him doubly careful not to obstruct the highway at so narrow and unprotected a spot. There is, as I have said, no evidence that he was acting under the authority of the corporation, or with their assent, in leaving the hammer where he did; and I can see no ground for his claim to be indemnified by them against the consequences of his own wrongful act.

I am of opinion, therefore, that his motion also should be dismissed with costs.

[CHANCERY DIVISION.]

EVANS v. KING.

Will—Construction—Estate tail—Shelley's case—Expression of intention contrary to operation of rule.

A testator by the third clause of his will devised certain lands as follows: "To my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple, but in default of such issue him surviving, then to my daughter Sarah Jane for the term of her natural life and upon death of my said daughter, then to the lawful issue of my said daughter to hold in fee simple, but in default of such issue to my said daughter, then to my brothers and sisters and their heirs in equal shares."

By a later clause the testator added "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will":—

Held, that James took an estate tail according to the rule in *Shelley's Case*, though probably against the real intention of the testator, and the later clause of the will could not be allowed to affect the interpretation of the third clause.

Statement. THIS was a special case, stated in an action of ejectment, for the purpose of procuring the construction of the will of Andrew Hamilton, the provisions of which are set out in the judgment.

The case was argued on December 1st, 1892, before FERGUSON, J.

E. D. Armour, Q. C., and *McBrayne*, for the defendants, contended that the testator's son James took an estate tail under the third clause of the will, and cited: Hawkins on the Construction of Wills, 2nd Amer. ed., at pp. 188-9; Theobald on Wills, 3rd. ed., at pp. 315, 319; *Denn* v. *Puckey*, 5 T. R. 299; *Doe* v. *Smith*, 7 T. R. 531; *Frank* v. *Stovin*, 3 East 548; *Hellem* v. *Severs*, 24 Gr. 320; *Williams* v. *Williams*, 51 L. T. N. S. 779; *Mills* v. *Seward*, 1 J. & H. 733.

J. Bicknell and *A. Bicknell*, for the plaintiff, the testator's daughter Sarah Jane, contended that James having died without lawful issue, she was entitled to the land; and cited *Re Hamilton*, 18 O. R. 195; *Roddy* v. *Fitzger-*

ald, 6 H. L. C. 823; *Morgan* v. *Thomas*, 9 Q. B. D. 643; *Montgomery* v. *Montgomery*, 3 J. & Lat. 47; *Meyers* v. *The Hamilton Provident and Loan Co.*, 19 O. R. 358; *Doe* v. *Rucastle*, 8 C. P. 876; *Head* v. *Randall*, 2 Y. & C. Ch. 231; *Smith* v. *Smith*, 8 O. R. 677; *Evans* v. *Evans*, [1892] 2 Ch. 173; *Maynard* v. *Wright*, 26 Beav. 285; Fearne on Contingent Remainders, 10th ed., vol. 1, at p. 188; *Bradley* v. *Cartwright*, L. R. 2 C. P. 511, 523; *Bowen* v. *Lewis*, 9 App. Cas. 890; *Peterborough Real Estate Co.* v. *Patterson*, 15 A. R. 751; *Lees* v. *Mosley*, 1 Y. & C. Ex. 589; Jarman on Wills, 4th ed., vol. 2, p. 439; *Kavanagh* v. *Morland*, 1 Kay 16; *Backhouse* v. *Wells*, 1 Eq. Abr. 184; *Woodhouse* v. *Herrick*, 1 K. & J. 352; *Crozier* v. *Crozier*, 3 D. & W. 373. Argument.

Armour, in reply referred to *Parker* v. *Clark*, 3 Sm. & G. 161.

March 8th, 1893. FERGUSON, J.:—

This is a case which, after certain changes made by consent, at or before the commencement of the argument, is a special case stated in an action of ejectment. The question, or, at least, the chief question being as to the true meaning and construction of the third clause or paragraph of the last will of the late Andrew Hamilton, who died on or about the first day of June, 1869, the property being situated in the city of Hamilton.

This clause of the will, omitting the particular description of a parcel of the land by metes and bounds is as follows:

"Thirdly: I give and devise lot two in block twenty-three, in Sir Allen Napier McNab's survey, fronting on Sheaffe street, in the said city of Hamilton, and that parcel of land containing about thirty-eight perches and seven-tenths of a perch, being composed of part of lot number fifteen, in the second concession of Barton, now in Hamilton city, and described as follows: * * to my son James, for the full term of his natural life, and from

Judgment.

Ferguson, J.

and after his decease, to the lawful issue of my said son James to hold in fee simple; but in default of such issue him surviving, then to my daughter, said Sarah Jane, for the term of her natural life; and upon the death of my daughter, Sarah Jane, then to the lawful issue of my said daughter, Sarah Jane, to hold in fee simple; but in default of such issue of my said daughter, Sarah Jane, then to my brothers and sisters and their heirs in equal shares."

By the second clause of the will, the testator devised other lands to his daughter, Sarah Jane, the words of this second clause being substantially the same as the words of this third clause, if the names of the son James and the daughter Sarah Jane, are changed in position so that each could be read for the other.

The fifth clause directs that certain personal property should be sold and converted into money, and the proceeds after paying funeral and testamentary expenses, equally divided between the said daughter Sarah Jane and the said son James; "and if either one be dead, then the issue of such one to take the share the parent would be entitled to."

The sixth clause is as follows: "Sixthly. It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devises mentioned in the second and third clauses of this my will."

The testator's son James assumed that he took by the devise in the third clause of the will an estate tail in the lands therein mentioned, and in the year 1870, executed a conveyance of the land to one Rieger, which conveyance is admitted before me to be a good disentailing assurance if the testator's son James had, as was assumed, an estate tail in the land; and, such title, if any, as passed to Rieger became, through a number of conveyances, vested in the defendant, John B. Williams, who is in possession of the land by his tenants, the defendants, Henry King and Robert Kirkpatrick.

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The testator's son, James Hamilton, died in the year 1886, leaving a widow, but without ever having any lawful issue.

The plaintiff is the testator's daughter, Sarah Jane, named in the third clause of the will, and she claims title under the provisions of such third clause.

The defendant, John B. Williams, claims to be entitled to the land in fee, but says that if it is found that he is not so entitled, then he claims a lien upon the lands for the value of lasting improvements made thereon by him under the belief that the lands belonged to him.

I am asked to say what are the rights and interests of the plaintiff and the defendant, John B. Williams, in respect of these lands; (2) To dispose of the costs of the action; and I am given power, if it should become necessary, to direct a reference to the Master of the Court at Hamilton as to mesne profits, and as to the amount, if anything, for which the defendant, John B. Williams, should have a lien for lasting improvements.

The case as to the construction of the third clause of the will was argued at great length, and many authorities were referred to by counsel. These authorities I have endeavoured to peruse.

The gift in this third clause is to the son James for the term of his natural life, and from and after his decease, to his lawful issue, "to hold in fee simple," but in default of "such issue, him surviving," then to the plaintiff for the term of her natural life, etc.

In devises of real estate "issue" is *primâ facie*, a word of limitation and equivalent to heirs of the body: *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823; Hawkins on Wills, 2nd Am. ed., at p. 189, and cases there referred to.

With respect to the limitation to "heirs of the body," it is immaterial whether they are described under that or any other denomination, since it is clear that in any case in which the word "issue" or "son" is construed to be a word of limitation, and follows a devise to the parent for life, or any other estate of freehold, such parent becomes tenant

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in tail by force of the rule in *Shelley's Case*:" Jarman on Wills, 4th ed., vol. 2, at p. 339. Such words are read as synonymous with "heirs of the body," and the effect is the same as if these words had actually been used.

In Jarman on Wills, 4th ed., vol. 2, the author after referring to authorities at page 362, expresses the result, saying: "Down to the very latest period, then, we have a confirmation, if confirmation were wanted, of the inadequacy of words of limitation in fee, annexed to *heirs of the body*, to control their operation." And further on it is said: "But it seems that if the superadded words of limitation, operate to change the course of descent, they will convert the words on which they are engrafted into words of purchase."

Mills v. *Seward*, 1 J. & H. 733, decided that where the remainder after a life estate to A. was to the heirs of the body of A., habendum to such heirs, and their heirs and assigns for ever as tenants in common, that the rule in *Shelley's Case* applied, and that A. was tenant in tail.

In Jarman on Wills, 4th ed., vol. 2, at pp. 421, 422, the author says: "And if the addition of formal words of inheritance will not prevent the word "issue" from operating as a word of limitation, still less will informal words do so, though sufficient to carry the inheritance—such as "all my interest" or "forever." See also *Griffith* v. *Evan*, 5 Beav. 241; *Manning* v. *Moore*, Alc. & Nap. 96; also *Fuller* v. *Chamier*, L. R. 2 Eq. 682.

In *Montgomery* v. *Montgomery*, 3 J. & Lat. 57, Lord St. Leonards is reported to have said: "A devise to A. for life, with remainder to his "issue," with superadded words of limitation, in a manner inconsistent with a descent from A., will give the word issue the operation of a word of purchase." This seems, however, to be to the same effect as the statement in Jarman before referred to, that if the superadded words change the course of descent, they will convert the words on which they are engrafted into words of purchase. See also 1 Rep. 95.

It is stated in Hawkins on Wills, 2nd Am. ed., at p.

192, that a devise to A. for life, remainder to his issue and their heirs male, as tenants in common, would give to the issue estates by purchase in tail male. This seems, however, no more than an instance, and serving to illustrate what was said by Lord St. Leonards in *Montgomery* v. *Montgomery*, and of the passage in Jarman before referred to. The superadded words operate a change in the course of descent. Judgment. Ferguson, J.

In the present case, the superadded words, so much referred to at the bar, are "to hold in fee simple." These words do not, I think, change the course of descent or create a new *stirps*; and so far as I am able to perceive, they have not the effect of converting the word issue into a word of purchase. They are informal words having, as indicated in the passage above cited from Jarman, a less effect than formal words of inheritance; and, even such formal words would not have the effect contended for. I am of the opinion that these informal superadded words "to hold in fee simple," have no effect, and must be rejected.

Then as to the words "him surviving" occurring in the expression, "but in default of such issue him surviving, then to my daughter," etc., it appears to me that the contention is fairly met by the case *Doe* v. *Rucastle*, 8 C. B. 876, referred to in Hawkins, *ib.*, at p. 191. The devise was of lands to A. for life with remainder to his issue, if more than one, equally amongst them, with a gift over if A. should die without issue living at his death; and, A. was held to take an estate tail. The particular words in this respect of the devise were, "And in case he shall not leave any issue of his body lawfully begotten at the time of his death, then I give and devise," etc. The case was much elaborated in argument, but the judgment of the Court was very short. I think the words "to hold in fee simple," may, for the purposes of construction, be read out of this devise, that is to say, rejected; and, when this is done, if no more remained to be said on the subject, it seems the devise is such as to give the son James an estate

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tail, for it would read as a gift to James for life, and from and after his decease to his lawful issue; but, in default of issue, then over. There would here seem to be both the express gift of an estate tail, and the like gift by implication, if construction of the words employed in the devise, is alone considered.

The testator has, however, in the present case, undertaken by the sixth clause of the will to declare what, or, in some measure, what was his intention, this clause I have above set forth.

There is a passage in Hargrave's Law Tracts, p. 562, referred to in Jarman on Wills, vol. 2, at p. 340, which runs: "As no declaration, the most positive and unequivocal, that the ancestor shall take only, or his estate be subject to the incidents of a life estate, will exclude the rule in *Shelley's Case*, so a declaration that the heirs shall take as purchasers, is equally inoperative to have such effect."

In the case *Jordan* v. *Adams*, 9 C. B. N. S. at p. 499, Cockburn, C. J., says: "When once the donor has used the words 'heirs,' or 'heirs of the body,' as following an estate of freehold, no inference of intention however irresistible, no declaration of it, however explicit, will have the slightest effect. The 'fatal words' once used the law fastens upon them and attaches to them its own meaning and effect as to the estate created by them, and rejects as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all provisions of the will, which would be incompatible with an estate of inheritance, and which tend to show that no such estate was intended to be created; although all the while it may be as clear as the sun at noon day, that by such a construction the intention of the testator is violated in every particular."

The learned Chief Justice then says that this is the principle involved in *Perrin* v. *Blake*, 4 Burr 2579, 1 W. Bl. 672; *Jesson* v. *Wright*, 2 Bligh 1, and *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823. Reference is also made to the passage in Hargrave's Law Tracts, which I have above alluded to, and other authorities on the subject.

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The learned Chief Justice, however, says, at p. 500: "But, although the rule thus established is inflexible to the extent I have stated, there is, nevertheless, one quarter from which it permits light to be let in and effect to be given to the real intention of the testator: this is where, by some 'explanatory context,' having a direct and immediate bearing upon the term 'heirs' or 'heirs of the body,' the devisor has clearly intimated that he has not used these words in their technical, but in their popular sense, namely, that of sons, daughters, or children, as the case may be." Reference is then made to the language of Lord Brougham in *Fetherston* v. *Fetherston*, 3 Cl. & F. 67, which are: "If there is a gift to A. and the heirs of his body, and then in continuation, the testator referring to what he had said, plainly tells us that he has used the words 'heirs of the body,' to denote A.'s first and other sons, then clearly the first taker would only take a life estate."

It is true that in *Jordan* v. *Adams*, the Court, the Exchequer Chamber, was equally divided, but there was no difference of opinion as to the principles and rules of construction above alluded to. The difference of opinion was as to the effect of the words, "their father," used by the testator in the context, in continuation of the words of gift to the heirs male of his body; and, as it would appear, or rather as it appears to me, having a direct and immediate bearing upon that expression.

At p. 490, Channell, B., says: "In determining whether the legal import of the words, 'heirs of the body,' is to be cut down, we must not surmise, but must see very clearly that the alleged interpreting words do cut down other words which carry with them a recognized legal meaning."

In Hayes' Inquiry into the effect of Limitations to Heirs of the body in Devises, a book referred to as an excellent work by Lord Wensleydale, in *Roddy* v. *Fitzgerald*, 6 H. L. Cas. at p. 879, the author says, at p. 47: "A testator may pervert and misapply the language of the law; but a testator speaking that language, must be understood to

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speak it according to its fixed and acknowledged import, unless he distinctly apprise us of his intention to use its words and phrases, as signs of other ideas than those which authority and usage have annexed to them. This must not be left to presumption or probable inference, but must be placed beyond all doubt; and in proportion as the words have a more certain and appropriate meaning, stronger evidence will be required to force upon them a different signification."

Lord Wensleydale, quoting from the same work, says, at p. 879: "Words should not be diverted from their appropriate sense, unless the will itself enjoins their reception in another sense, and not merely in another sense, but in another given sense, as clearly affixed to them."

There are authorities (not a few) going to show, as was said by Baron Alderson in *Lees* v. *Mosley*, 1 Y. & C. Ex. 589, that "issue" more readily than "heirs of the body," would yield to the plain intention of the testator, and that it required a less demonstrative context to show such intention. This proposition is referred to and considered by Lord Wensleydale in *Roddy* v. *Fitzgerald*, at p. 881-2, where after discussing the matter and referring to the view of Chief Justice Monahan, he says in conclusion: "I cannot help thinking, however, that the difference, when the subject is fully considered, is apparent, rather than real; and that practically the same degree of certainty in the context, to alter the meaning of both expressions is required." For the purposes of the present case, it is not, as it seems to me, material whether such a difference or distinction is or is not considered to have an existence.

The sixth paragraph of this will is professedly, and is, as I think, nothing else than a clause by which the testator stated, or stated in part, his intention; and I am of the opinion that according to the authorities to which I have referred—and there are many others to the same effect—in the effort to construe the devise in question, that contained in the third paragraph of the will, the

declaration of intention in the sixth paragraph must be left out of the case. The word "issue" occurs in this sixth paragraph, but not, so far as I can see in such a way as to cast or reflect any more light than is to be found in the devise in question itself, that contained in the third clause of the will.

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Then as to the fifth paragraph. The word "issue" is used in this; and the word "parent" is also used in such a connection with it (the word issue), that it appears, as I think, that the testator here used the word "issue," as signifying children. This clause, the fifth, is wholly in respect of the division of personal property, and the clause seems altogether separate from the devise in question in the third clause. There seems to be no connection, grammatical, by reference or otherwise between the two clauses, and they relate to entirely different subjects; and assuming that "issue" as used in the fifth clause means children, beyond doubt, yet I cannot see that it is to be considered explanatory context having a direct and immediate bearing upon the term "issue" used in the devise in question in paragraph three. Nor is it a word used by the testator in continuation, referring to what he has said in the devise in question, by which he tells us that he has used the word "issue" in the devise in question in any sense other than its legal signification in the connection in which it is used in the devise in question.

What, and I think all, that can be said in favour of this word in the fifth clause being an interpretation, even if it is assumed that it there means children, is that the word having been employed in one clause of his will—no matter how far separated from the devise in question, and in respect to a subject no matter how different—as meaning children, it would not be unreasonable to suppose that the testator used the same word in all parts of his will in the same sense and with the same meaning.

This, I think, giving its fullest possible force, falls vastly short of what is required as "interpretation" by context, for, considered apart, and it must be considered apart, from

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all declarations of intention, and from the superadded words that have no operation or control, it leaves the matter to conjecture and in doubt, which is contrary to the authorities, which say that it must not be left to presumption or probable inference, but must be placed beyond doubt. The use of this word "issue" in the fifth clause, giving it the meaning there contended for by the plaintiff, (children), does not, according to the authorities, in my opinion, serve as an interpretation of the word "issue" as used in the third clause; and I think the devise in question is to be considered as if neither the fifth or sixth clauses of the will were existing, and considered without reference to these clauses or either of them, the result is as before indicated, that the testator's son James took by the devise an estate tail.

Although I have found difficulty, I have arrived at the conclusion, and I am of the opinion that the son James took by the will an estate tail in the lands in question (probably contrary to the real intention of the testator), and it being conceded that the conveyance of the lands made by him was a good disentailing assurance, and no question being raised as to the validity of the mesne conveyances down to the defendant John B. Williams, I am of the opinion that this defendant John B. Williams is the owner in fee of these lands, if it is assumed that the testator had a good title in fee to the same. Then assuming this to be so, the defence to this action of ejectment succeeds, and I need not, so far as I can see, say anything further as to the matter or questions submitted by the special case except the matter of costs.

The case says that I shall have power to give judgment in the action according to my opinion as to the true construction of the will, and to say by whom the costs should be paid.

My opinion is, that the judgment in the action should be for the defendants, and that the plaintiffs should pay their costs.

Action dismissed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

BLIGHT V. RAY.

Lien—Mechanics' Lien—Owner of lands under verbal contract—Unpaid vendor—Consent of owner—R. S. O. ch. 126, sec. 2, sub-sec. 3.

A verbal agreement without any condition as to forfeiture on nonpayment of the purchase money was entered into for the purchase of certain lands it being understood that the purchaser would proceed to erect buildings thereon, which he accordingly did, procuring materials and work from the plaintiff and others, and then became insolvent without having paid anything to the vendor :—

Held, that there having been sufficient acts of part performance, the purchaser had become the owner in equity of the lands and the plaintiff's lien attaching to his interest the vendor could only after that hold the lands subject to the burden of the lien.

Before the parties claiming liens furnished work and material, they were aware that the purchaser was in difficulties, but the vendor assured them that they would be paid, and urged them to go on with the work, although it was not contended that he actually guaranteed payment himself :—

Held, that the work was done and the material furnished with the "privity or consent" of the vendor within the meaning of sub-section 3 of section 2 of the Mechanics' Lien Act, R. S. O. ch. 126.

THIS was an appeal from the report of the Referee in a mechanic's lien case, the circumstances of which are fully set out in the judgment.

The appeal was argued on March 9th, 1893, before FERGUSON, J. Argument.

Lennox, for Ray, owner of the property. We gave no "consent" within the meaning of the statute: Phillips on Mechanics' Liens, 2nd ed., secs. 40, 67, 70, 243, 247, and the cases there referred to. We also refer to *Graham* v. *Williams*, 8 O. R. 478; 9 O. R. 458; *McVean* v. *Tiffin*, 13 A. R. 1.

Urquhart, for the plaintiff Blight, and the defendant Scott, lienholders. Ray did consent: Jones on Liens, vol. 2, sec. 1251, 1256; *Nellis* v. *Bellinger*, 6 Hun (N. Y.), 560; *Otis* v. *Dodd*, 24 Hun (N. Y.), 538; *Petrie* v. *Hunter*, 2 O. R. 233.

Judgment. March 17th, 1893. FERGUSON, J. :—

Ferguson, J.

This is an appeal from the report of the Referee in a mechanic's lien case brought under the provisions of the Act 53 Vic. ch. 37, (O.) entitled an Act to Simplify the Procedure for enforcing Mechanics' Liens.

The appeal is under the provisions of section 35 of the Act which provides that orders and certificates made by a Referee or Master under the Act shall be appealable in like manner as orders made in Chambers by a local Judge.

The Referee by his report has found in favour of Blight, the plaintiff, under and by virtue of his lien, $110, a sum which, with interest and costs added, amounts to the sum of $212.51, and in favour of the defendant Scott, under and by virtue of his lien the sum of $79.55, which, with interest and the costs of proving the claim, amounts to the sum of $86.55.

The leading facts and circumstances appear to be these: Ray was the owner of the land, a lot or part of a lot in the city of Toronto. He and Manes made a verbal contract for the purchase and sale of the land, it being contemplated and understood at the time that Manes should immediately proceed with the erection of buildings upon the land. The purchase money was not, nor so far as appears, was any part of it paid. Manes proceeded with the buildings, two houses, as contemplated by him and Ray, and in so doing employed, but did not pay, the plaintiff Blight and the defendant Scott. It is not disputed that Manes is indebted to these men, respectively, for their work, materials, etc., in the sense found by the Referee or that they are entitled to their respective liens for these sums upon any interest of Manes in the land. It is, however, contended that there is not any lien upon the interest of Ray in these lands, and Ray by his notice of appeal seems to contend that Manes never had any interest in the land at all, there having been only an offer by Ray to sell the lands to Manes but no sale, though Manes took possession, etc. This last seems entirely untenable and was not eventually

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urged before me on the appeal. It is quite clear from the evidence that there was a sale by Ray to Manes pursuant to which Manes went into possession and made substantial improvements by erecting or, in part erecting, the two houses, the value of which improvements, Ray, though apparently desiring to minimise the same, has placed at $400.

The verbal contract of sale did not embrace or contain any provision in respect of a forfeiture by Manes of any of his rights arising under it or in pursuance of it, and I do not see how the contention referred to in the fifth ground of appeal respecting a surrender or forfeiture by Manes of his rights, if any he had, can succeed.

After the making of the contract and up to the time at which Manes failed, that is, finally failed, to pay these men Blight and Scott, the true position of Manes and Ray in respect to the title to the land was, I think, this: Manes became and was the owner in equity and entitled to a conveyance from Ray upon payment of the purchase money, which, it appears, was $1,600, Ray holding the legal estate with which he need not part till paid his purchase money. After taking possession and commencing the improvements on the land Manes was entitled to hold this position and enforce his rights against Ray, even against a pleading setting up the Statute of Frauds, for these were clearly "acts of part performance" of the parol contract. Manes and Ray had each an interest in the land. It was not disputed that these liens attached upon any interest that Manes had in the land, nor could it be, so far as I can see.

Ray now professes to be the owner of the land out and out, and says that Manes has no interest in it. While Manes certainly had, as I think, an interest in the land these liens attached, and there being nothing in the contract between Manes and Ray in the nature of a forfeiture clause, I do not see how the interest of Manes could pass or be transferred to Ray freed from the burdens of these liens. Manes might give or transfer his interest (a kind

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of interest, which, in some circumstances, might be of great value) to Ray, but then Ray would be, *quoad* that interest, a person claiming under Manes, and the interest would in Ray's hands be still subject to the burden of these liens. So that the liens having attached to Manes' interest in the property, this interest is still subject to the burden of these liens, whether the interest is at the present time in the hands of Ray or Manes.

The chief contention before me was, however, as to the third ground of appeal, which is:—

"The Referee was wrong in finding that the work was done by the plaintiff and the defendant Scott on the buildings in question with the privity and consent of the defendant Ray, and that from his conduct and connection with the erection of the said buildings and his representations as to the loan to be obtained he induced credit to be given and has received the benefit of the work." See also the latter part of the fifth ground. The words found in the statute sub-sec. 3 of sec. 2, R. S. O. ch. 126, are "privity or consent."

Ray, as was conceded, is a man of considerable substance, so to speak, a man owning properties. This was known at the time the work commenced to all parties concerned. The fact was also known to all concerned that Manes had been and was in difficulty and not a man of much, if any, means. Manes had pointed out to both Blight and Scott the source from which he intended to obtain the money to pay them for the work they were to do which was an intended mortgage upon the property to a lending company then in course of negotiation, the money, as I understand the matter, to be advanced upon the mortgage by instalments as the work progressed.

From a perusal of the evidence on the subject, it, as I think, appears that after Manes had made his bargain with each of the men, Blight and Scott, he entertained doubts as to whether they would commence and proceed with the work upon his contract and assurance alone. Before Scott commenced Manes brought about a meeting

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between him and Ray on a Wednesday at the church door when Ray told Scott that he need not be afraid of getting his pay, that all that Manes had told him about the contemplated mortgage was true, that it would be "all right." Scott says that Ray then told him that he would see him paid. This last Ray contradicts, but the Referee says that he preferred the oath of Scott. Scott commenced work the next day after this. He says, however, that he did not rely upon this as a guarantee by Ray, and that he gave the credit to Manes, having the assurance by Ray (whom he considered a more substantial person than Manes) that he should get his pay. After Scott had finished one of the foundations and was about giving up the job on account of not getting pay as promised and expected, Ray saw him and advised him to go on, saying that he would get his pay all right, and Scott accordingly went on with the work. The evidence shews that on many occasions Ray (who seems to have kept close watch of the work as it progressed) urged Scott to go on with the work always telling him that he would get his pay, on one occasion telling him that even if Manes did not finish the houses some one else would, that in either case there would be the mortgage upon them and that Scott should be paid out of the "first draw."

Before Blight commenced his work he saw Ray who in their conversation on the subject told him of the intended mortgage and that he (Blight) would be all right, that he had sold Manes the property and he would see about the loan for him and that he (Blight) should be paid out of the "first draw" of the mortgage money. Ray then told him that all would be satisfactory, that he would fix it all right, and told him to "hurry up" with the buildings. Blight says he took Ray's word for it and went on with the work. There is much more of the evidence going to shew that Ray on many occasions endeavoured to encourage, persuade and induce each of these men who were in doubt as to their pay, to go on with the work. They did go on, and although the credit was given to Manes, no one can, I

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think, read the evidence without being of the opinion that they did the work feeling assured as to their pay by the representations of Ray.

Manes making default in respect of another mortgage matter or transaction the building company declined to complete this mortgage or advance any money to Manes, and what is said is that the purchase from Ray of this land "fell through."

Manes, it is said, is not in a position to pay anything. Ray says that land and buildings belong to him, that he would pay these men nothing and that they have no lien upon the property.

In the case *Nellis* v. *Bellinger*, 6 Hun 560, the learned Judge in giving judgment while speaking of the consent mentioned in the statute under which the case was decided, says: "And it does not detract from the legal effect of such consent, that the defendant gave it under an impression that it devolved no liability upon him. * * The amendment of the statute passed in 1873 (Laws, 1873, ch. 489) was designed to meet the objection, that there could be no lien against the owner, when the labour or materials had been furnished under a contract with a person whose interest arose upon an agreement, whereby the owner agreed to sell the land to such person, and to make advances towards the erection of a building thereon. In such cases the rights of the lienor were always subordinated to the interests of the legal owner, for the lien affected only the equitable title of the vendee. The statute now gives a lien, as well when the owner of land consents to the erection of a structure upon it, as when he contracts directly for its construction. And such consent of the owner may be proved by the fact that he entered into such contract, or by other acts and declarations, as well as by direct evidence. * * The legislature, by the amendment cited, clearly intended to enforce the equitable principle, that one who knowingly takes the benefit of the property or labour of another, in the form of improvements made upon his land, ought to have the land subjected to a lien for the value thereof."

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Ferguson, J.

In the same case it was held that it was not necessary that the acts of the lienor should have been in any way induced by the consent of the owner of the land.

This case was subsequently referred to in the case *Otis* v. *Dodd*, 24 Hun 538. See also *Davis* v. *Humphey*, 112 Mass. 309. As to what will amount to proof of consent see also Jones on Liens, vol. 2, sec. 1254. These books and decisions are, of course, not binding here but one is quite at liberty to approve of the reasoning found in them. The statutes under which the cases were decided are generally different from our statutes in many respects, but I do not see that the provision regarding the consent of the owner referred to in the case in 6 Hun is materially different from the provision of our statute as regards the immediate point in question here, and taking these cases and references as a guide I should have no hesitation in arriving at the conclusion that such a consent on the part of Ray as is necessary to have a lien upon his interest in the land declared has been proved. I am of the opinion that if less had been proved the lien might yet be properly declared. In the case *Graham* v. *Williams*, 9 O. R. 461, the expression occurs: "The privity and assent must be in pursuance of an agreement," but the following sentence shews, I think, plainly that the words must be understood to relate to a case of the kind then under consideration, and besides, if the words were understood to have general application it might be remarked that where there is an agreement a consent is out of the case.

After what I think is a careful perusal of all the evidence, and after examining all the authorities referred to, I am of the opinion that the report of the learned Referee is quite right and should be upheld.

In the view that I have taken it is not, so far as I can perceive, necessary that I should determine anything in regard to the preliminary objection to the appeal that was argued at some length. I think there is no weight in the ground of objection that the Referee should not have reported specially as in paragraphs 7 and 8 of the Report.

Judgment. Ferguson, J.

The appeal is dismissed as to every ground of appeal taken, and the whole Report affirmed with costs to be paid by the defendant Ray.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA v. FARRELL.

Intoxicating liquors—Liquor License Act—Admission of guilt—Right to object to legality of rules and regulations—Right to impose costs and imprisonment.

On an information charging that the defendant, in his premises, being a place where liquor might be sold, unlawfully did have his bar room open after 10 o'clock in the evening, contrary to the rules and regulations for license-holders passed by the License Commissioners, etc., the defendant signed an admission stating that, the information having been read over to him, he desired to plead guilty to the charge, which was the only evidence before the Court, and on which the defendant was convicted. It did not appear that the municipality had passed any by-law on the subject:—

Held, that this did not prevent the defendant from objecting to the power of the License Commissioners to pass such rules and regulations, but on the authority of *McGill* v. *License Commissioners of Brantford*, 21 O. R. 665, the objection must be overruled.

Regina v. *Brown*, 24 Q. B. D. 357, followed.

By the conviction herein a fine and costs were imposed, and, in default of payment, distress, and, in default of sufficient distress, imprisonment:—

Held, under sec. 98 of the Liquor License Act, R. S. O. ch. 194, incorporating sec. 427 of the Municipal Act, costs and imprisonment could properly be imposed.

Statement.

THIS was a motion to make absolute an order *nisi* to quash a conviction, and was heard before GALT, C.J., ROSE and MACMAHON, JJ., on the 9th day of February, A.D. 1893.

The defendant pleaded guilty to an information charging that he "in his premises, being a place where liquor may be sold, unlawfully did have his bar room open after ten of the clock in the evening, contrary to the rules and regulations for license holders passed by the license commissioners of the north riding of Oxford, April 28th, 1892."

Statement.

The defendant was convicted of the offence charged. By the conviction a fine and costs were imposed, and in default of payment distress, and in default of sufficient distress, imprisonment.

DuVernet, for the motion.
Langton, Q. C., contra.

The objections to the conviction appear in the judgment of the Court, which was delivered on March 4th, 1893, by

ROSE, J.:—

The defendant signed the following admission on the back of the information. "The information herein having been read to me, I desire to plead guilty to the charge therein contained."

This plea admitted that the license commissioners had, on the 28th of April, 1892, passed a rule or regulation under which the defendant, a license holder, was forbidden to keep open his bar room on his premises, being a place where liquor might be sold, after ten o'clock p.m.; and further admitted a violation of such rule or regulation.

This admission furnishes the only evidence before the Court, and we cannot look at any thing further.

It was still open to the defendant to contend that the license commissioners had no power to pass any such rule or regulation: *Regina* v. *Brown*, 24 Q. B. D. 357.

I think, however, they had the power. I retain the opinion I expressed in *McGill* v. *License Commissioners of Brantford*, 21 O. R. 665, to which, to avoid repetition, I refer. It does not appear here that the municipality had passed any by-law on the subject. The cases are therefore similar in that respect.

The second objection was that the rule or regulation was invalid, because it contained an absolute prohibition and did not except certain persons, who, as argued by Mr. DuVernet, were excepted by the statute.

Judgment.

Rose, J.

It was impossible to consider this objection, as we have not the rule or regulation before us in evidence other than as set out in the admission above noted, and from that we are unable to say how the fact is. For all that appears, the exceptions may have been made. See *Regina* v. *Excell*, 20 O. R. 633.

We are in the same difficulty in considering the third objection, which was that the rule or regulation was passed on the 28th April, and did not provide for not coming into force before the 2nd of May.

There is no evidence to support the fourth objection, viz.: that the rules or regulations do not provide for the enforcement of the penalty; or the fifth, that neither costs nor imprisonment is provided for.

It was further objected that there was no power to award costs or imprisonment.

The conviction is in the form provided for by section 98 of the Liquor License Act, incorporating for such purpose section 427 of the Municipal Act, and is, I think, fully warranted. We considered a similar objection in *Regina* v. *Johnson*, 26th January, 1892, unreported.

These were all the objections argued before us, and in my opinion none are sustained.

The motion must be dismissed with costs.

[COMMON PLEAS DIVISION.]

RODGERS v. THE HAMILTON COTTON COMPANY.

Master and servant—Accident to servant—Liability under the Workmen's, etc., Act—Factories Act, construction of—Volenti non fit injuria—Applicability of—53 Vic. ch. 23, sec. 7 (O.).

In the defendants' dye-house over the tanks containing the dye was certain machinery consisting of a series of rollers for wringing the dye out of the warp as it came from the tanks, having cogwheels at the ends thereof where they connected with the frame of the machine. There were spaces between the tanks where planks were placed for the workmen to pass along, and which were always in a slippery condition. The plaintiff, a workman employed by the defendants, who was aware of the absence of a guard, but did not consider it a defect, while returning along one of these planks from the discharge of his duty in disentangling the warp, slipped, and by reason, as was found by the jury, of the defendants' negligence in not guarding the wheels, in trying to save himself caught his hand therein and was injured :—

Held, that the cog-wheels constituted part of the machinery, and being dangerous, should have been guarded under sec. 15, sub-sec. 1 of the Factories Act, R. S. O. ch. 208; and that the non-guarding constituted a "defect in the condition of the machinery" under the Workmen's Compensation for Injuries Act, R. S. O. ch. 141.

McCloherty v. Gale Manufacturing Co., 19 A. R. 117, commented on.

Held also, following *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423, that the maxim *volenti non fit injuria* does not apply where an accident is caused by the breach of a statutory duty.

Statement.

THIS was an action tried before FALCONBRIDGE, J., and a jury at the Hamilton Assizes on the 10th September, 1892.

The plaintiff was a dyer, and for two years prior to the injury complained of was employed in that capacity in the dyehouse of defendants in Hamilton. In the dyehouse were three tanks arranged in line, sunk in the ground and standing about three feet above the floor with a space between them of about 18 inches in width. For the purpose of drying the warp a machine was used, consisting mainly of a series of rollers for wringing the fluid from the cotton as it came from the tanks. The machines were propelled by steam, and the rollers, which were about three feet long, had gearing at the end of the pair, which gearing was at the time the plaintiff was injured exposed and unguarded.

Statement.

The warp machine was movable, and when the dye in one tank was exhausted, the machine was moved over to the next adjoining tank.

The workmen employed about the machine climbed over the shafting connected with the gearing, in order to pass between the tanks.

The statement of claim alleged: (4) "In the space between the tanks and raised about a foot from the floor are placed planks for the said workmen to walk upon in passing to and from between the said tanks. The said planks, which are always wet and slippery, pass under the rollers, (should be shaft), and project about a foot in front of said tanks so that the workmen may step upon the projection in passing between the tanks, but owing to the negligence of the defendants there was no cleat or other arrangement on the projecting end of the said planks to prevent a workman from slipping off same as there was danger of his doing, owing to the slippery condition of the said planks."

(5) "On the 9th of February, 1892, the cotton warp became entangled, and the plaintiff had to climb over said rollers (shafting) and pass along said plank between the said tanks, and when he was returning, as he was climbing over the said rollers (shafting), his foot slipped off the end of the plank and falling backwards his right hand was caught in said unguarded gearing and drawn into the cog-wheels, and was so badly mutilated that he has been permanently injured."

(7) "The injury complained of was caused to the plaintiff by the negligence of the defendants in not properly guarding the said gearing, and owing to the defects in their ways, work, plant and machinery."

From the plaintiff's evidence it appeared that a chain of cotton warp became entangled, or caught, in one of the rollers attached to the frame, and he started from the front of the tanks where the lever controlling that particular part of the machinery was placed, the usual place for him to stand, and crossed the shafting, which was about two feet four inches

Statement.

higher than the plank, stepped on the side of the tank, thus enabling him to reach the frame of the warp machine and disentangle the warp, and was returning to his former position, and had put his right leg over the shaft and his foot was on the plank projecting outside the tanks, and he had brought his left foot clear of the shaft when his right foot slipped, and in throwing out his left hand to save himself it was caught between the cogs of the machinery and three fingers were disabled.

There was a lever attached to the shaft, by which the machinery was thrown out of gear and so stopped. But the plaintiff stated the machinery was not stopped when an entanglement of the warp took place and required to be adjusted, as a stoppage would affect the colour of the warp by remaining too long in the tank.

The machinery, with which the defendants were charged with negligence in not covering, consisted of two cogwheels, one of which was attached to the shaft and the other to the roller in the frame of the warp machine. The junction of the cogwheels was about two feet four inches above the plank between the tanks, and about nine inches above the top of the tank, to which the warp machinery happened at the time to be attached.

The trial Judge submitted several questions to the jury, which with the answers were:

1st. Were the defendants guilty of negligence in not guarding the gearing or cogwheels? Answer, "Yes."

2nd. Was the injury to the plaintiff caused by the said gearing or cogwheels not being guarded? Answer, "Yes."

3rd. If the non-guarding constituted a defect, did the plaintiff know of such defect, and did he fail without reasonable excuse to give or cause to be given within a reasonable time information thereof to the defendants, or to some person superior to himself in the service of the defendants?

Answer "No; according to the evidence the plaintiff did not consider the non-guarding a defect, nor did the plaintiff warn the defendants as to the dangerous state of the wheels."

Statement.

4th. Was the alleged defect, if it existed, known to the defendants, or did the defect arise from or had it not been discovered or remedied owing to the negligence of the defendants or of some person entrusted by them with the duty of seeing that the condition or arrangements of the machinery were in proper condition?

Answer. "There existed a defect (by non-guarding) partly through the neglect and partly through the ignorance of the defendants."

5th. Was the accident to the plaintiff caused by his own carelessness or negligence? Answer, "No."

6th. If the defendants are liable at what sum do you fix the damages? Answer, "$750."

The learned Judge upon the findings of the jury entered judgment for the plaintiff.

The defendants moved on notice to set aside the judgment entered for the plaintiff and to have the judgment entered for the defendants.

In Michaelmas Sittings, December 6, 1892, before a Divisional Court composed of MACMAHON and STREET, JJ., *Crerar*, Q. C., and *J. B. Crerar*, supported the motion. There is no liability under the Workmen's Compensation for Injuries Act, as no defect in the machinery was proved to exist, and, the recovery, if at all, must be under the Factories Act, for a breach of duty arising under that Act. The allegation in the statement of claim, and the ground taken by the plaintiff at the trial, was that there was a defect in the machinery by reason of the absence of a cleat; but it was admitted that if a cleat had been there, instead of being a benefit it would have been a source of danger. The plaintiff then contended there was no guard to the cogwheels, but this could not bring the case within the Workmen's, etc., Act, as this would not be a defect in the machinery. There was no breach of any duty imposed by the Factory Act. The duty to fence or guard machinery can only arise where the machinery is dangerous, while here there is no evidence that the cogwheels were danger-

ous. The case of *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 117, is clearly distinguishable, as there it was proved the machinery was dangerous and the plaintiff was not aware of its dangerous character. The defendants were not therefore guilty of any negligence in not guarding the cogs, and it is essential there should be negligence; *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423; *Finlay* v. *Miscampbell*, 20 O. R. 29, 36; *Smith* v. *Baker* [1891] A. C. 325; *Wilson* v. *Merry*, L. R. 1 Sc. App. 341; *Hamilton* v. *Groesbeck*, 19 O. R. 76. But even if there were such breach of duty the present action is not maintainable therefor. The Act provides a penalty for such breach, and the remedy is limited to the penalty, for apart from the penalty there is no common law liability: *Couch* v. *Steel*, 3 E. & B. 402; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441; *Hildige* v. *O'Farrell*, L. R. 6 Ir. C. L. 493; Addison on Torts, 6th ed., p. 76, sec. 74; *Pritchard* v. *Lang*, 5 Times L. R. 639. The next point is that the doctrine of *volenti non fit injuria* applies. The plaintiff was aware of the defect, if any, and voluntarily incurred the risk. The case comes directly within *Thomas* v. *Quartermain*, 18 Q. B. D. 685. The plaintiff, morever, was guilty of contributory negligence, as the evidence clearly shewed he could have avoided the accident by crossing the plank in another manner. Argument.

Lynch-Staunton, contra. It was the plaintiff's duty to go on the place where the accident happened; it was the only way he could get on the shaft. The evidence clearly shews that the cogwheels were dangerous and should have been guarded, and the omission to guard them was therefore a defect in the machinery, for the Act expressly says that dangerous machinery must be guarded. There was clearly a breach of the statutory duty, and the jury have expressly found that the defendant was guilty of negligence in omitting to have it guarded. It is no answer that the defendant knew of the defect for he did not think it was dangerous; but in any event that would not relieve the defendant from the per-

Argument. formance of the duty imposed on him by the statute: *Thompson* v. *Wright*, 22 O. R., 127. The Factory Act can be read in connection, with the Workmen's, etc., Act, and it was so held in *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 117, and that case cannot be distinguished from the present, as there the plaintiff knew of the danger, and there was no finding of negligence. The doctrine of *volenti non fit injuria* does not apply here, as the evidence failed to shew that the plaintiff voluntarily incurred the risk; and moreover it does not apply where there is a breach of a statutory duty: *Smith* v. *Baker*, [1891] A. C. 325; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Blamires* v. *Lancashire and Yorkshire R. W. Co.*, L. R. 8 Ex. 283; *Dean* v. *Cotton Co.*, 14 O. R. 119; *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423. There was no evidence of contributory negligence. It is quite apparent from the evidence that the plaintiff could not have got to the place where the accident happened in other manner than he did.

March 4th, 1893. MacMahon, J.:—

From the evidence of the plaintiff himself the want of a cleat was not a defect in the ways, plant, etc., as he admitted a cleat on the plank where it projects beyond the tanks would have been a source of danger.

The only defect therefore alleged to exist in the machinery with which we have to deal, is the non-guarding of the cogwheels, and in regard to which, it is stated in the notice of motion, and urged at bar, that there was no evidence that the machinery was dangerous; and, if not dangerous, there was no duty cast upon the defendants to guard it.

It is true the plaintiff stated he did not see there was any danger, and also that it did not strike him that the cogwheels were dangerous if left unguarded. And the jury in answer to the third question found that the plaintiff did not consider the non-guarding a defect.

However by "The Factories Act," R. S. O. ch. 208, sec.

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MacMahon, J.

14, "It shall not be lawful to keep a factory so that the safety of any person employed therein is endangered, * * * and whoever so keeps a factory shall, upon conviction thereof incur and be liable to imprisonment," etc.

And by section 15, "In every factory: (1) All belting, shafting, gearing, fly-wheels, drums and other moving parts of the machinery * * * and all other like dangerous structures * * shall be, as far as practicable, securely guarded."

The jury found that the defect existing was the non-guarding of the cogwheels, which defect was occasioned partly through the neglect and partly through the ignorance of the defendants.

All "shafting" and "gearing" are by section 15, sub-sec. 1 of the Factories Act declared to be "dangerous structures" and "shall be, as far as practicable, securely guarded." If "dangerous," unless guarded, then there was a "defect" in the "condition of the machinery" within sec. 3, sub-sec. 1 of the Act to secure compensation to workmen in certain cases. R. S. O. ch. 141.

The particular question I am now considering was dealt with by Osler, J. A., in delivering the judgment of the Court of Appeal in *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 117, at p. 122, where he said: "I do not think that the plaintiff is obliged to rely upon the provisions of the Factory Act and amendments as to fencing of machinery, although they may properly be invoked in support of the judgment. I think the question as to whether the shafting was machinery, which under the Act was required to be fenced, was raised at the trial, but not in the view of maintaining the action as one for injuries caused by negligence consisting in the omission to comply with a statutory duty. The Act requires such a piece of machinery as that in question to be as far as practicable securely guarded. That being so, I can see no reason why the absence of a guard, where the Act requires it, should not be deemed a defect in the condition or arrangement of the machinery, and thus the finding of

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the jury may also be supported, not necessarily upon the meaning to be given to the term "arrangement" as used in the Workmen's Act, but as a finding that the condition or arrangement of the machinery was defective by reason of the omission to comply with the provision of the Factory Act."

See also *Thompson* v. *Wright*, 22 O. R. 127, where the Chancery Divisional Court held that the failure to furnish a guard was *per se* evidence of negligence on the part of the defendants.

In the present case the jury have found the defendants were guilty of negligence, a question which was not submitted to the jury in *McCloherty* v. *Gale Manufacturing Co.*; and upon the absence of which finding Burton, J. A., based his dissenting judgment.

Two of the other grounds urged before us were: that the plaintiff had voluntarily incurred the risk attending the employment; and that the plaintiff did not warn the defendants that the machinery was dangerous.

It will be convenient to consider these two grounds together.

Mr. Crerar strongly relied upon *Thomas* v. *Quartermain*, 18 Q. B. D. 685, as an authority that the plaintiff could not recover, even if a defect in the machinery or its arrangement existed by reason of the non-guarding of the cog-wheels, as he was aware for a long time of such defect and voluntarily incurred the risk of the employment.

Wills, J., in *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423, draws attention to a feature (evidently overlooked by counsel) in the judgment of the two justices in *Thomas* v. *Quartermain*, who thought the maxim *volenti non fit injuria*, did not apply at all where the injury arose by a direct breach by the defendant of a statutory duty. And Grantham, J., in his judgment, agreeing with Mr. Justice Wills says, "How then can the defendant rely on the decision in that case (*Thomas* v. *Quartermain*) when the learned judges in the Court of Appeal say that it is not to apply to cases where there is a statutory obligation im-

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posed on the defendant." The case of *Blamires* v. *Lancashire and Yorkshire R. W. Co.*, L. R. 8 Ex. 283 is referred to by Mr. Justice Grantham as shewing that where there is a breach by the defendants of a statutory obligation to have a communication between the guard of a train and the passengers, was evidence against them, in an action of negligence, although the non-compliance with the statutory obligation was not the proximate cause of the accident. Mr. Justice Wills expressed the opinion in the *Baddeley Case* that if the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed upon him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as himself, such an agreement would be a violation of public policy, and ought not to be listened to.

However the question is set at rest by the amendment to the Workmen's Act by 53 Vic. ch. 23, sec. 7 (O.), * which provides that in an action against his employer a workman shall not by reason only of his continuing in the employment with the knowledge of the defect, negligence, act, or omission which caused his injury, be deemed to have voluntarily incurred the risk of the injury.

As said by Osler, J. A., in *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. at p. 120: "This section may almost be said to have declared, as it were, by anticipation (for there is no corresponding section in the English Act), the law as laid down in the House of Lords in the recent case of *Smith* v. *Baker* (1891) A. C. 325."

The defendants had knowledge of the defect independently of their workman—the plaintiff. The defendants, as the owners of a factory, are assumed to know the law, and are obliged to comply with it; and where a statutory obligation exists a non-compliance with it is evidence of negligence. And the jury have found expressly that the defendants were guilty of negligence; and in addition that the plaintiff was not aware of any defect in the

* Now 55 Vic. ch. 30, sec. 6, sub-sec. 3.

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machinery or its arrangement by reason of the cogwheels being unguarded.

The remaining grounds undisposed of are: That the Judge should have asked the jury to find whether the plaintiff could not have availed himself of another method of crossing from the plank way, which would have rendered the accident impossible. And that the finding of the jury that there was no contributory negligence was perverse.

The learned Judge could not have put a question to the jury in the form desired by the defendants' counsel. In the absence of any provision by a step or steps to cross and recross the shafting, there were only two ways of doing so; one being that used by the plaintiff, who being a tall man could step over the shafting and had adopted that means, when crossing it, and the other way, which men of smaller stature could use, of stepping up on the edge of the tank, and, after putting one leg over, jumping down to the plank.

There was no absolute safety in either method of crossing. It was a question of comparative degrees of safety with which the jury had to deal when they came to consider whether the plaintiff had been guilty of contributory negligence in crossing the shafting as he had been accustomed to do for over two years.

"The only peculiarity of contributory negligence is that it proceeds on the assumption that both plaintiff and defendant have been guilty of some breach of duty; and the inquiry is limited to which of the two by exercising ordinary care might last have prevented the occurrence; while in the case of ordinary negligence the inquiry is whether the defendant was guilty of want of ordinary care, and, if so, whether after his neglect any other agency whatever had or might have diverted the course of the operations. We then conclude that contributory negligence is but a case of negligence not dependent on any different rule of law, but pre-supposing the limitation of the general question of negligence to an inquiry to which of two persons its final impulsion should be imputed." Beven on Negligence, 136-7.

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MacMahon, J.

The jury having found the defendants guilty of negligence, as they were perfectly justified in doing, had then to consider whether the plaintiff through some negligent act of his own was the proximate cause of the injury he sustained. On that issue the jury have found in the plaintiff's favour. We see no ground whatever for setting aside the findings of the jury or the judgments directed to be entered thereon. The motion must therefore be dismissed with costs.

Since writing this judgment we have been referred by the plaintiff's counsel, to *Stanton* v. *Scrutton & Co.*, 9 Times L. R. 236, just decided, which confirms the opinion above expressed.

STREET, J.:—

I agree in the conclusion that this motion should be dismissed. The building in which the accident occurred was within the provisions of the Factories Act, R. S. O. ch. 208, and the cogwheels which caused the accident were in my opinion a part of the machinery required to be guarded in order to comply with the 1st sub-section of the 15th section of the Act. They were not so guarded, and the jury have found that the injury to the plaintiff was caused by the absence of a guard, and that the defendants were guilty of negligence in not guarding them.

Under the authority of *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 117, the absence of a guard, which should have been present under the Factories Act, is evidence to go to the jury of a defect in the condition or arrangement of the machinery; and the jury here have found that the want of a guard was a defect.

Under the authority of *Finlay* v. *Miscampbell*, 20 O. R. 29 the absence of a guard under such circumstances is evidence of negligence to go to the jury; and they have found that it constituted negligence.

The principle *volenti non fit injuria* has been held not to apply where the accident has been caused by the

Judgment. Street, J.

defendants' breach of a statutory obligation: *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423. And even if applicable the knowledge of the workman of the existence of the defect has been considered to be merely an element in the question of contributory negligence: *Thomas* v. *Quatermain*, 18 Q. B. D. 685.

In my opinion the motion should be dismissed with costs.

[COMMON PLEAS DIVISION.]

WEEGAR v. THE GRAND TRUNK RAILWAY COMPANY.

Negligence—Railways—Evidence—Sufficiency of—Non-suit—New trial.

The plaintiff was an assistant yardsman in the defendants' employment, whose duty it was to marshal and couple cars subject to the orders of the conductor of a shunting engine, to whose orders the engine-driver was also subject. According to the plaintiff's evidence, while attempting to carry out specific instructions received from the conductor, which the latter denied, as to coupling certain cars, the conductor negligently allowed the cars to be backed up, thus driving the cars together and injuring the plaintiff. The plaintiff had for a long time been in the defendants' employment, was thoroughly experienced in his duties, had never received specific instructions before, and knew before he went in between the cars that the engine was in motion backing up, and only eight feet distant. On a motion to set aside a verdict found by the jury for the plaintiff, the Court, though not satisfied with the verdict, was of opinion that there was evidence for the plaintiff to be submitted to the jury, and therefore refused to interfere either by granting a non-suit or a new trial.

Statement.

THIS was an action tried before MACMAHON, J., and a jury at the Toronto Autumn Assizes for 1892, when on answers to questions left to the jury judgment was entered for the plaintiff for the sum of $1,000 and costs.

The plaintiff was assistant yardsman in the employ of the defendant company, and had been in such employ for several years, his work being at the time of the accident the marshalling of cars and placing them in order subject to such commands as he might receive from Andrew Garland, the conductor of the shunting engine. While coupling cars on the 11th November, 1891, his hand being

between the ends of two drawbars was crushed by the cars being pushed together by the shunting engine, under the circumstances stated in the judgment. Statement.

The defendants moved on notice to set aside the judgment entered for the plaintiff, and to have a nonsuit or judgment entered for the defendants, on the ground that there was no evidence of negligence to submit to the jury.

In Hilary Sittings, February 7th, 1893, before a Divisional Court, composed of GALT, C. J., and ROSE, J.,

Osler, Q. C., supported the motion. The verdict for the plaintiff cannot stand, as it is against the weight of evidence, and further no negligence was proved. The verdict is based on the evidence of the plaintiff alone, and against the evidence of four of his fellow employees, whose evidence cannot be impeached. It is contended that the plaintiff was acting under Garland's order in making the coupling. It was no part of Garland's duty to explain to the plaintiff how the coupling was to be done; and it would have been superfluous to have done so, as the plaintiff was an experienced coupler, and always exercised his own judgment; and it is incredible that he should have received specific instructions on this particular occasion. The cause of the accident, however, was not the manner in which the coupling was done, but through the train moving down on the plaintiff while in the act of coupling; and Garland was not responsible for this. In any event, there should be a new trial.

W. R. Smyth, contra. The evidence shews that the act which the plaintiff had to perform was something out of the ordinary case of coupling cars. The plaintiff was in the act of coupling the cars when he was called away by Garland to another part of the yard, and on his coming back, he found the pin had got jammed. Garland, under whose orders the plaintiff was, instructed him how to make the coupling. Garland also had charge of the engine; and

Argument.

while the plaintiff was attempting to carry out Garland's instructions, and depending on Garland to regulate the movement of the engine, Garland negligently allowed the engine to be backed up without warning the plaintiff, and the accident thereby occurred. There certainly cannot be a nonsuit, as there was evidence to submit to the jury. The plaintiff was bound to obey the orders of Garland, and the injury was the result of obeying such orders: *Wild* v. *Waygood* [1892], 1 Q. B. D. 783; *Phœnix Insurance Co.* v. *McGhee*, 18 S. C. R. 61. The maxim *volenti non fit injuria* does not apply, where, as here, the plaintiff is not a free agent: *Smith* v. *Baker* [1891], A. C. 325, 336. The Court should not grant a new trial, unless the verdict be such as no reasonable men could have arrived at; which is certainly not the case here.

March 4th, 1893. ROSE, J.:—

For the purpose of determining the motion for nonsuit the following evidence, which was submitted to the jury, must be considered; first, that Garland, who was called the conductor of the shunting engine, was the plaintiff's superior officer, and the plaintiff was subject to any orders received from Garland: that on the day in question Garland walked with the plaintiff to where the two cars that were to be coupled were standing, the drawheads being about four inches apart, and gave the plaintiff the following specific directions, quoting the language of the plaintiff as used in the witness box: "You go in and change that link from drawbar to drawbar, and, after you change it drop the big mogul pin and place the little sharp pointed pin on the drawbar from which you take the link, so that when the engine is coupled on it will make itself."

Garland, if this is true evidence, knew exactly the work to be done by the plaintiff; and also, as further stated by the plaintiff, that in shifting the link it would be necessary for him to use his fingers, catching hold of the link for the purpose of shifting it from the forward to the rear of the car,

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Rose, J.

after having taken out the sharp pointed pin, so as to enable him to drop in the mogul pin, and thus place the sharp pointed pin on the drawbar, so that the action of the two cars coming together when the forward car was propelled by the engine would cause the sharp pointed pin to fall into place, and thus make the coupling, in one sense, automatically. As the plaintiff went in between the cars to execute the orders of Garland, Garland moved forward towards the engine, which was then to the knowledge of both Garland and the plaintiff backing down for the purpose of assisting in making the coupling. Garland was, as I have said, called the conductor of the engine. He had control of it. The engine driver was subject to his orders, and testified that he was looking at Garland waiting for his orders, and that if he had received instructions to stop the engine he would have done so. So that we may view Garland as in effect managing the engine. When the engine therefore backed against the cars and drove them together, it must be taken on this evidence that it was in accordance with the will of Garland that they should be thus driven together.

The plaintiff says that it was negligent in Garland to allow the cars to be shoved together, when he knew the work in which he was engaged, and the manner in which it would be necessary to execute it; and that Garland should have stopped the engine until he (the plaintiff) had executed the order according to the specific instructions, and had come out from between the cars and told Garland that all was right and ready for the engine to drive the cars together.

The question is, whether or not this was evidence of negligence to be submitted to the jury.

It has been argued with much force that it was a very singular thing that Garland should give specific instructions to a man who had been many years in the service of the company, and who understood his duties quite as thoroughly as Garland understood them, and that this order should have been given thus specifically on this occasion and on no other previous occasion.

Judgment.

Rose, J.

It was further urged upon us, that as the plaintiff knew that the engine was in motion backing towards the cars until only eight feet distant, when the plaintiff went in between them, or in any event did not know that the engine had come to a standstill, and did not request Garland to stop the engine, and had received no promise from Garland that he would stop it, his placing his hand between the drawbars only four inches apart was taking his chances, and was in fact such negligence on his part as prevented him recovering; and thus, on his own showing, entitled the defendant company to judgment.

There is much potency in this argument; and, I confess, that one does not readily come to a conclusion in favour of the plaintiff. But the difficulty is probably from confusing one's opinion as to the right of the plaintiff to have evidence submitted to the jury with the opinion as to the conclusion which should be arrived at upon such evidence.

I confess I should have difficulty in coming to a conclusion in the plaintiff's favour upon the evidence which I have indicated; but that does not enable me to determine that there was not evidence to be submitted. I think that if Garland knew the space between the drawbars, and if it must be assumed that the drawbars being so close to each other it would be necessary in shifting the link to use the fingers, and, if he knew that the plaintiff was executing his order to shift the link, and if he was in control of the engine so that whether it stopped or not depended upon his will, these are facts which could not be withdrawn from a jury to be considered by them in arriving at a conclusion as to whether there was or was not negligence.

As to the motion for a new trial.

The contention urged by the counsel for the defendants, to which I have above referred, added to the evidence of the witnesses that Garland was not with the plaintiff when he reached the cars which he was coupling at the time of the accident, makes a strong case for the defendants. But the jury have chosen to believe the plaintiff and to dis-

Judgment.

Rose, J.

believe Garland, the credit to be attached to Garland's evidence being attacked by the evidence of the plaintiff's wife; and I do not see what right we have to interfere. If the plaintiff was telling the truth, there was evidence to be submitted to the jury which supports their finding; and why send the case back for a new trial in order that the question of credibility may be retried. The case has been heard and disposed of before the chosen forum. We know nothing of the demeanour of the witnesses or their manner of giving evidence, nor have we any means of judging as to which of the witnesses were telling the truth. It is not our province to determine the issue; and although not quite satisfied with the result, I do not see any principle upon which we can interfere.

The motion must be dismissed with costs.

GALT, C. J., concurred.

[COMMON PLEAS DI[illegible]SION.]

REGINA v. MCCAY.

Intoxicating liquors—Liquor License Act—Druggist—Conviction for allowing liquor to be consumed on the premises—Validity of.

It is an offence under the Liquor License Act, R. S. O. ch. 194, and amendments thereto, for a chemist or druggist to allow liquor "sold by him or in his possession to be consumed within his shop by the purchaser thereof," and it is not essential that he should be registered.

A conviction in the above form does not charge an alternative offence.

The adjudication and conviction, besides imposing the money penalty under sec. 70, further imposed imprisonment for three months, as provided by that section.

The Court differed as to the validity of the term of imprisonment imposed, but held that in any event the conviction could be amended under 53 Vic., ch. 37, sec. 27 (D.), so as to comply with sec. 67 of the Summary Convictions Act.

Statement. THIS was a motion to make absolute a rule *nisi* to quash a conviction of the defendant by the police magistrate of the town of Woodstock, for that being a druggist, he did on the 20th of October, 1892, "unlawfully allow liquor sold by him, or in his possession, to be consumed within his shop by the purchaser thereof."

In Hilary Sittings, 17th of February, 1893, before GALT, C. J., ROSE, and MACMAHON, JJ.,

Du Vernet supported the motion. No offence under the Act was proved. The charge is not for selling or not recording, but for allowing liquor to be consumed on the premises. Section 52 of the Liquor License Act, R. S. O. ch. 194, authorizes chemists and druggists to keep and have liquors for sale for strictly medicinal purposes in packages of not less than six ounces without any restriction; but there must be a doctor's certificate for the sale of a larger quantity. There is no prohibition to the liquor being consumed on the premises. The prosecution rely on section 60, but that section only applies to persons having a shop license; and see form 9. It has been expressly held that chemists and druggists are not required to take out a license; and fur-

Argument.

thermore, neither the information nor the conviction state that a license was required. Section 7 of 55 Vic. ch. 51, does not create any liability. Its language is doubtful and ambiguous, and any ambiguity must be construed in favour of the defendant: Maxwell on Statutes, 2nd ed., 319, where the cases are collected. The next objection is, that in the conviction the offence is stated in the alternative, namely, unlawfully allowing liquor sold by defendant or in his possession, to be consumed, etc., which invalidates it: *Cotterill* v. *Lemprière*, 24 Q. B. D. 634. Then the evidence does not shew that the defendant was a registered chemist or druggist; and further, there was no power to award imprisonment for three months in default of payment of the fine imposed: *Regina* v. *Scott*, 20 O. R. 646. The evidence disproves the charge, for the defendant shews that he merely prescribed for the purchaser, who complained of illness.

Langton, Q. C., contra. The magistrate decided on the facts before him, and his decision cannot be questioned on the merits. He has expressly found that the defendant sold liquor to the extent of one and a-half ounces, which was consumed on the premises, though it is immaterial what the quantity was. Section 52 provides for the sale by a chemist or druggist, of intoxicating liquors under certain restrictions, for the sale of which he would otherwise have to procure a license; and sec. 60 prohibits any consumption on the premises of such liquors. Sec. 33, sub-sec. 3 shews that "intoxicating" liquors are referred to by the words "liquors * * for the sale of which a license is required" in sec. 60; any other construction would render nugatory the words "no chemist or druggist" in sec. 60, because a chemist or druggist is not required to take out a license for the sale of liquors which he may sell under sec. 52. The previous legislation on the subject bears out this view: *Regina* v. *Denham*, 35 U. C. R. 503. The conviction is not in the alternative. It does not include two offences; it is all one offence; but even if there are two offences, that would not invalidate it: *Rodgers*

Argument. v. *Richards* [1892], 1 Q. B. 555. It is not necessary that the defendant should be licensed. The Act refers to any druggist or chemist. Then as to the conviction imposing imprisonment for three months in default of payment of the fine, the Court can amend the conviction under 53 Vic. ch. 27 (D.)

Du Vernet, in reply. You cannot amend the conviction so as to alter the penalty. If the 60th section can be made to apply to the defendant at all, it would be only in case he took out a shop license, and there is nothing to prevent a chemist or druggist taking out a shop license.

March 4th, 1893. MACMAHON, J :—

There was ample evidence of the sale and consumption of liquor on the premises to justify the conviction of the defendant.

Sub-sec. 1 of sec. 52 of the "Liquor License Act," R. S. O. ch. 194, as amended by 55 Vic. ch. 51, sec. 7 (O.), provides: "Chemists and druggists, duly registered as such under and by virtue of 'The Pharmacy Act,' may keep and have liquors for sale for strictly medicinal purposes, in packages of not more than six ounces at any one time, except under certificate from a registered medical practitioner," etc.

And by the 60th section: "No person having a shop license to sell by retail, and no chemist or druggist shall allow any liquors sold by him or in his possession, and for the sale of which a license is required, to be consumed within his shop, or within the building of which such shop forms a part, * * * or by any other person not usually resident within such building," etc.

The clause in 55 Vic., above referred to, amending the 52nd section of the Act, is not only much involved, but it is ungrammatical, and therefore rendered somewhat difficult of construction.

The 60th section is also not framed so as to clearly express the intention of the legislature, and one is left to gather what the intention is from previous legislation, and from other sections of the Act.

When the Act respecting "Tavern and Shop Licenses," 36 Vic. ch. 34, sec. 1 (O.), was passed, it enumerated all those who were prohibited from selling or keeping liquors for sale without a license; and then there was this exception: "But this shall not apply to * * any chemist or druggist duly registered as such, under and by virtue of the 'Pharmacy Act of 1871,' who keeps or has such liquors for strictly medical purposes only." Judgment. MacMahon, J.

When the amendment and consolidation of the Liquor Acts was made by 37 Vic. ch. 32, sec. 20 (O.), it was provided that "No person having a shop license to sell by retail, shall allow any liquors sold by him, or in his possession, and for the sale of which a license is required, to be consumed within his shop," etc.

This 20th section was amended by 40 Vic. ch. 18, sec. 10 (O.), by adding after the word "retail" the words, "and no chemist or druggist," so that the section after amendment would read: "No person having a shop license to sell by retail, and no chemist or druggist, shall allow any liquor sold by him, * * and for the sale of which a license is required to be consumed," etc.

The 60th section of the Liquor License Act, R. S. O. ch. 194, is a literal transcript of sec. 20 of 37 Vic. ch. 32 (O.), as amended.

Chemists and druggists did not require a license to sell liquor for medicinal purposes. And although not requiring a license, the enactment prohibiting their permitting liquor sold by them to be consumed in their shops, or on the premises, is introduced into the clause of a statute which applied solely to persons having a shop license to sell by retail; thus shewing that chemists and druggists, although permitted to sell without a license to the extent and under the restrictions contained in section 52, were placed in the same category, and liable to a penalty for permitting liquors sold by them to be drunk on their premises, as a person having a shop license would be.

The object of the legislature was no doubt to prevent chemists and druggists from doing that which actually

Judgment. MacMahon, J.

took place in this case, namely, under the guise of prescribing for illness, disposing of liquor to be consumed on the premises.

As already remarked, section 60 is not framed with that precision that would be expected in an enactment of that character. But the object of the legislature is apparent when we read back to the sources of the legislative enactment we are called upon to construe. And I have given above what I conceive to be the fair sense and meaning of the language in the 60th section of the Act.

To do otherwise than I have done would, I am afraid, be to misread the statute, and misunderstand its purpose: *per* Martin, B., in *Nicholson* v. *Fields*, 7 H. & N. 810, and this would be to defeat, not promote the object of the legislature: *Regina* v. *Hodnett*, 1 T. R. 96, 101; Maxwell on Statutes, 2nd ed., 319.

For any infraction of the 60th section the penalty is "in money and costs as provided by section 70 of this Act."

The adjudication and first conviction follow the 70th section of the Act in imposing a fine of $50 and costs. But the adjudication and conviction provide also for imprisonment under the 70th section which the magistrate had no authority to impose. The punishment by imprisonment on default of payment of the fine and costs would be under section 67 of the Summary Convictions Act, which enables the magistrate, in the event of no sufficient distress, to commit for a term not exceeding three months.

The amended conviction attached to the return provides for distress on nonpayment of the fine and costs, and in default of distress two months' imprisonment.

In *Regina* v. *Scott*, 20 O. R. 646, 649, 650, Mr. Justice Rose deals with the question of distress on nonpayment of the fine and costs in such a case as this.

The amended conviction is proper in form, and the imprisonment imposed in default of distress is not in excess of what is authorized, but it does not follow the adjudica-

Judgment. MacMahon, J.

tion. As the magistrate was by the 67th section of the Summary Convictions Act empowered to adjudge imprisonment for three months, the conviction may be so amended under the power conferred by 53 Vic. ch. 37, sec. 27 (D.), amending section 87 of the Summary Convictions Act: See *Regina* v. *Flynn*, 20 O. R. 638.

There is nothing in the ground urged that the words taken from the 60th clause of the Act, "Sold by him or in his possession," in the information and conviction, charges an alternative offence. Of course before there can be an offence the chemist or druggist charged must either have sold the liquor which was consumed, or he must have had in his possession the liquor which was consumed. But the gist of the offence is not the sale—because the defendant as a druggist was entitled to sell without a medical requisition up to six ounces—but that he permitted liquor to be drunk on his premises, which liquor he by law had a right to sell.

The only other ground is that the evidence does not shew the defendant to be a registered chemist or druggist.

The person to whom the liquor is said to have been supplied, stated that the defendant kept a drug store in Norwich, and that the liquor was sold to him by the defendant.

The defendant gave evidence on his own behalf, and while denying that he had supplied any liquor on the occasion in question, admitted having compounded for that person a mixture to be taken medicinally, as such person complained of being ill.

There is evidence he kept a drug shop; that he practised as a chemist or druggist; and under the 19th section of the Pharmacy Act, R. S. O. ch. 51, he could not have compounded prescriptions unless he was a person registered under the Act. However the 60th section of the Act applies to "any chemist or druggist."

The motion must be dismissed with costs.

Judgment.

Rose, J.

ROSE, J.:—

I am somewhat at a loss to understand the force and effect of the new section 52 introduced by 55 Vic. ch. 51, sec. 7 (O.). My learned brother has set it out in his judgment. Nothing is said in the first sentence about the sale of liquor, thus differing from the old section. Is it meant that a certificate is required to enable the chemist or druggist to "keep and have liquors for sale in packages of more than six ounces?" If so, what is to be the form of certificate, and when it is obtained, what quantity or quantities may a medical practitioner authorize the chemist or druggist to keep?

But not staying to criticise the language of the section, I think we may, for the purpose of disposing of this case, arrive at a meaning to be derived from the legislation by pursuing a somewhat similar course to that followed by my learned brother.

By sections 49, 50, the sale or keeping for sale of liquors without a license is prohibited.

By section 52 chemists and druggists duly registerd may keep and have for sale liquors for strictly medicinal purposes, in packages of not more than six ounces at any one time; but by section 60 no chemist or druggist shall allow any liquors sold by him, or in his possession, to be consumed within his shop.

The meaning of the word "liquors" is defined by section 2, sub-section 1, to include all intoxicating liquors; and by section 60 the word "liquors" is qualified by the words "and for the sale of which a license is required." These words do not in my opinion, for the purpose of this section, add to or take away from the meaning of "liquors," as defined by the Act. They may not be apt words as applied to chemists or druggists, and probably would not have appeared had not the section, as pointed out by my learned brother, by amendment been extended to chemists and druggists.

Judgment.
Rose, J.

I read the words "liquors * * for the sale of which a license is required," as meaning intoxicating liquors; for by section 49 a license is required for the sale of intoxicating liquors. I confess that I am driven to this construction by the fact that otherwise a druggist might sell any number of packages of six ounces each, and allow them to be drank on the premises without a license and without a certificate.

In this view it is immaterial whether the quantity consumed was more or less than six ounces.

It is also immaterial whether the liquor was sold by the defendant, or was simply in his possession; and the conviction was therefore right in declaring him guilty of allowing liquor, *i. e.*, intoxicating liquor, to be consumed within his shop by the purchaser thereof. Such was the offence, and I agree that it made no difference that the liquor was described as either "sold by him or in his possession."

I see nothing in the objections to the term of imprisonment. Section 85 does not apply: *Regina* v. *Scott*, 20 O. R. 646. And if there were any defect it would be the subject of amendment: *Regina* v. *Flynn*, 20 O. R. 638.

As to the objection that it was not shewn that the defendant was a registered chemist or druggist, I am of the opinion that it was not necessary to give evidence on the point. Section 60 says: "No chemist or druggist." It would be no defence to prove that the defendant was duly registered. The statute says whether registered or unregistered; whether you have the right to carry on business or not; whether you lawfully have and sell or not, it shall be an offence under section 60 if you, carrying on business as a chemist or druggist, allow intoxicating liquor sold by you or in your possession, to be consumed in your shop.

In this view the provisions of section 52 are not material to the determining of this case.

The motion must be dismissed with costs.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA v. HODGE ET AL.

Intoxicating liquors—Liquor License Act—R. S. O. ch. 194, sec. 131—Search warrant for liquors—Obstructing officer executing—Punishment for offence—R. S. C. ch 162, sec. 34—Indictment—Legality of warrant.

The defendants were committed for trial for obstructing a peace officer acting under a search warrant issued on an information charging that there was reasonable ground for the belief that spirituous, etc., liquors were being unlawfully kept for sale contrary to the Liquor License Act in an unlicensed house :—

Held, that the search warrant must be deemed to have been issued under section 131 of the Act, and that section containing no provision for punishment in such case, the proceedings against the defendant must be by indictment for a misdemeanour under R. S. C. ch. 162, sec. 134.

The Court refused to determine the validity of the warrant on a motion to set aside the commitment, as it could be raised on the trial of the indictment if a true bill were found.

Statement. THIS was a motion on behalf of the defendants to set aside their commitment for trial.

The charge against them was for unlawfully obstructing one Robert Slemin, a police constable, in the performance of his duty.

On the 15th of July, 1892, a search warrant was issued directed to the inspector of licenses and to the constables and other peace officers of the city of Toronto, founded on an information said to have been laid by Robert Slemin, police inspector, "before me, John Baxter, J. P., Esquire, magistrate in and for the said city of Toronto, that there is reasonable ground for belief that spirituous or fermented liquor is being unlawfully kept for sale or disposal contrary to the Liquor License Act, in a certain unlicensed house or place within my jurisdiction, that is to say, in the house or premises of Mrs. Hazlett, known as No. 24 Widmer street, in the said city of Toronto." The warrant, which was under seal, then authorized and required a search for liquor on the said premises, and was signed "John Baxter, J. P., in and for the city of Toronto."

It was for obstructing Slemin in the execution of this warrant that the charge was laid against Hodge and Mrs.

Hazlett; and on the hearing of the charge before the police magistrate on the 29th July, they were committed for trial. Statement.

The order *nisi* asked that the commitment for trial of Albert S. Hodge and Mary E. Hazlett be set aside with costs on the grounds, amongst others:—

1. That sec. 130, sub-sec. 2 of R. S. O. ch. 194, provides a special summary procedure where an officer attempting to search, armed with a search warrant, is obstructed by any inmate of the house or other person, and excludes the method by indictment.

2. That the search warrant under which the constable acted was illegal, because it does not shew upon its face that the justice of the peace who issued it was acting in the illness, absence, or at the request of the police magistrate.

3. That the search warrant improperly describes Mr. Baxter, the justice who issued the search warrant, as a police magistrate.

4. That assaults, resistances, or obstructions of constables or other officers acting under the authority of the Liquor License Act, do not come under R. S. C. ch. 162, sec. 34.

In Hilary Sittings, December 6, 1892, before MACMAHON and STREET, JJ., *DuVernet*, supported the motion.

No one appeared to shew cause.

The argument sufficiently appears from the judgment.

March 4th, 1893. MACMAHON, J.:—

Had this been a charge under sec. 130 of R. S. O. ch. 194, effect would have to be given to the argument, that the magistrate must proceed summarily under the provisions of section 70 of that Act and, upon conviction fine, and in default of payment cause the defendant to be imprisoned.

The officer acting under sec. 130, sub-sec. 1, may "Enter into any and every part of any inn * * wherein refreshments are sold, or reputed to be sold, whether under license or not, and may make searches in every part thereof," etc. And by sub-sec. 2, "Every person being therein * * who refuses or fails to admit such officer * *

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MacMahon, J.

demanding to enter *in pursuance of this section* in the execution of his duty, or who obstructs or attempts to obstruct the entry of such officer * * or any such searches as aforesaid, shall be liable to the penalties and punishments prescribed by section 70 of this Act."

An officer proceeding under the authority conferred by section 130, could not force an entrance into premises by breaking the lock or fastening of the door; nor could he break the lock of any closet, cupboard, box, etc., in his search for liquor. In order that these extreme measures may be taken, it is necessary that an information should be laid under section 131 by an officer, that there is reasonable ground for belief that spirituous or fermented liquor is being kept for sale, or disposal, contrary to the provisions of the Liquor License Act in an unlicensed house, when the justice may grant his warrant to make the search.

The officer acting under the warrant issued in this instance forced the outer door of the premises, and with assistance was endeavouring to search for liquor when they were assaulted and obstructed by the defendants.

There is no provision in the Liquor License Act for the punishment of an offender under section 131 any more than there is for the punishment of an offender who obstructs an officer while in the discharge of his duty in endeavouring to levy the amount of a fine inflicted for an infraction of the Act, or for the arrest of a person who in default of payment of such fine was by a warrant of commitment directed to be imprisoned.

There being no provision in the Liquor License Act for the punishment of the defendants, they may be indicted for a misdemeanour under R. S. C. ch. 162, sec. 34, for assaulting a peace officer.

The safest course is always where proceedings are instituted before a justice of the peace in the absence, illness, or at the request of the police magistrate, to shew on the face of the proceedings under which of the circumstances mentioned in the statute the justice is acting, as it may prevent unnecessary applications being made to the Court. However, the legislature having authorized a justice of

Judgment.

MacMahon, J.

the peace to act in the illness, absence, or at the request of the police magistrate, it will, I think, be proper in this case to follow the declaration of the Court in *Rex* v. *Simpson*, 1 Str. 46, where the Court said "that where the legislature has given a power the Court will presume that the justices have followed that power unless the contrary appears." There is nothing before us shewing that Mr. Baxter was not acting for the police magistrate under some one of the circumstances provided for by the legislature. I think the maxim *omnia presumuntur esse rite acta* applies.

There was no conviction in this case, the defendants being merely committed for trial, so that if any illegality exists in the search warrant it can be taken advantage of by way of defence on the trial of the defendants.

The cases of *Regina* v. *Gordon* 16 O. R. 64, and *Regina* v. *Lynch*, 19 O. R. 664 (not cited on the argument) have a bearing on the question raised here as to a justice of the peace acting for the police magistrate.

The search warrant does not describe Mr. Baxter as a police magistrate.

The motion will be dismissed without costs.

STREET, J.:—

I agree with my learned brother MacMahon in his opinion that sub-sec. 2 of sec. 130 of R. S. O. ch. 194 does not apply to this case, as the officer alleged to have been assaulted was acting in pursuance of a warrant under section 131 of the same Act.

This being the case, I do not think we should, upon a motion of this kind, determine the question raised as to the validity or invalidity of the warrant under which the officer was acting. That is a matter which will naturally arise upon the trial of the indictment should a true bill be found, and will be determined by the trial Judge, or be made the subject of a case reserved should he deem it proper to raise it in that way.

I agree that the motion should be dismissed.

[COMMON PLEAS DIVISION.]

MILLOY v. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Carriers—Liability as, or as warehousemen.

The plaintiff delivered from time to time a quantity of apples to defendants at their warehouse for the purpose of shipment by their railway. A sufficient quantity having been delivered to fill a car, plaintiff applied for and was by defendants promised one at a named date. In the ordinary course of business, on the barrels being loaded on the car, a shipping bill would have been signed by defendants containing an exemption for liability for loss by fire. The defendants failed to furnish the car at the date specified, and, a fire occurring, the apples were destroyed:—

The Court was evenly divided, GALT, C.J., being of the opinion of the trial Judge, that the responsibility of the defendants was that of carriers and not of warehousemen, and that they were liable for the loss sustained by the plaintiff; while ROSE, J., was of the contrary opinion.

Statement. THIS was an action to recover the value of certain apples delivered to the defendants at their station at Paris, to be forwarded to Toronto.

The action was tried before MACMAHON, J., and a jury, at Toronto, on the 21st November, 1892.

Certain questions were submitted to the jury, which with their answers thereto are set out in the judgment of GALT, C. J.

The learned trial Judge delivered the following judgment on the findings:—

MACMAHON, J.:—

Mr. Osler—notwithstanding the answers by the jury to the questions submitted to them—contended that the plaintiff was not entitled to judgment; his argument being that the evidence was directed to shewing that the railway company had not provided cars for the shipment of the apples according to agreement, and the action was not framed to recover for that default or negligence.

There was evidence given by the agent, and also by the employee who looked after the shipping for the railway company at the Paris station, that there were cars at

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MacMahon, J.

that station by which the apples could have been shipped on the days when, according to the evidence for the plaintiff, he had been promised a car by which to ship.

Where "delivery be made at the warehouse or other place of business of the carrier for as early transportation as can be made in the course of the carrier's business, and subject only to such delays as may necessarily occur in awaiting the departure of trains * * he becomes, the moment the delivery is made, a carrier as to the goods and his responsibility as such at once attaches." Hutchinson on Carriers, 2nd ed. sec. 88.

The jury found there were promises made for two or three days prior to the fire that a car would be provided; the evidence on behalf of the railway company is, it had, during these days cars by which the apples could have been forwarded. When the time arrived that the railway had cars it became from that moment a carrier of the goods—although prior to such time the apples were in their possession merely as warehousemen.

There was the evidence of two witnesses as to a statement made by the agent of the railway company that had the apples been shipped according to orders they would not have been burned.

The judgment must be entered for the plaintiff for amount found by the jury with interest and costs.

The defendants moved to set aside the judgment for the plaintiff, and to enter the judgment for the defendants, or for a new trial upon the grounds: 1. That the judgment was against law and evidence, and, notwithstanding the findings of the jury, should have been entered for the defendants. 2. That there was no evidence on which it could be held the defendants received the goods as carriers; it was the plaintiff's duty to load the apples on the cars, and until that was done the defendants were merely warehousemen, and were not responsible for the loss. 3. For the admission of evidence objected to at the trial.

Argument. There were two other objections, covered by those already mentioned.

In Hilary Sittings, February 7th, 1893, before a Divisional Court, composed of GALT, C. J., and ROSE, J. *Osler*, Q. C., supported the motion. The evidence clearly shews that the apples were delivered to the defendants as warehousemen with the object of their accumulating until there were a sufficient number of barrels to fill two cars, when the defendants were to have the cars ready. There never were a sufficient number of barrels in the warehouse to fill two cars. But even if the arrangement was to furnish one car as the plaintiff contends, and that the defendants had negligently omitted doing so, this would not make defendants liable. It was the plaintiff's duty to select the barrels he intended to ship by that car from the other barrels stored in the warehouse, mark them, and load them on board the car, sign a shipping bill and pay the freight. Had a shipping bill been signed it would have contained an exemption against loss by fire. The plaintiff was well aware of the nature of the shipping bill, as he had made previous shipments. It is quite clear that so long as anything remains to be done by the shipper no liability arises. Negligence on the defendants' part in not furnishing the car would not of itself render the defendants liable as carriers.

Fullerton, Q. C., contra. There was a complete delivery to the defendants as carriers. The contract was that the defendants would have a car ready as soon as there were a sufficient number of barrels to fill the car, and then the defendants' duty as carriers arose. No selection was necessary, as all the defendants had to do was to take from the shed a sufficient number of barrels to fill the car. Nor was it essential that a shipping bill should be signed or the freight paid: Hutchinson on Carriers, 2nd ed., sec. 88; Beven on Negligence, ed. 1889, 618, 620; *Lovell* v. *London, Chatham and Dover R. W. Co.*, 34 L. T. N. S. 127; *Leach* v. *South-Eastern R. W Co.*, 34 L. T. N. S. 134

March 4th, 1893. GALT, C. J.:— Judgment. Galt, C.J.

The action is brought against the defendants to recover the value of certain apples delivered at their station at Paris to be forwarded to Toronto.

The freight sheds of the defendants were destroyed by a fire for which the defendants are not to blame; and the question at issue is, whether at the time of the fire the apples were in possession of the defendants as common carriers or as warehousemen.

The facts are briefly as follows: The servant of the plaintiff by his instructions carted a quantity of apples from his orchard to the station of the defendants. It was not disputed that when those apples were brought it was with the intention that they should be forwarded to Toronto at some future date. They were received at the station and placed in the freight sheds; and it was admitted by the plaintiff that when they were first received they were not delivered to and accepted by the defendants as common carriers; they were in their possession as warehousemen. The servant continued from day to day to bring in apples; and the allegation on behalf of the plaintiff is that when a sufficient quantity, namely, some 150 or 160 barrels had been delivered, an application was made to the agent of the defendants for a car in which to ship the apples, which he alleges was promised by the agent. The car was not furnished on the day promised, and on that night the freight sheds were destroyed by fire.

The promise is disputed by the defendants.

The contention on behalf of the plaintiff is that as soon as his agent had applied for a car and such application had been accepted, the position of the defendants was changed, and the apples were thenceforth in their possession as common carriers, and not as a warehousemen.

The law bearing on this subject is very clearly and briefly stated by Grover, J., in *O'Neill* v. *New York Central, &c., R. W. Co.*, 60 N. Y., Court of Appeal, 138, at p. 141: "A carrier is responsible as such only when goods are delivered and accepted by him for immediate

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transportation in the usual course of business. If delivered awaiting further orders from the shipper before carriage, he is, while they are so in his custody, responsible as warehouseman."

The effect of this judgment is summed up in Hutchinson on Carriers, 2nd ed., sec. 88, as follows: "The delivery must be to the carrier for immediate transportation; for if goods are delivered to him to be stored until further orders are received from the owner, the carrier becomes a mere depositary or bailee until further orders have been given, etc. But the moment such orders are given, the carrier having accepted them with that understanding, his duties and responsibilities as carrier begin."

The questions submitted by the learned Judge, and which were objected to at the trial and in the motion are:

1. When was the first request made by Black for a car? (I may mention the first delivery was on Wednesday the 21st, and the fire on Monday, the 26th October, 1891.) A. Friday.

2. When was he told the car would be in readiness. A. Saturday.

3. Was more than one request made by Black for a car? If so, when? A. Saturday.

4. If more than one request was made, what, if any provision made by Wilson? A. Cars provided by Wilson from time to time.

5. Was there any unreasonable delay in furnishing a car by the railway company? A. Yes.

The objection taken by Mr. Osler at the trial and in the notice of motion, is based on this, as stated by him at the trial, viz.: "I desire to object that the questions your lordship proposes to submit are not questions arising on the record. I submit that the question whether there was negligence in furnishing a car or not does not arise on the record."

The statement of claim, it is true, makes no charge of negligence in furnishing a car; it is simply an action against them as common carriers, alleging the delivery of

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the goods to them, and charging they did not deliver them, "but by their negligence and carelessness they were destroyed by fire."

It appears to me, bearing in mind that the original delivery was not to the defendants as common carriers, but as bailees to be held until further directions, and that express notice was required to change their position, and place the apples in their custody as common carriers, it was absolutely necessary to ascertain whether such notice had been given, and whether it was accepted by the defendants.

The only way in which notice could be given was to request the defendants to provide a car, and if they agreed so to do, they, at any rate after the expiration of the time when the car was to be provided, must under the authority to which I have referred, viz.: "The moment such order is given the carrier having accepted them with that understanding his duties and responsibility as carrier begin."

In the present case it was not disputed that when the apples were first placed in the shed it was, with the intention of the plaintiff and to the knowledge of the agent, that they should be shipped as a car load to Toronto; it therefore became necessary to ascertain whether the plaintiff had given notice to the defendants of his desire that the apples should be shipped to Toronto, and the time when such shipment was to be made, and whether the defendants accepted such notice. These questions were submitted to the jury; and as they have found all the facts in favour of the plaintiff the responsibility of the defendants was changed, and they were in possession of the goods as "carriers" at the time of the loss.

The motion must be dismissed with costs.

ROSE, J.:—

The plaintiff owned a farm near Paris on the line of the defendants' railway. On Wednesday the 21st day of October, 1891, the plaintiff by his servant, one Black, commenced drawing apples from the farm to the railway station,

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and depositing them as they were carried in the shed or warehouse of the company. At the time of taking the first load Black saw a man in the shed or warehouse who told him where to put the apples, and whom he (Black) told that the plaintiff was going to ship the apples to Yonge street wharf, Toronto. On the Wednesday two loads of apples were brought in, sixteen barrels to the load. On the next day, Thursday, four loads were brought in, and on that day Black saw Wilson, an employee of the defendant company at Paris who had charge of the freight shed. Black asked Wilson on that day, Thursday, according to his (Black's) evidence, when the plaintiff could get cars to ship the apples, and was told that he could get them whenever the plaintiff wanted them. Black further said that he would let Wilson know in the morning—that was on Friday morning—telling him that the apples were to be shipped to Yonge street wharf, Toronto. On the Friday two more loads of apples were taken in when Black saw Wilson and told him to get a car for the plaintiff on the Saturday when he would ship. To this, according to Black's evidence, Wilson said "all right."

I may say that although there is a dispute upon the evidence, I am dealing with this case upon the findings of fact by the jury, and so stating the evidence according to the plaintiff's contention. On the Saturday two loads of apples were brought in in the morning and two in the afternoon, so that on Saturday morning the plaintiff had at the station some 158 barrels of apples, two barrels having been taken off one of the loads by the plaintiff and left in Paris for his own purposes. By Saturday afternoon there were therefore 190 barrels in the warehouse of the defendant company. On Saturday morning Wilson told Black that no cars had come in for the plaintiff; that they would be in on Monday sure; that they had a hard job to find cars; that they were shipping so much flour and turnips it was a hard matter to get cars. On Monday morning two more loads were brought in, and on Monday afternoon two more, making altogether sixteen loads less the two barrels

referred to. On Monday morning Wilson told Black that there were no cars, but that they might be in at noon, and in the evening Wilson told Black that the cars might be in that night. On Tuesday morning when the plaintiff's man came with two more barrels of apples the freight sheds had been burned and the apples destroyed. Judgment. Rose, J.

This action was brought to recover the value of the apples.

The statement of claim sets out that the defendant is a common carrier, and has a station and warehouse for receiving goods at the town of Paris; that on or before the 26th October, 1891, the plaintiff delivered to the defendant at its warehouse in Paris 254 barrels of apples, to be carried from Paris to the city of Toronto for reward; that the defendant company received the apples and contracted and agreed with the plaintiff to deliver them to him at Toronto with due diligence. Averment, nondelivery of the apples, and destruction and total loss by fire by the negligence and carelessness of the defendant.

It was admitted, as is manifest, that as the apples were delivered at the freight sheds, the company received them in the character of a warehouseman. They were not delivered for immediate shipment, but were received at the warehouse, and stored for the convenience of the plaintiff until he should have there delivered sufficient to make a carload or two carloads.

There was a contest on the evidence as to whether or not the cars were asked for; but on the findings of the jury we must deal with the case as if Black had on Friday requested a car to be ready on Saturday, and had again requested on Saturday that a car should be furnished, and that Wilson promised on Friday and on Saturday and again on Monday that a car would be furnished, and that the delay under the circumstances was unreasonable; and I think we must further consider it as having been established that the company could have furnished a car but for neglect on the part of some of its servants.

It was stated that from 135 to 160 barrels would fill a

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car according to the various sizes of the cars used, and a fair average number making a carload was fixed at 150 barrels, for which judgment was given.

The question to be considered here is whether the character of the holding of these apples was changed before the fire, so that they were not any longer warehoused for the plaintiff, but were held by the defendant as a common carrier. If as a warehouseman, there could be no liability, for the fire by which they were destroyed was, as far as the company was concerned, an accidental one, and not in any sense attributable to its negligence. If the apples were then, at the time of the fire, in the possession of the defendant company as common carrier, then the company would be liable as an insurer.

It was contended on the part of the plaintiff, that as soon as the plaintiff had delivered at the shed of the company a sufficient number of barrels to fill a car, and had asked for a car, and a car had been promised, the character of the holding changed. Certain facts however have been lost sight of in making that contention. It was stated on the part of the company and not denied, and must be found as a fact (for according to agreement at the trial the Court in this case has to deal with all questions arising on the evidence, and not found by the jury), that it was part of the plaintiff's duty to select from the greater quantity of barrels that he had in the warehouse 150 barrels, brand them in such a way as would enable the parties to identify them and place them on board the car at his own expense and by his own labour. In other words the plaintiff retained control over the apples until the car load was selected from a lot in the warehouse, branded and placed on board the car. Then, as stated by Black, the plaintiff, according to the ordinary custom, would have signed a shipping contract, the form of which was produced and proven, and is marked as an exhibit.

The form is in duplicate, one part being a request by the shipper to the company to receive the property mentioned therein in apparent good order, addressed to the place of

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delivery to be sent by the company subject to the terms and conditions stated upon the shipping note; and the other part an acknowledgment of the company having received the goods in question in apparent good order, addressed as before stated, and subject to the same terms and conditions. Condition number four, endorsed upon the request note and receipt is: "4. Nor shall the company be liable for damages occasioned by * * fire."

Now, it is perfectly clear that as long as the apples remained in the warehouse subject to the plaintiff's control, and were not to be put *in itinere* until something further had been done, the character of warehouseman was not changed into that of carrier.

The case most nearly in point that I have seen is that of *St. Louis, Iron Mountain, etc., R. W. Co.* v. *Knight*, 122 U. S. 79, which is summarized in the footnote to paragraph 88, 2nd ed. of Hutchinson on Carriers, as follows: "So where the goods are yet to be graded, classified, marked or set apart from others by the shipper, before they are ready for shipment, they cannot be deemed to be delivered to the carrier for carriage."

It is on this evidence plain, I think, that if the company had furnished a car, and that car had been placed alongside the warehouse, the goods would still have been under the control of the plaintiff until placed on board the car. It would have not been the duty of the company, nor could its servants properly have ventured to select from the bulk the barrels that were to go, mark them, and place them upon the car. The evidence is all to the contrary. The goods were therefore not in the warehouse to be put immediately *in itinere*, but were there held for the plaintiff, warehoused for the plaintiff, until such time as the company should furnish a car on which the plaintiff might place them after having done such necessary acts as would be preliminary to signing a request note and receiving a receipt for the goods.

I am therefore of the opinion, without staying to go into the various cases cited, most of which are referred to

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in Hutchinson on Carriers, that the company held these goods at the time of the fire in the character of a warehousman, and not as a common carrier.

It does not seem to me to be quite right that the plaintiff should have an advantage from the accident of the fire happening during the interval of time between the receipt of the apples in the warehouse and the furnishing of the car, when if the car had been furnished, and the goods had been made ready for carriage, the plaintiff would have been required by the company to have entered into a contract which would have freed the company from liability for loss in the event of fire. We should, I think, require the clearest evidence that the company had chosen to assume the position of carrier without the protection which the ordinary contract would give before we hold it liable for the loss which did not occur through any negligence on its part; that is to say, the fire, as I have said, was accidental as far as the company was concerned. And greater care should be observed, because if, as was suggested, the pleadings were amended, and the action framed for breach of contract to supply a car the loss which is here claimed could not have been recovered as damages flowing from such breach. It would not be the natural breach of such a contract, and could not have been said to have been in the contemplation of the parties, nor a liability undertaken by the carrier. See *Crawford* v. *Great Western R. W. Co.*, 18 C. P. 510 at p. 526; and *Brodie* v. *Northern R. W. Co.*, 6 O. R. 180.

The plaintiff did not choose to insure his own goods and he should not call upon the defendant to insure them without reward in that behalf, unless it clearly intended to undertake such liability in addition to the ordinary risks not provided against by the form of contract to which I have referred. If the plaintiff could succeed here, there would be the somewhat singular result that having over 250 barrels in the warehouse at the time of the fire, the company would occupy the position of warehouseman as to 100 of these barrels not designated

or selected from the bulk, and for the loss of which it would not be responsible, and as to 150 also not designated and not separated from the bulk, it would be a common carrier, and liable as an insurer. Judgment. Rose, J.

Upon the whole, I think there must be judgment for the defendant company, and the action dismissed with costs, including the cost of this motion.

The Court being equally divided, the motion failed, and was dismissed with costs.

[COMMON PLEAS DIVISION.]

CLARK V. MCCLELLAN.

Bailment—Storage of wheat—"At owner's risk"—Loss by fire.

A quantity of wheat was delivered by the plaintiff to the defendant, a miller, under a receipt stating that the same was received in store at owner's risk and that the plaintiff was entitled to receive the current market price therefor when he called for his money. The wheat to the plaintiff's knowledge was mixed with wheat of the same grade and ground into flour. The mill with all its contents was subsequently destroyed by fire, but there had always been in store a sufficient quantity of wheat to answer plaintiff's receipt:—

Held, that the receipt and the facts in connection therewith constituted a bailment of the wheat and not a sale.

South Australian Ins. Co. v. *Randall*, L. R. 3 P. C. 101, distinguished.

THIS was an action tried before MACMAHON, J., without a jury, at Orangeville on the 21st September, 1892. Statement.

The action was to recover the value of a quantity of wheat claimed by the plaintiff to have been sold by him to the defendant, and which had been destroyed by fire while stored in the defendant's mill.

The defendant denied that there had been any sale and alleged that the wheat had been stored by the plaintiff with the defendant at the plaintiff's risk.

The facts are fully set out in the judgments.

The learned Judge reserved his decision, and subsequently delivered the following judgment:—

Judgment.

MacMahon, J.

October 1, 1892. MACMAHON, J.:—

All the facts were found by me at the conclusion of the trial with (I think) the exception of that relating to the amount of flour, etc., sold, and the grain purchased, and that which formed the defendant's share as miller from the custom work between the 31st of March when the statement was given by the defendant to the manager of the Bank of Hamilton, and the 23rd of April, the date of the fire.

The evidence is, that there was as much, if not more wheat came in during the above period than would replace the flour, etc., that went out. My finding is in accordance therewith. I have already found that the plaintiff was aware that his wheat was to be mixed with other wheat in the hoppers and bins in the defendant's mill, and ground into flour, the plaintiff being entitled to receive the current price for his wheat when he called for his money.

The receipt given by the defendant to the plaintiff reads thus:—

ALTON, February 24th, 1892.

"Received in store at owner's risk, one hundred and ninety-eight (198.57) spring wheat at 62½ lbs., and ninety-one (91.50) of fall, 63 test, to receive current market price when called for his money."

The *South Australian Ins. Co.* v. *Randell*, L. R. 3 P. C. 101, 104, now the leading authority on the subject, decided that where corn was deposited by farmers with a miller to be stored and used as part of the current consumable stock of the miller's trade, and was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of an equal quantity on the day on which he made his demand, such transaction amounted to a sale and was not a bailment of the corn.

The distinction between that case and the present is that plaintiff's wheat was received in store at his risk.

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MacMahon, J.

In a note at p. 6 to Bennett's 6th American edition of Benjamin on Sales, the effect created by the words "at owner's risk," is thus stated: "If, however, the written contract in such case stipulates, as it often does, that the property remains 'at the risk of the owner,' it seems equally clear that in such cases the transaction ought not to be considered a sale, but only a bailment. See *Nelson* v. *Brown*, 44 Iowa 455, and 53, *ib.* 555; *Ledyard* v. *Hibbard*, 48 Mich. 421."

The headnote to *Nelson* v. *Brown*, 53 Iowa 555 (in Appeal), is: (1) "A contract acknowledging the receipt of grain for storage, 'loss by fire, heating and the elements at the owner's risk,' and giving the warehouseman the right to return grain of equal test and value, though not the identical grain, constitutes a bailment, which becomes a sale at the option of the bailee. (2) Under such contract, the title to the grain does not pass to the warehouseman by reason of its being mixed with other grain of the same grade, nor by his shipment of the identical grain deposited, but the property remains in the depositor, and at his risk as to fire and the elements, so long as there is left in store a mass in which he, as tenant in common with other depositors, is the owner of an interest equal to his deposit."

In *Ledyard* v. *Hibbard*, 48 Mich. 421, the action was replevin, and was brought after the failure of the receivers of the grain. The plaintiff was a farmer, and the receivers of the grain, millers, who gave a receipt in the following form: "Received of William B. Ledyard by L. Byrne, 820 bushels number one wheat, at owner's risk from elements, at 10 cents less Detroit quotations for same grade when sold to us. Stored for —— days. Hibbard & Graff."

The headnote gives the effect of the judgment delivered by that eminent jurist Judge Cooley: "Nothing was charged for storage, but the millers used the wheat as they needed it in their manufacture, and its identity was constantly changing in the elevators: *Held*, that in the absence of local usage to the contrary, or of a course of

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dealing between the parties by which a different effect should be given them, the receipts should be construed as evidence of a bailment instead of a sale."

"Warehouse receipts for grain received in store must be construed by their terms and by commercial usage. In commerce they would be understood to represent the title to the quantity of grain specified, and changes in bulk caused by delivery and shipments would not affect the title of the holder of receipts, and he could call for his proper quantity so long as so much remained in store. Nor would the consumption of the grain by the warehouse owner make any difference so long as the quantity is kept good."

"Where grain is stored under contracts reserving to the owner an option to treat the transaction as a bailment, or as a sale, the fact that he has always chosen to treat it as a sale is not conclusive evidence that any particular storage is to be regarded until such choice is indicated."

The plaintiff, as I have found, always regarded the grain as being in the mill on bailment, and even after the fire stated he had not sold to the defendant, but placed it in the mill for storage.

Sufficient grain having been reserved to represent the quantity stored by the plaintiff, it was there at his risk, and having been destroyed by fire prior to any sale thereof to the defendant, he is not entitled to recover.

There must be judgment for the defendant dismissing the plaintiff's action with costs.

The plaintiff moved on notice to set aside the judgment for the defendant and to enter it for the plaintiff.

In Hilary Sittings, February 7th, 1893, before a Divisional Court composed of GALT, C. J., ROSE, and MACMAHON, JJ., *Elgin Myers*, Q. C., supported the motion. What took place here constituted a sale and not a bailment. The grain was not kept apart but was mixed with the other grain of the defendant, and the plaintiff was to get the value of the grain at the then market price whenever he called for pay-

ment. To constitute a bailment there must be a keeping apart and return of the identical grain. The use of the words "at owner's risk," does not, as contended by defendant, shew that the grain remained the property of the plaintiff. This means, as it said, at the risk of the owner, who in this case was the defendant. The case of *South Australian Ins. Co.* v. *Randell*, L. R. 3 P. C. 101, is expressly in point. There it was decided that the ownership was in the defendant. He also referred to the cases collected in the judgment of the learned trial Judge. There was, however, negligence in the defendant. He left the mill unguarded, and the fire occurred in consequence. Argument.

Aylesworth, Q. C., contra. The plaintiff never intended to sell the grain to the defendant, nor the defendant to purchase it. The intention was merely to store the grain, and that it should be mixed with the defendant's other grain, and when the plaintiff should so desire he could either have an equal quantity of a grain of similar grade, or the then market price. The plaintiff was leaving his farm and had no place to store the grain, and it was stored by the defendant simply for the plaintiff's convenience. It was always treated as a bailment, even up to the time of the trial when an amendment was obtained and a sale claimed. The meaning of the words "at owner's risk," was that the grain itself, or an equivalent amount, was to remain at the plaintiff's risk, *i. e.*, that the defendant was not to be responsible so long as the grain or its equivalent was there, and to guard against the very event which happened, namely, fire. The evidence also shews that the plaintiff at first thought of insuring it, but decided not to go to the expense. The case of *South Australian Ins. Co.* v. *Randell*, L. R. 3 P. C. 101, is quite distinguishable. All that case decided was that the warehouseman had an insurable interest. The question in every case is one of intention, and the intention was that there should be merely a bailment: Blackburn on Sales, 2nd ed., 245 *et seq.*; *Castle* v. *Playford*, L. R. 7 Ex. 98; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; *Young* v. *Matthews*, L. R. 2 C. P. 127. Even

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if the Court should come to the conclusion that there was a sale, still the defendant was only to be liable if the wheat was there when he called for his money. There was clearly no such negligence as would entitle the plaintiff to recover.

March 4th, 1893. GALT, C. J.:—

There was no contradiction as to the evidence, which may be summed up as stated by my brother MACMAHON in his judgment as follows: "The evidence is that there was as much, if not more wheat that came in during the above period than would replace the flour, etc., that went out. My finding is in accordance therewith. I have already found that the plaintiff was aware that his wheat was to be mixed with other wheat in the hoppers and bins in the defendant's mill and ground into flour, the plaintiff being entitled to receive the current price for the wheat when he called for his money."

The receipt given to the plaintiff reads thus:

ALTON, February 24th, 1892.

"Received in store, at owner's risk, one hundred and ninety-eight (198.55) spring wheat, test 62½ pounds, and ninety-one (91.50) of fall, 63 test, to receive current market price when called for his money."

The simple question is whether under the terms of this contract the plaintiff is entitled to recover from the defendant the value (for no price was fixed) of the wheat which had been placed in the mill, the mill with its contents having been destroyed by fire before the plaintiff had called for his money.

The contention of the plaintiff is that because the wheat delivered by him had been mixed with other wheat belonging to the defendant, and could not therefore be specifically returned, the property had vested in the defendant and therefore he was responsible for the value to the plaintiff.

The case relied on by Mr. Myers was *South Australian Insurance Co.* v. *Randell*, L. R. 3 P. C. 101, 104. That

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case, however, differs essentially from the present. The action was brought by the respondents to recover under a policy of insurance for a quantity of wheat which was in their mill at the time of the loss, and which had been placed in the mill under circumstances similar to the present, but on the receipt of which no reservation had been made as to risk, consequently the plaintiff might have been held responsible for the loss. The policy contained a clause that the company would not be held responsible for wheat "held in trust." The judgment of the Court was that under the facts of the case, as the respondents were responsible to the farmers, it could not be said that they were trustees of the goods, and consequently the appeal was dismissed.

There are several American cases cited by my learned brother, viz.: *Nelson* v. *Brown*, 44 Iowa 455, and 53 Iowa 555, also *Ledyard* v. *Hibbard*, 48 Mich. 421, which establish that when it is expressly agreed that the wheat when taken into an elevator, where it must necessarily be mixed with other wheat, is stated to be at owner's risk, the property remains at the risk of the owner; and it seems equally clear that in such cases the transaction ought not to be considered a sale but only a bailment.

In the case of *Martineau* v. *Kitching*, L. R. 7 Q. B. 436, which was an action brought by the plaintiffs to recover the price of certain sugar sold by them to the defendant, which had not been taken away by him, and which was destroyed by fire, the plaintiffs were held entitled to recover. The terms of sale were that for a specified time the sugar was at the risk of the seller. The fire took place after that time had elapsed.

Lush, J., in his judgment says, at p. 459: "But I agree that the question is not in whom the property was, but at whose risk the goods were, and I collect clearly from the terms of the contract that it was agreed between the parties that after the expiration of two months the goods were to be at the risk of the buyer."

Quain, J., "I think with regard to the first question in

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the case it may be decided upon the short ground that by the express contract between the parties, whether the property passed to the buyer or not, it was, if not expressly, impliedly agreed between them that the risk after the two months, should be in the buyer." (In the present case the receipt is express "at owner's risk.")

The judgment of Blackburn, J., at p. 455, is to the same effect.

In the case now before us it was proved that when the fire took place there was, as found by the learned Judge, a larger quantity of wheat in the mill not covered by the warehouse receipt than was sufficient to cover the claim of the plaintiff, consequently as the wheat was at his risk he has no claim against the defendant.

ROSE, J.:—

It seems to me the receipt may be read somewhat as follows: "I, the defendant, will receive your, the plaintiff's, wheat in store, at your own risk, and when you wish to sell it, I will pay you the current market price."

Having regard to the fact that the plaintiff well knew that the wheat was to be mixed with other wheat held by the defendant, I think we must not regard the fact that it was not kept separate. Whenever the plaintiff was willing to sell, he could go to the defendant and demand the then current market price. He could raise no question as to the identical wheat which he deposited being there in store, for both parties knew that its identity would be lost as soon as placed in store. As long as the defendant had in store wheat answering in quantity and quality to the wheat stored, the plaintiff could raise no question as to the identity. Both parties knew and dealt with each other on the understanding that the defendant would at all times, in the ordinary course of business, have in store more than sufficient wheat to represent that received from the plaintiff. The plaintiff sold to the defendant a certain quantity of wheat, but by the bargain between himself and the de-

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fendant, he was given the option of determining when he would sell the balance. Neither party, it may be, contemplated a return of the wheat; but whenever the plaintiff made up his mind to sell, he could inform the defendant and receive the current market price. In the meantime, however, the parties provided that if the wheat in the defendant's storehouse should be destroyed by any casualty the risk should be the plaintiff's, *i.e.*, the defendant should not make good the loss out of wheat in store belonging to the defendant or may be to others—in other words, if by any casualty the defendant lost the wheat which was in store representing the plaintiff's wheat the plaintiff should bear the loss. Before the plaintiff made up his mind to sell, the defendant's wheat was destroyed, and the plaintiff seeks to make the defendant bear the loss and to have the contract construed to mean that the wheat was at the defendant's risk instead of at the plaintiff's risk. This, I think, would be contrary to the express and expressed intention of the parties. In view of the fact of a sale by the plaintiff to the defendant of a certain quantity of wheat, a storing of the balance, at the owner's risk, the discussion about insurance, the conduct and statements of the plaintiff, both before and after the fire, to hold that the agreement in question was a sale by the plaintiff to the defendant would be to declare a result by operation of law and not intended by either party.

I agree that the motion must be dismissed with costs.

I find no evidence to support Mr. Meyer's argument that the defendant was guilty of such negligence causing the fire as would fix him with liability in any event.

[QUEEN'S BENCH DIVISION.]

IN RE SEAR AND WOODS.

Lien—Mechanics' lien—"The price to be paid to the contractor"—R. S. O. ch. 126, secs. 7, 9, 10—53 Vic. ch. 38—Contract abandoned—No money payable by owner to contractor—Existence of liens—Wages-earners—Priority—Enforcing liens—Taking benefit of proceedings by other persons.

The words used in secs. 7 and 9 of the Mechanics' Lien Act, R. S. O. ch. 126, as amended by 53 Vic. ch. 38, "the price to be paid to the contractor," and other like expressions in the same sections, all mean the original contract price, and not that part of the contract price to the extent of which the contractor has done work or supplied materials.

And where the owner has, in good faith and without notice of any lien, paid the contractor the full value of the work done and materials furnished, and such value does not exceed the statutory percentage of the contract price, and the contractor has abandoned his contract, and no money is payable to him in respect thereof, no lien can exist or be enforced against the owner in favour of any one.

Wages-earners are not, by virtue of sec. 9, sub-sec. 3, and sec. 10, as amended, entitled to the percentage of the contract price necessary to be retained, if it never becomes payable by the owner to the contractor.

Persons who have registered liens, but have taken no proceedings to realize them, cannot have the benefit of proceedings taken by other persons to enforce liens against the same lands, where the liens of such other persons are not enforceable.

Goddard v. *Coulson*, 10 A. R. 1, followed.

Re Cornish, 6 O. R. 259, not followed.

Statement. IN April, 1892, one George J. Woods let to one McAvoy a contract to build certain houses in the city of Toronto for $2,550.

McAvoy received from Woods on account of the contract price, the sum of $2,138.55, and then failed in business and abandoned the work, leaving the houses uncompleted. One Sear, a sub-contractor under McAvoy, and certain other persons who had supplied materials to McAvoy, and certain other persons employed by him in the work whose wages had not been paid, registered liens under the Act. Thereupon an application was made by Woods, the landowner, to the Master in Chambers for an order that the lien of Sear and the registration thereof might be vacated, upon the ground that nothing was due by the landowner. The Master (having first brought Kieran and McAdam, other lien-holders, before him by

notice), acting upon the authority of *Moorhouse* v. *Leake*, 13 O. R. 290, made an order referring it to the Registrar of this Division to ascertain whether anything was due by the landowner to McAvoy under the contract, the amount required to complete the contract, the names of the persons who had registered liens, the amount due them respectively, and to specially report any matter that might be inquired into between the several persons concerned. Thereupon the Registrar, having taken evidence, reported: Statement.

1. That the contract price was $2,550.

2. That the contractor had received $2,138.55.

3. That the contract had not been carried out by McAvoy; and that to complete the work according to the plan and specifications, there would be required a sum of $425 at the least.

4. That Thomas Davis, Kieran and McAdam, and Joseph Sear had registered liens for materials; and that William Hill and five other persons had registered liens for unpaid wages, the total of unpaid wages due the six persons being $278.10; besides other matters, which it is unnecessary here to mention.

Upon this report, the landowner, Woods, served a notice upon each of the persons having registered liens, of a motion before the Master in Chambers for an order vacating all their liens. Upon this motion all the lien-holders, excepting Davis, appeared and contested the matter. On 21st November, 1892, the Master in Chambers, after reviewing the authorities, gave judgment in favour of the application, and directed that all the liens should be vacated, and the registration of them annulled. He directed that each party should pay his own costs relating to the proving of the liens of Davis and the six wages-earners; and that Sear and Kieran and McAdam should pay to George J. Woods the costs of the two motions before him, the costs of the reference to the Registrar, and the costs of discharging their liens in the registry office.

The wages-earners appealed to a Judge in Chambers

Statement. from this order, upon the ground that the Master should not have held their liens to have been vacated, but should have held them entitled to a lien to the extent of twelve and a-half per cent. of the price payable to the contractor. Kieran and McAdam also appealed, upon the ground that they should not have been ordered to pay costs.

Both appeals were argued before STREET, J., in Chambers, on 26th November, 1892.

Snelling, Q. C., for the wages-earners.

Frank Denton, for Kieran and McAdam.

Hodge, for Woods.

December 12, 1892. STREET, J.:—

The contract price was $2,550; the contractor did work and furnished materials to the amount of $2,125, and received from the owner $2,138.55; and the work has never been finished. The contractor owed to the wages-earners who appeal here, $278.10, and they have registered liens under the Act for that amount.

The question arises whether, under these circumstances, the Mechanics' Lien Act gives them any lien as against the owner, it being admitted that as a matter of fact the owner has paid the contractor more than the value of the work done, and that the contractor has abandoned the contract, leaving the work unfinished which he contracted to do.

Under R. S. O. ch. 126, sec. 7, as amended by 53 Vic. ch. 38, sec. 1, "The owner shall, in the absence of a stipulation to the contrary, be entitled to retain, for a period of thirty days after the completion of the contract, * * (*b*) twelve and a-half per centum of the price to be paid to the contractor, where such price is more than $1,000 but does not exceed $5,000."

By sub-section 1 of section 9 of the same chapter 126, R. S. O., as amended by 53 Vic. ch. 38, sec, 2, it is provided

that "All payments, up to eighty-seven and a-half per cent. of the price to be paid for the work, machinery or materials, etc., made in good faith by the owner to the contractor, etc., shall operate as a discharge *pro tanto* of the lien created by this Act," etc.; and by sub-section (3) of the same clause, "a lien for wages for thirty days or for a balance equal to the wages for thirty days, shall, to the extent of the said twelve and a-half per cent. of the price to be paid to the contractor, have priority over all other liens under this Act, and over any claim by the owner against the contractor for, or in consequence of, the failure of the latter to complete his contract."

Judgment. Street, J.

The lien is created by the 4th section of ch. 126, R. S. O., and provides that "every * * person doing work upon * * the construction * * of any building, * * shall, by virtue of being so employed, * * have a lien for the price of the work * * upon the building * * and the lands occupied thereby or enjoyed therewith; limited in amount to the sum justly due to the person entitled to the lien;" and by section 10 of the same Act it is enacted as follows: "Save as herein provided, the lien shall not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor."

The question to be determined, obviously depends upon the construction to be placed upon the expression, "the price to be paid for the work, machinery or materials," in sub-section (1) of sec. 9 of ch. 126, R. S. O., which is intended to be the equivalent of the expression "the price to be paid to the contractor," in sub-section (4) of the same section.

In *Re Cornish*, 6 O. R. 259, where the contract price was $2,690, the contractor did work to the amount of $2,350, received $2,125 on account, and then failed. The owner then let a new contract for the completion of the work for $525.88. It was held by the majority of the Chancery Divisional Court that "the price to be paid to the contractor" must be held to mean only the price to be

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Street, J.

paid for such work as the contractor performs under the contract, and they allowed a lien to the extent of $235.

A month before the delivery of the judgment in *Re Cornish*, the Court of Appeal gave judgment in *Goddard* v. *Coulson*, 10 A. R. 1. In that case a contract had been let by the defendants to one Crittenden, to erect a building for $1,350. Crittenden sub-let the stone work to the plaintiffs, and a balance of $184.70 remained due them. Crittenden abandoned the work before completing it, having received the value of the work done by him and his sub-contractors, excepting $189.70. The defendants re-let the contract for the completion of the work at a sum which amounted to much more than the balance of the original contract. The plaintiffs claimed a lien to the extent of $135, being ten per cent. upon the amount of the original contract—ten per cent. being then the deduction which the owner was entitled to retain by the law as it stood. The Court of Appeal held that the plaintiffs were not entitled to any lien.

I do not think that case helps me to a decision of the present one, because the Court had not there to consider the preference given by the Act to wages-earners over the claim by the owner against the contractor for non-completion. Nor, I think, does it conflict with the construction placed by *Re Cornish* upon the expression "the price to be paid to the contractor." The difference between the two cases, is this: in *Re Cornish* the Court held the lien-holders entitled to a lien for ten per cent. upon the work done by the original contractor with whom they were in privity, although a part of this ten per cent. had been applied in completing the work under the new contract; while under the decision of the Court in *Goddard* v. *Coulson*, as I understand it, the lien would have been limited to the balance of this ten per cent. not exhausted under the new contract in the completion of the work. In other words, they would have restored the judgment of the Master in Chambers in *Re Cornish*.

The construction of the expression "the price to be

paid to the contractor" must be taken to have been settled, for the purposes of the present appeal, by the judgment of the Court in *Re Cornish*, as the sum which he had earned at the time he abandoned the work, namely, $2,125. If he had completed the work, the price to be paid him would, of course, have been the contract price, and probably the price of any extras. The meaning of the expression must, therefore, be taken to vary according to circumstances, and the owner, to be safe, must reserve the percentage upon the value of the work done from time to time. Here he has not done so, but has paid the contractor the full value of the work and something more. I must hold, under these circumstances, with great respect for the opinion of the learned Master in Chambers, from whom I am compelled to differ, that the payments so made are only protected to the extent of eighty-seven and a-half per cent. upon $2,125, the value of the work done so far as the wages-earners are concerned, and that they are entitled to a lien for the remaining twelve and a-half per cent. upon this $2,125 = $265.62, which amount they entirely exhaust.

Judgment.

Street, J.

It was urged by counsel for Woods that the liens of these wages-earners are no longer binding, because no proceedings have been taken to realize the claim under the Act, and more than ninety days have elapsed since the work was done. See section 23, ch. 126, R. S. O.

I cannot find in the proceedings before me, that this ground was taken at any earlier period. I find nothing in the report of the Registrar to enable me to say when the work was done by these wages-earners, and the Clerk in Chambers informs me that the affidavits referred to in the order of the 21st November, 1892, have been obtained from him by one or other of the parties, so that I am unable to refer to them.

Counsel for Woods, however, stated before me that the last work claimed for by the wages-earners was done on the 2nd August, 1892. I find an abstract amongst the papers from the registry office, from which it appears that

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Street, J.

proceedings were taken by Sear to realize his lien on 12th September, 1892, and a *lis pendens* registered upon the same day. Sear was a man who sold to McAvoy the brick used in the building; the wages-earners were persons employed by McAvoy in its erection. They are, therefore, to be treated as being in the same class with Sear, within the meaning of sub-section (1) of sec. 30 of ch. 126, because they claim under the same contractor. The mere fact that the wages-earners have some rights under sub-section (3) of sec. 9, which the other members of the same class do not enjoy, does not take them out of the class. The proceedings taken by Sear must be treated as having been taken on behalf of these wages-earners as well, and their liens are therefore preserved.

Messrs. Kieran and McAdam appeal against the order directing them to pay costs of the proceedings. It was argued by counsel for Woods that no appeal lies for costs only. Having, however, varied the order of the learned Master in Chambers upon other points, there is no doubt of my jurisdiction to vary it upon the question of costs in favour of a party whose only complaint happens to be upon that question. It appears that these appellants, Kieran and McAdam, appeared before the Master in Chambers upon an adjournment of the original motion, in pursuance of a notice served upon them, and that they joined with Sear before the Master in Chambers in insisting that a large balance was due to the contractor from Woods. They have failed in their contention, so far as their own claims are concerned, but they have succeeded in shewing that the application of Woods to vacate the liens registered by the class represented by Sear should not succeed. The costs do not appear to have been increased to any considerable extent, if at all, by the fact that Kieran and McAdams joined with Sear in contesting the claim made by Woods to vacate the lien.

I think, therefore, that the proper order upon the whole matter will be to allow the appeals of the wages-earners and of Kieran and McAdam with costs; to vary the order of the

learned Master in Chambers by striking out so much of it as orders that the liens registered by Joseph Sear and the six wages-earners be vacated and discharged; by striking out so much of it as orders Joseph Sear and Kieran and McAdam to pay costs; by striking out the portion of it which directs that each party pay his own costs relating to the proving of the liens of Sear and the six wages-earners; and by inserting in it an order that George J. Woods do pay to the six wages-earners their costs of the proceedings. I do not think it would be proper at this stage of the litigation to order the registration of the lien of Sear to be vacated, although nothing can be recovered under it against Woods, because his proceedings upon it seem to be the foundation upon which the wages-earners must base the continued existence of their liens.

Judgment. Street, J.

An appeal by Woods from this decision was argued before the Divisional Court, (ARMOUR, C. J., and FALCONBRIDGE, J.) on the 7th February, 1893.

Aylesworth, Q. C., for Woods, referred to *Truax* v. *Dixon*, 17 O. R. 366; *Goddard* v. *Coulson*, 10 A. R. 1; *Wood* v. *Stringer*, 20 O. R. 148; *Townsley* v. *Baldwin*, 18 O. R. 403; *McNamara* v. *Kirkland*, 18 A. R. 271.

Snelling, Q. C., for the wages-earners, referred to *Re Cornish*, 6 O. R., at p. 266; *Wilson* v. *Sleeper*, 131 Mass. 177; Holmested on Mechanics' Liens, p. 17; *Crone* v. *Struthers*, 22 Gr. 247.

Frank Denton, for Kieran and McAdam.

Aylesworth, in reply, referred to Holmested on Mechanics' Liens, p. 97; *Briggs* v. *Lee*, 27 Gr. 464; *Schultz* v. *Hay*, 62 Ill. 157.

March 4, 1893. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The contract made between the contractor, McAvoy, and the owner, Woods, was dated the 26th of April, 1892, and by it McAvoy covenanted that he would on or before the

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Armour, C.J.

1st day of June, 1892, do all the stone, brick, concrete, and tuck pointing required in the erection and completion of five houses and one store, and provide all the materials therefor, for the sum of $2,550; and Woods covenanted that, in consideration of the performance of his covenant by McAvoy, he would pay McAvoy $500 when each pair was ready for the roof, $667.50 when the whole work was completed, and the balance within thirty-one days from the completion of the work, and upon McAvoy obtaining, if required, a certificate from the county registrar that he had examined the records and found no mechanics' liens or claims recorded against the lands of Woods on account of McAvoy. The contract also contained a provision for the payment by McAvoy to Woods of $50 a week, by way of liquidated damages, for each and every week the work remained incomplete after the time limited for its completion.

It will be seen that by this contract a sum in excess of twelve and one-half per centum upon the contract price of $2,550 was to be retained for thirty-one days after the completion of the work.

McAvoy did work and provided materials under this contract to the amount of $2,125 only, and payments were made to him on account of the contract price to the amount of $2,138.55.

In this condition of matters McAvoy abandoned the work, and it has never been finished; and the contention is that, although the contract has never been completed by McAvoy, and although he has only done work and provided materials in respect of the contract to the amount of $2,125, and although Woods has made payments to him on account of the contract price to the amount of $2,138.55, or $13.55 in excess of the amount of the work done and materials provided by McAvoy, he is bound by law to pay to the wages-earners employed by McAvoy, in addition to what he has already paid, the sum of $265.62, being twelve and one-half per centum upon the $2,125, the amount of work done and materials provided by McAvoy under his

contract; and this contention has been given effect to by the judgment of my brother Street.

Judgment.

Armour, C.J.

The words used in section 7 of the Mechanics' Lien Act, as amended by 53 Vic. ch. 38, "the price to be paid to the contractor;" the words used in section 9 (1), "The price to be paid for the work, machinery or materials, as defined by section 4 of this Act;" the words used in section 9 (2), "the price to be paid by the owner for the work, machinery or materials, as defined by section 4 of this Act;" the words used in section 9 (3), "the price to be paid to the contractor;" and the words used in section 9 (4) added by 53 Vic. ch. 38, "the total price to be paid, or contracted or agreed to be paid, for the whole of the work, machinery or materials, as so defined by section 4 of this Act;" all, in my opinion, mean the price agreed by the owner to be paid to the contractor for the work, machinery, and materials agreed by the contractor to be performed and supplied for the price so agreed to be paid by the owner to the contractor therefor; in other words, the contract price; and I am unable to agree in the view that they do not mean the contract price, but only such part of the contract price as the contractor has done work, or supplied machinery or materials to the extent of.

My view of the meaning of these words is strengthened by the provision of section 7, as amended by 53 Vic. ch. 38, which provides that the owner shall, in the absence of a stipulation to the contrary, be entitled to retain for a period of thirty days after the completion of the contract (*a*) fifteen per centum of the price to be paid to the contractor, where such price does not exceed $1,000; (*b*) twelve and a-half per centum of the price to be paid to the contractor, where such price is more than $1,000 but does not exceed $5,000; and (*c*) in all other cases ten per centum of the price to be paid to the contractor.

This section does not, as will be observed, provide for the retention by the owner, from time to time during the progres of the work, of these percentages in respect of the

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Armour, C.J.

actual value of the work done from time to time as the work progresses, as would have been the case had the legislature intended that the words "the price to be paid to the contractor" should mean the value of the work done by the contractor from time to time under his contract, but only authorizes the retention of these percentages in respect of the price to be paid to the contractor after the completion of the contract.

My learned brother founded his opinion as to the meaning of these words upon the decision of the majority of the Chancery Divisional Court in *Re Cornish*, 6 O. R. 259; but, as I read the judgment of the Court of Appeal in *Goddard* v. *Coulson*, 10 A. R. 1, it appears to me to overrule the decision of *Re Cornish* in this respect.

Goddard v. *Coulson* is also a clear authority for holding that where, as in this case, the owner has, in good faith and without notice of any lien, paid to the contractor the full value of the work done and materials provided by him, and the value of the work so done and of the materials so provided does not exceed eighty-seven and one-half per centum of the contract price, and the contractor has abandoned his contract, and no money is payable to him in respect thereof, no lien can exist or be enforced against the owner by any person who has supplied materials for the work to the contractor.

And in that case the Court held that it was only in respect of ten per cent. of the contract price that any lien could exist, and that such ten per cent. never having become payable to the contractor, no lien existed or could be enforced.

The Chief Justice said (p. 7): "The ten per cent. can be literally held liable as a part of the 'price to be paid by the owner,' provided such a portion remains or is in existence, but we should not, we think, extend it by any necessary implication to ten per cent. on a price for work which has never been done, and which to the great injury of the owner his contractor wrongfully refused to do."

Judgment.
Armour, C.J

And Patterson, J. A., said (p. 8): "But looking only at the second part of the section, which gives a lien on ten per cent. of the 'price to be paid as aforesaid by such owner,' I do not think it can fairly be said to do more than to charge, in favour of the mechanic, etc., ten per cent. of the money which becomes payable by the owner to the principal contractor.

"It has not been shewn in evidence in this case, with much certainty, what was the price to be paid by the owner; for, although it appears that there was a written contract, the plaintiffs, on whom rested the burden of establishing their lien, have not proved the terms of the contract. But, gathering its nature as best we can from such evidence as there is, we are driven to the conclusion that the contract price agreed upon never became the price to be paid, because the contractor failed to do what was necessary to earn it, or to earn more than he was in good faith actually paid, that amount being under ninety per cent."

It follows that in this case, the contract price being $2,550, and the owner having, in good faith and without notice of any lien, paid the contractor the full value of all the work done and materials provided by him, and the amount so paid to the contractor not being in excess of eighty-seven and one-half per cent. of the contract price, and no greater part of the contract price having ever become payable, no lien exists or can be enforced in favour of any one.

But it is contended that the wages-earners are in a different position from other persons in whose favour liens may exist under the Act; that they have a lien upon twelve and one-half per cent. of the price to be paid to the contractor; and that the owner is bound to pay this twelve and one-half per cent., whether it ever becomes payable by the owner to the contractor or not; and that in this case the owner, Woods, is subject to a lien upon his property for $318.75, being twelve and one-half per cent. upon the contract price of $2,550, although he owes nothing to the

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Armour, C. J.

contractor, and although this $318.75 has never become payable to the contractor, McAvoy. And it is said that this is the effect of section 9, sub-section 3, and of section 10, of the said Act.

The words "save as herein provided" in the 10th section may well be applied to the case of an owner paying to the contractor after notice of a lien, and to the case of an owner paying to the contractor for the purpose of defeating or impairing a lien, and do not necessarily support the view that wages-earners are entitled to the twelve and one-half per cent. of the contract price, whether it ever becomes payable by the owner to the contractor or not. Section 9, sub-section 3, provides that "a lien for wages for thirty days, or for a balance equal to the wages for thirty days, shall, to the extent of the said twelve and one-half per cent. of the price to be paid to the contractor, have priority over all other liens under this Act and over any claim by the owner against the contractor for, or in consequence of, the failure of the latter to complete his contract."

This lien is declared to be "to the extent of twelve and one-half per cent. of the price to be paid to the contractor," and if nothing becomes payable to the contractor, there can be no lien, as was held in *Goddard* v. *Coulson*, and is to "have priority over all other liens under this Act, and over any claim by the owner against the contractor for, or in consequence of, the failure of the latter to complete his contract."

It is, no doubt, difficult to put a construction upon these latter words, "and over any claim by the owner against the contractor," etc.; but I do not think that we should be warranted in holding that giving priority to this lien was equivalent to enacting that the owner should pay it, whether the percentage had become payable or not.

If the legislature had intended to so enact, nothing would have been easier than to express such intention; and we are asked to construe the obscure and doubtful language of the legislature so that it shall work a gross injustice, in compelling the owner to pay, to persons with

whom he never had any dealings, money which never became payable by him to the contractor. Judgment. Armour, C.J.

"We must require," said Hagarty, C. J., in *Goddard* v. *Coulson*, "very express legislation—clear beyond reasonable doubt or question—to establish a claim so startling in its result."

And it is a rule for the construction of statutes that, unless you are obliged to do so, you must not suppose that the legislature intended to do a palpable injustice : per Brett, L. J., in *Ex p. Corbett*, 14 Ch. D. at p. 129. See also *Hill* v. *East and West India Dock Co.*, 9 App. Cas. at p. 456, *per* Earl Cairns.

Patterson, J. A., in *Goddard* v. *Coulson*, commenting upon this provision, then 45 Vic. (1882), ch. 15, sec. 4, said : "And I am not prepared to commit myself to the opinion that even under the Act of 1882 the owner can be compelled to pay to the workmen money for which he never became indebted to the contractor. The lien under that Act is expressed, as in the earlier one, to be on ten per cent. of the price *to be paid* to the contractor, and it may be found when it becomes necessary to decide the point, that section 4 only postpones, in favour of the lien, a cross demand against a defaulting contractor."

The legislature were in this provision declaring a lien upon a sum which might never become subject to such lien, never becoming payable, and there was no greater absurdity in their doing this than in giving it priority, over any claim by the owner against the contractor for, or in consequence of, the failure of the latter to complete his contract.

And I think the construction to be put upon the provision may well be that put upon it by Patterson, J. A., of only postponing in favour of the lien a cross-demand against a defaulting contractor; but, whatever construction may be put upon it, I do not think that we should be warranted in putting upon it the construction contended for.

It is clear that no lien can exist or be enforced by Davis, who claimed a lien as a sub-contractor under McAvoy; for

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Armour, C.J.

such a lien is limited by section 8 to the amount payable to the contractor: *Townsley* v. *Baldwin*, 18 O. R. 403.

It is also clear that, under the authority of *Goddard* v. *Coulson*, no lien can exist or be enforced by Sear or by Kieran and McAdam, each of whom claimed a lien for bricks supplied to McAvoy.

And I hold, for the reasons above set forth, that no lien can exist or be enforced by the wages-earners.

If, however, I am wrong in so holding, and if the wages-earners had liens, I am of opinion that they have lost them by reason of their never having taken any proceedings to realize such liens.

No doubt, the action brought by Sear, if he had been a lien-holder, would have enured to the benefit of the wages-earners, but as he was not a lien-holder, as I think is clear from the case of *Goddard* v. *Coulson*, his action could not enure for the benefit of the wages-earners: *Burt* v. *British Nation Life Assurance Ass'n.*, 4 De G. & J. 158; *Dillon* v. *Raleigh*, 13 A. R. 53; 14 S. C. R. 739; *Smith* v. *Doyle*, 4 A. R. 471.

The appeal will, therefore, be allowed with costs, and the judgment of the Master in Chambers will be restored.

[QUEEN'S BENCH DIVISION.]

RE ROBINSON AND CITY OF ST. THOMAS.

Municipal Corporations—By-law—Exclusive privilege granted to Telephone Company—Monopoly—Municipal Act, 55 Vic. ch. 42, sec. 286, (O.).

A by-law passed by a city council ratified an agreement between the city and a telephone company providing that no other person, firm, or company should, for five years, have any license or permission to use any of the public streets, etc., of the city for the purpose of carrying on any telephone business:—

Held, that this by-law was in contravention of section 286 of the Municipal Act, 55 Vic. ch. 42, and was *ultra vires* of the council.

Statement.

THIS was a summary application made on behalf of John A. Robinson, a ratepayer of the city of St. Thomas, to quash by-law number 653 passed by the council of the municipal corporation of that city, on the ground that it was illegal, being in contravention of sec. 286 of the Municipal Act, 55 Vic. ch. 42, (O.), which is as follows: "No council shall have the power to give any person an exclusive right of exercising within the municipality any trade or calling, or to impose a special tax on any person exercising the same, or to require a license to be taken for exercising the same, unless authorized or required by statute so to do," etc.

The by-law in question recited, among other things: "That the company" (*i. e.*, the Bell Telephone Company), "are also desirous of preventing, as far as possible, for the term of five years, the erection by any other company of other lines in the city for the purpose of carrying on any telephone business;" and, in accordance with the application of the company, an agreement was entered into, which was ratified by the by-law, the first section of which was as follows: "The city, as far as it has power to do so, covenant and agree that they will not for a period of five years from the date hereof give to any person, firm, or company, other than the Bell Telephone Company of Canada, Limited, any license or permission to use any of

Statement.

the public streets, lanes, or alleys of the city for the purpose of building in, upon, or under such streets, lanes, or alleys, any poles, ducts, or wires for the purpose of carrying on any telephone business."

The motion was argued before GALT, C. J., in Court on the 14th April, 1893.

Hellmuth, for the applicant.

Colin McDougall, Q. C., for the city corporation.

S. G. Wood, for the Bell Telephone Company.

April 29, 1893. GALT, C. J.:—

The cases to which I was referred are American cases. There was no case mentioned as determined by our own Courts bearing on this subject, namely, as to the power of municipal corporations to pass by-laws similar to that now in question.

The case of *The Norwich Gas Light Co.* v. *The Norwich City Gas Company*, 25 Conn. 18, arose out of the following circumstances. I refer to the facts so far as is necessary for the consideration of the present case. Hinman, J., in giving the judgment of the Supreme Court, says as follows: "The court of common council of the city of Norwich, on the 4th of August, 1851, passed a resolution which purports to grant to Treadway and his heirs and assigns the right to lay gas-pipes and erect gas-posts, etc., in the streets of the city, and it declares that the privileges thereby granted shall continue and be in full force, and may be enjoyed by said Treadway, and his assigns, for the period of fifteen years; and that during that time no other person, persons, or corporation shall, by the consent of the court of common council, lay gas-pipes in said streets." The portion of the judgment bearing on this question is as follows: "We think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction

Judgment.

Galt, C.J.

upon its free manufacture and sale, it comes directly within the definition and description of a monopoly."

There was a case in the Supreme Court of Ohio, *State of Ohio* v. *Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262, in which it appears that a contract had been entered into between the city council of Cincinnati and one James F. Conover and his associates, by the terms of which the city council of Cincinnati undertook to invest James F. Conover, his associates, their heirs, assigns, and successors, with the full and exclusive privilege of using the streets, lanes, alleys, commons, and public grounds of the said city for the purpose of conveying gas to the city and its citizens for the term of twenty-five years from that date. In delivering the judgment of the Supreme Court, the learned Judge refers to the case which I have just mentioned of *The Norwich Gas Light Co.* v. *The Norwich City Gas Co.*, and states (p. 293):—"But we have referred to these authorities, as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book, in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

What then are the statutory provisions conferred upon a municipality as respects telephones? Section 496, subsection 39, of the Municipal Act is as follows:—"The council of every city, town and incorporated village may pass by-laws for regulating the erection and maintenance of electric light, telegraph and telephone poles, and wires within their limits."

Then, to use the language of the learned Judge in the case to which I now make reference (18 Ohio St. p. 296):—"If under the general power here given, a single

Judgment.

Galt, C.J.

city council might bind its successors not to make or permit any further use of the streets for a similar purpose, for a period of twenty-five years, why not for a hundred years, or in perpetuity? Was such the legislative intention? If so, we fail to discover it, either in the express terms of the statute, or as arising therefrom by clear and necessary implication."

By the very terms of the by-law which was passed for the ratification of the agreement it is expressly stated as I have mentioned:—"That the company are also desirous of preventing, as far as possible, for the term of five years, the erection by any other company of other lines in the city for the purpose of carrying on any telephone business." It is manifest that, so far as the agreement was concerned, it was the object and intention of both parties that the Bell Telephone Company should have a monopoly for the next five years of the telephone business in the city of St. Thomas, and therefore it is entirely beyond the power of the municipality to enter into such an agreement.

Motion absolute with costs.

[QUEEN'S BENCH DIVISION.]

RE HANNA ET AL. V. COULSON: MAXON, GARNISHEE.

Prohibition—Division Court—After-judgment Summons—Garnishee—"Defendant"—R. S. O. ch. 51, sec. 235.

The word "defendant," as used in section 235 *et seq.* of the Division Courts Act. R. S. O. ch. 51, means the person sued in the action, and does not include a garnishee.

Prohibition to a Division Court granted, where the primary creditors, having obtained judgment against the garnishee, issued an after-judgment summons against him.

Statement.

THIS was a motion by the garnishee, Maxon, for prohibition to the fifth Division Court in the county of Essex to prohibit the primary creditors, Hanna and Cowan, the County Judge, and the clerk of the Division Court, from proceeding against the applicant under an after-judgment summons issued by the primary creditors against the applicant.

The primary creditors brought an action in the Division Court to recover $200 upon a promissory note made by the primary debtor, Coulson, and sought to garnish to that extent a debt due by Maxon to Coulson under a judgment recovered by Coulson against Maxon in the High Court of Justice for $300 damages and costs of that action. The primary creditors obtained judgment against both primary debtor and garnishee for $200, and then issued from the Division Court the summons referred to against the garnishee as a judgment debtor.

The motion for prohibition was argued before ROSE, J., in Chambers on the 2nd May, 1893.

Swabey, for Maxon, contended that he did not come within the word "defendant" as used in sec. 235 of the Division Courts Act, R. S. O. ch. 51, and therefore that the Division Court had no jurisdiction to issue or proceed upon the summons.

Aylesworth, Q. C., for the primary creditors, contra.

Judgment.

Rose, J.

May 3, 1893. ROSE, J.:—

I see nothing in sec. 235, ch. 51, R. S. O., to prevent a party who has obtained a judgment against a garnishee availing himself of its provisions, unless the fact that the person who may be examined under such section is named the "defendant." To so construe the section would be to narrow its effect so as without reason to deny a right to one judgment creditor which is enjoyed by other judgment creditors.

The fact that clauses (*a*) and (*b*) of sub-sec. 4 of sec. 240 may be confined to defendants who have contracted with the plaintiff, does not militate against the plaintiffs' right. If it did, then also would it if the defendant were the maker of a promissory note against whom an indorser had obtained judgment.

Mr. Aylesworth referred to sec. 188, sub-sec. 2, as shewing that the garnishee might well be referred to under the general term "defendant."

Motion refused with costs.

The garnishee appealed from this decision to the Queen's Bench Divisional Court, and his appeal was argued before ARMOUR, C. J., and STREET, J., on the 16th May, 1893.

Swabey, for the appellant.

Aylesworth, Q. C., for the primary creditors.

May 22, 1893. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The question raised in this case is whether a garnishee against whom a judgment has been recovered by a primary creditor in the Division Court is a "defendant" within the meaning of that word as used in section 235 of the Division Courts Act, and as such is subject to its provisions.

Judgment.
Armour, C.J.

It is a sound rule of construction to give the same meaning to the same word occurring in different parts of an Act of Parliament, and the word "defendant" is invariably used in all the other parts of the Act as signifying the person sued in the action, and no reason can be adduced to shew that it is used in any other sense in sections 235 to 248, inclusive, or in any of them. And I think it clear that it is used in the same sense in these sections.

Sections 235 to 247, inclusive, existed, substantially in the same words, in 13 & 14 Vic. ch. 53, long before the provisions as to garnishment were introduced into the Division Courts Act by 32 Vic. ch. 23; and certainly up to that time the word "defendant," in what is now section 235, signified the person sued in the action; and it is quite clear that 32 Vic. ch. 23 did not expressly alter its signification.

In 32 Vic. ch. 23 the word "defendant" is never used as signifying the garnishee; and throughout the Division Courts Act, as found in the R. S. O. 1887 ch. 51, as also throughout the general Rules in force relating to Division Courts, the distinction between a garnishee and a defendant is invariably maintained.

Garnishee is not covered either by the legal or ordinary meaning of the word "defendant," and the whole context of the Division Courts Act shews that garnishee is never intended to be included in the word "defendant."

Sections 238, 240, 246, and 248, as amended by 55 Vic. ch. 11, sec. 4, appear to me to be wholly inconsistent with the idea that the word "defendant" in section 235 includes a garnishee.

In my opinion, the order for prohibition must go, with costs, here and below, to be paid by the primary creditors.

[CHANCERY DIVISION.]

THE ONTARIO INVESTMENT ASSOCIATION v. LEYS.

Company—Winding-up—Transfer of Shares for a Particular Purpose—Neglect to Re-transfer—Unpaid Calls—Liability as Contributory.

The defendant, at the request of the president of the plaintiff association, accepted from him a transfer of shares, partly paid up, in the association for the purpose of attending a meeting of shareholders and forming a quorum, and gave the president a power of attorney to re-transfer the shares after the meeting. No re-transfer was made, and the defendant remained in ignorance that the shares stood in his name until the association became financially embarrassed:—

Held, that he was liable as a contributory.

Decision of MACMAHON, J., at the trial reversed.

Statement. THIS was an appeal from a judgment of MACMAHON, J., in an action for unpaid calls on stock in the plaintiff association.

The action was tried at Toronto on January 16th, 1893, before MACMAHON, J., without a jury.

Meredith, Q.C., and *T. G. Meredith*, for the plaintiffs.

T. E. Parke, for the defendant.

It appeared from the evidence that the defendant had, at the request of the president and managing director of the plaintiff association, accepted a transfer of ten shares of the capital stock in the association merely for the purpose of attending a meeting of shareholders to form a quorum, which he did; and that he signed a power of attorney to re-transfer the shares when the meeting was over. No re-transfer was made under the power, and the defendant remained in ignorance that the shares still stood in his name until the association became financially embarrassed, when this action was brought to compel him to pay calls made on the shares which were not paid up at the time of the transfer to him.

At the close of the trial the learned Judge gave the following judgment:

Judgment.

MacMahon, J.

MACMAHON, J.:—

There can be no doubt, I think, upon the facts of this case, that the defendant never intended to become a stockholder of this company by the transfer which was made to him of the ten shares.

The transfer was made by the president of the company with a view to enabling the company to pass some necessary legislation at that particular juncture, and without the assistance of some additional shareholders that legislation could not be proceeded with; and Mr. Leys was induced to accept the shares merely for the benefit and advantage of the company, but with the understanding that they should not remain in his name for any longer period than that required for the temporary purpose for which they were transferred to him.

I find that he executed a power of attorney enabling a re-transfer of the stock to be made to Mr. Murray,* and that he supposed that the transfer was made in accordance with the agreement which I find existed, both on the evidence of Mr. Leys and on the evidence of Mr. Ellis between the president of the company and Leys— that the transfer should be for a mere temporary purpose.

At that time (in September, 1886)—it is quite apparent that the company was very much embarrassed. Mr. Murray, as president of the company—whom the present manager admits was one of those instrumental in wrecking the Ontario Investment Association,—was fully aware of the financial straits to which the association was reduced.

There is no doubt with the knowledge that Mr. Murray had, if a transfer had been intended to have been made for valuable consideration, and on representations which would likely follow from inducing a person whom the

* The President.—REP.

Judgment.

MacMahon, J.

president desired to take shares, if he had not disclosed the position of the company as he knew it, that the inducement to take these shares would have been a fraud upon the stockholder.

I do not think the fact of the transfer appearing in the books, or any other means that might be adopted to hold Mr. Leys liable, ought to avail in this particular case. He did not intend, as I said, to become a stockholder, neither did the transferrer, Mr. Murray, intend that the stock should be transferred to Leys to remain permanently in his name. In fact Murray had the means at his disposal through the power of attorney, which I find Mr. Leys executed, to re-transfer the shares to himself at once in accordance with the agreement. If he did not so transfer the shares it was not Mr. Leys' fault.

There was a notice of call made in September, 1887. That call was made after the collapse of the association, and should not have any effect whatever in fastening the liability upon the defendant.

I think the plaintiffs have failed to make out a case which ought to hold the defendant liable, and the action must be dismissed, with costs.

From this judgment the plaintiffs appealed to the Divisional Court, and the appeal was argued on February 27th, 1893, before BOYD, C. and FERGUSON, J.

Meredith, Q. C., for the appeal. The defendant became a shareholder when he accepted the transfer of the shares. They are still standing in his name. The books of the company shew that: R. S. O. ch. 157, sec. 54. The company is entitled to enforce the calls: section 46. Once a shareholder a person is always a shareholder, unless he takes the proper means to divest himself of the shares: *City of Glasgow Bank—Bell's Case*, 4 App. Cas., at p. 563; *per* Lord Hatherley, *In re Patent Paper Manufacturing Co.—Addison's Case*, L. R. 5 Ch. 294; *In re Contract Corporation—Head's Case*, L. R. 3 Eq. 84; *White's Case*, *ib.* 86; Buckley on the Companies' Act, 4th ed., 35.

Purdom, contra. The evidence shews that since the meeting the defendant was never in any way treated as a shareholder; even if he ever was a shareholder, it was only as a trustee. A fraud was perpetrated on him by the chief officer of the company. Argument.

Meredith, Q. C., in reply, referred to *In re Rolling Stock Company of Ireland—Clack's Case*, 14 W. R. 986; *In re General Provident Ass. Co.—Cross's Case*, 17 W. R. 1006.

April 22, 1893. BOYD, C.:—

Ten shares of the plaintiff corporation not fully paid up were transferred to the defendant by the president and managing director, being part of the shares held by that officer in his own right. He held some other shares as trustee for the company, but these were not transferred.

The defendant accepted the shares, signed the transfer, and was entered on the books as holder. He proceeded forthwith to take part in a general meeting of the company. He gave contemporaneously a power of attorney to the president that the shares might be transferred back to him after their purpose was served in the hands of the defendant.

This transaction took place in order to enable a quorum to be formed, so that certain business of the company might be done. That is the explanation given, and no further action was taken in respect to the shares either by the company, the president, or the defendant. So that today they stand in his name in the books, and a return to that effect has been made to the government.

So far as intention goes, it was probably not intended by the defendant that he should be a shareholder so as to incur any liability, and that he expected to be divested of the shares after the particular purpose of the transfer was served. But it is equally clear that he did intend to become a shareholder, and did accept the shares as such *pro hac vice*, and did act thereon and that he took no steps to see that the power of attorney was made use of so as to replace matters in *statu quo*.

Judgment.

Boyd, C.

In other words, he trusted to the president in taking the shares, and letting them remain in his name; but the act and promise of the president was not the act and undertaking of the corporation, and I do not see how if the defendant was once a shareholder he has since, by mere inaction, lost that character: *City of Glasgow Bank—Bell's Case*, 4 App. Cas., at p. 563.

Had the shares transferred been held in trust for the company, then Leys might possibly as against the company have escaped responsibility under the holding in *Re Waterloo Life etc., Co.—Saunder's Case*, 2 D. J. & S. 101.

But upon the present state of facts the rule is stated by Giffard, L.J., in *In re Patent Paper Manufacturing Co.—Addison's Case*, L. R. 5 Ch. at p. 297: "The law undoubtedly is, that a person who is once a shareholder must remain a shareholder until he can shew that he has in some lawful way got rid of his liability."

A case substantially like the present in which liability was found by Lord Cairns, is *In re The International Contract Co.—Sanger's Case*, 37 L. J. Ch., at p. 293, followed in *In re General Provident Ass. Co.—Bridger's Case*, L. R. 9 Eq. 74, at p. 79. See also as to the power to re-transfer, not acted on: *Adderly* v. *Storm*, 6 Hill 624, a New York State case.

I would reverse the judgment, and costs will have to follow.

FERGUSON, J.:—

I am unable to take the view expressed by the learned Judge before whom the trial took place, and I agree in the conclusions stated in the judgment of the Chancellor.

It seems beyond all question or cavil that the shares spoken of were transferred to the defendant; that he accepted the transfer and acted as a shareholder of these shares in the association.

The name of the defendant was properly entered in the books of the association as the owner of these shares, and

Judgment.

Ferguson, J.

it remains so in those books, and the books are *primâ facie* evidence: sec. 54, R. S. O. ch. 157.

The defendant admits a transfer to and an acceptance by him of the shares; but he says that he gave Murray a power of attorney for the re-transfer of the shares. This power of attorney was not produced, nor could it be found, but the learned Judge finds that it had an existence; that is, that it was given as the defendant says.

Giving, as I think, the greatest possible force to such a power of attorney, even calling it a transfer, which would be going quite too far in favour of the defendant, as no entry of such a transfer was made in the books of the association, the case would then seem to fall under the provisions of section 52 R. S. O. ch. 157, and the transferrer and transferee would be jointly and severally liable to the association and its creditors. I do not say that such was or is the effect of the power of attorney in this case, but giving it the highest degree of importance that could be contended for, no more than this could be the effect of it.

The short case here seems to be this: The defendant did become, and was a shareholder in respect of these shares, and there is nothing to shew that he, at any time, ceased to be such shareholder.

In Buckley, at p. 35, 4th ed., the author, quoting from Lord Chelmsford, in *Spackman* v. *Evans*, L. R. 3 H. L. 238, says: "Every one who has at any time become a shareholder, and is unable to shew that at the date of the order he had ceased to belong to the company, either by the forfeiture or transfer of his shares, or in some other authorized manner, must be placed upon the list."

In *City of Glasgow Bank—Bell's Case*, 4 App. Cas., at p. 563, Lord Hatherley says: "If we find that he was originally on the list by his own authority, and that he never took any adequate steps in point of law for the removal of his name from the list, the consequence is inevitable, that, having begun to be, he continues to be, * * a person proper to be placed upon the list of contributories."

Judgment.

Ferguson, J.

In *In re Patent Paper Manufacturing Co.—Addison's Case*, L. R. 5 Ch., at p. 297, Sir G. M. Giffard, L. J., says: "And the law undoubtedly is, that a person who is once a shareholder must remain a shareholder until he can shew that he has in some lawful way got rid of his liability."

Many authorities might be mentioned in support of the same proposition.

It may be, and if my view of the case is the correct one, is, unfortunate for the defendant that he yielded to the solicitations of Murray. But I can take no view of the case but that the defendant was once a shareholder, and so entered in the books of the company by his own authority, and that for any thing that he has made appear, he has since continued to be such shareholder, and liable in respect of these shares, and I somewhat unwillingly state my conclusion to be that the opinion of the learned trial Judge is not the correct one, and that the defendant is liable.

I think the judgment appealed from should be reversed.

G. A. B.

[QUEEN'S BENCH DIVISION.]

STUART ET AL V. THOMSON ET UX.

Husband and Wife—Ante-nuptial Contract by Letters—Post-nuptial Conveyance of Lands—Destruction of Letters—Description of Lands—Duty of Husband—Intent to Defeat Creditors.

A young man under twenty-one made an offer of marriage by letter to a young woman, and in the letter promised that if she would marry him he would, after the marriage, give her all the property he had (meaning real property), describing it as "my farm in Osprey," and "my property in Elmvale." She accepted the offer unconditionally, also by letter; the marriage took place; and he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily and without any evil intent, destroyed the letters, believing that they had no longer any use for them:—

Held, that the letters formed a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given.

Gilchrist v. *Herbert*, 20 W. R. 348, followed.

Held, also, that the description of the properties in the man's letter was sufficient, he having no other properties in the places mentioned.

Held, lastly, that there was a duty on the part of the husband to convey to his wife, which negatived the existence of an intent to defeat creditors.

THIS action was tried at Barrie on the 8th, 9th, and 10th May, 1893, before FERGUSON, J. Statement.

W. C. McKay and *R. D. Gunn*, for the plaintiffs.

John Birnie, for the defendants.

The facts are stated in the judgment.

May 13, 1893. FERGUSON, J.:—

The action is to set aside, as being fraudulent and void as against creditors of the defendant David Thomson, two conveyances made by him to his wife, his co-defendant Hattie E. Thomson; one being a conveyance of a farm in the township of Osprey, of the value, as is said, of $2,000 and upwards, and the other being a conveyance of a property in the village or town of Elmvale, of the value, as is said, of $1,000 and upwards; also, to have it declared that the defendant Hattie E. Thomson is a trustee for her co-defendant, David Thomson, of a property situate in the town of Orillia, of the value, as is said, of $1,700 and upwards.

Judgment.

Ferguson, J.

The action is brought by the plaintiffs, Stuart, Harvey, & Co., on behalf of themselves and all other creditors of the defendant David Thomson.

These plaintiffs are wholesale merchants in Hamilton, who gave credit to the firm Jackson & Thomson, who were from the month of September, 1891, to about September, 1892, carrying on business in groceries and boots and shoes, in the town of Orillia.

The plaintiffs are now judgment creditors of that firm by a judgment of the County Court of the county of York, signed on the 1st day of October, 1892, for the sum of $216.77 and costs, which costs have been ascertained to be the sum of $31.34; this judgment being against John P. Jackson and David Thomson, trading under the name, style, and firm of Jackson & Thomson. Upon this judgment executions were duly placed in the hands of the proper sheriff to be executed, and it is said, and not denied, that no property can be found to satisfy the executions in the whole or in part.

The conveyance of the lands in Elmvale bears date the 27th day of April, 1892. It is said to have been re-executed some time later by reason of some supposed defect in the execution or in the affidavit of the witness. The existing affidavit of due execution was sworn on the 1st day of June, 1892, though there was an affidavit of execution sworn on the 30th day of May, 1892. What, as I think, appears from the evidence and the document is that as early as the 27th of April, 1892, the deed was in fact signed by Thomson, but that it was not completed for the purposes of registration till the 1st day of June following. The deed was registered the 24th June, 1892. This conveyance is for the expressed consideration of one thousand dollars.

The conveyance of the farm in Osprey bears date the 5th day of May, 1892. The affidavit of execution appears to have been sworn the same day. This deed appears to be for the expressed consideration of $3,000. The registration of it was the 11th May, 1892. It is clear

Judgment. Ferguson, J.

that there was no money consideration for either of these conveyances. The conveyance of the property in Orillia, which is from one Andrew Tait to the defendant Hattie E. Thomson, bears date the 9th day of June, 1892. The affidavit of execution appears to have been sworn the 4th day of July following, and the deed appears to have been registered on the 6th day of August, 1892. The expressed consideration is $1,700, and there is no doubt that this sum was the actual consideration.

The plaintiffs in their pleading say that at the times of the making of these conveyances of the lands in Osprey and Elmvale, the firm Jackson & Thomson, and the defendant Thomson, were in insolvent circumstances and unable to pay their debts in full, and, at any rate, the defendant Thomson, without the lands above referred to, was not in possession of property sufficient to pay his debts in full; that these conveyances were made with intent on the part of Thomson to hinder, delay, and defeat the plaintiffs and his other creditors, and in pursuance of a scheme by him to place his property beyond the reach of his creditors, and that the conveyances were voluntary and without consideration; and that in pursuance of the same scheme he, the defendant Thomson, procured the said Andrew Tait to execute and deliver to the defendant Hattie E. Thomson a conveyance of the property in Orillia, which property Tait had before contracted to sell and convey to him, the defendant Thomson; and that the purchase money of this property was paid out of the moneys of the defendant Thomson, or out of the proceeds of the other properties that he had, as aforesaid, conveyed to his wife, Hattie E. Thomson. And the plaintiffs allege that the defendant Hattie E. Thomson was at the time fully aware of the wrongful intention of her husband, and was a party to the same, and accepted the conveyances with a view to assist him in the said scheme.

The defences of the defendants deny generally all the material charges against the defendants. The defendant Thomson says he was married to the other defendant on

Judgment.
Ferguson, J.

or about the 6th day of January, 1892, and that some time previous to the marriage, and in or about the month of January, 1891, he promised in writing to his co-defendant that if she would marry him he would convey and assign to her after such marriage the farm in Osprey and the property in the village of Elmvale; and that the conveyances of these lands were in pursuance of this promise, the marriage being the consideration for the same; and he says the lands in Orillia were paid for by his co-defendant with her own money. He then sets up that the firm Jackson & Thomson had, before this action, made an assignment for the benefit of their creditors under the provisions of ch. 124, R. S. O., to one John Rose; and he says that the assignee, and not the plaintiffs, is the one who has the right to bring this action, if any one has such right; and he contends that the plaintiffs have no *locus standi* here.

The defendant Hattie E. Thomson sets up the same ante-nuptial agreement; says that the Osprey and Elmvale lands were conveyed in pursuance of it; and that the solemnization of the marriage was the consideration for the conveyances. She says that she bought and paid for the Orillia lands with her own money. She denies being a party to or having any knowledge of such a scheme as the one alleged by the plaintiffs; and she alleges, on the contrary, that her conduct throughout was entirely innocent, and that she stands in the position of a purchaser for valuable consideration without notice.

The assignment for the benefit of creditors mentioned in the pleadings was made the 16th day of September, 1892, long after the expiration of sixty days from the date of the execution of the lastly executed of the conveyances sought to be impeached.

As to the alleged ante-nuptial agreement relied on by the defendants, the facts shortly stated, as nearly as I have been able to glean them from the evidence given, assuming that the evidence is true, are as follows:—

In the month of December, 1890, Thomson and his

Judgment.
Ferguson, J.

wife (she being then Miss Clarke) met at Elmvale, both being there as visitors. Thomson asked her brother for an introduction to her and received one. They remained in the village some time as visitors to some friends, and became, as I understand, somewhat intimate, so much so that when he was leaving to go to his home he asked her to write him after she had returned to her home in Collingwood, as to her safe arrival, etc., which she did. The evidence seems to indicate that during their stay at Elmvale he became seriously attached to her, and in the month of January, 1891, he wrote to her proposing marriage, he being then under twenty-one, and she being about nineteen years of age. He says that in this letter he told her that he was just a working fellow; that his parents were dead; that he had no home; but if she would have him, he would, after their marriage, give her all the property he had, telling her what properties he owned. He says he mailed the letter himself. [I may here say that this witness and others appeared to me to use the words "property" and "properties" as signifying real estate only.] Thomson, besides these two properties, the farm in Osprey and the property in Elmvale, had been left considerable sums of money by relatives who had died, which I think these witnesses did not intend to embrace in the word "property," or the word "properties," as they used the words.

She says that Thomson wrote her some time in January, 1891, proposing marriage to her, and promising her all his property; that in the letter he said he had fallen in love with her, and if she married him, he would, after she was his wife, give her the property, and that the properties in Osprey and Elmvale were mentioned in the letter.

They both say that this letter was answered by one containing an unconditional acceptance of the offer. He says that he destroyed most of the letters received from her soon after his perusal of them.

They both say that in July, 1892, all the letters that

Judgment.

Ferguson, J.

she had received from him, the letter of acceptance received by him, and perhaps some others, were burned by them; that they agreed the letters should be destroyed as they were no longer of any use. This was after all the conveyances in question had been executed.

Matthew Clarke, a brother of Mrs. Thomson, says, and she herself says, that she shewed him the letter of proposal received from Thomson, and asked his advice in the matter, which advice was to accept the proposal. He says the letter was a proposal of marriage, and stated that if he was accepted he would give her all his property, mentioning the property in Elmvale and the farm in Osprey. He says the letter stated that he (Thomson) was coming up to Collingwood and would drive out to see the farm. He says he advised her to keep the letter till the property was conveyed to her. [I was under the impression that this witness was not, owing to the manner of his examination, given a full and fair opportunity of stating all that he could respecting the contents of the letter]. He, however, said afterwards that the letter was a proposal to make her his wife, and that if she would marry him he would give her all his property after the marriage.

Fanny Aldrich, a sister of Mrs. Thomson, says she saw and read the letter; that it said he was glad he had met her, and that he had some person to love; that he was an orphan; that it proposed marriage, and said he would give her all his property after the marriage if she accepted him; and that the two properties, the Osprey farm and the Elmvale property, were mentioned in the letter, but that the Orillia property was not.

Thomson says that his wife kept asking him to convey the properties to her after the marriage; and he states that the reason for delay in so doing was that the title deeds of one of the properties were in Elmvale, and those of the other property were with his uncle in Scarborough, while they were living in Orillia. One would suppose that what was wanted were the descriptions by metes and bounds.

Judgment.
Ferguson, J.

As to these letters, there was not—and one would not expect that there could be—opposing evidence. But it was suggested and contended that the evidence was such that it could not be believed, or ought not to be believed.

All I can say in this respect is that I think I observed the witnesses as they gave the evidence most carefully; that I detected nothing in their demeanour to warrant me in thinking that they were unworthy of belief. Thomson gave his evidence very slowly, but this was, I think, owing to his personal manner. The others who were sworn on the subject spoke naturally, and seemingly in a straightforward manner. They did not give the contents of the important letter in the same words, nor did any of them profess to give all the words of the letter. There was, so far as I was able to perceive in the demeanour of the witnesses, or in the manner in which the evidence was given, nothing to indicate that the story had been concocted or invented for the purpose and the occasion; nor do I think that the witnesses had sufficient intelligence of a legal or *quasi* legal character to enable them to invent such a story; and I cannot even suspect for an instant that any professional gentleman would aid them in such a matter. The circumstances are, however, peculiar. The proposal at first seems a very abrupt one. The offer at the outset to convey the properties seems out of the usual, or anything like what one would suppose to be the usual, course in such cases. But it is to be borne in mind that Thomson was then a mere boy; that he was intending yet to go to school; that he had been brought up in a country place; that he was an orphan and had no home to which to bring a wife; that she had vastly the advantage of him in brightness of personal appearance; that it is fair to say that her attractions for him were very strong; that he had been fortunate in being left more property than most young men in the country, which was no doubt a fact existing in his mind; and that most likely he feared that a proposal of himself in proper person alone would probably be rejected. These considerations, when I take into account the appearance

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and demeanour of the parties then concerned, seem to me sufficiently to account for the peculiarity in the circumstances of the proposal.

I endeavoured whilst the evidence was being given, and I have since endeavoured by every consideration that I could bring to bear, to assign it its proper place and give it its proper weight, and my conclusion is that the story of these letters is a true story, and not a concoction or fabrication.

I am of the opinion that it is proved that these two letters were written as stated; that they were considered a contract and were a contract; that on the faith of these letters the marriage took place; and that, in pursuance of the agreement contained in the letters, the conveyances of the farm in Osprey and the property in Elmvale were made; and that the letters were voluntarily destroyed by the parties after the conveyances had been made, they believing that they had no longer any use for them; the female defendant possibly at the time of their destruction recollecting the advice of her brother to keep the letter till she got the conveyances; and that the act of such destruction was without any evil intent.

Then the case *Gilchrist* v. *Herbert*, 20 W. R. 348, seems to decide that a pre-nuptial agreement to settle property on the wife will be enforced even though the letters which constituted such agreement have been lost, if the loss can be proved to have occurred through an unforeseen and inevitable accident, and if the existence and substance of the letters can be clearly established by evidence.

I do not think the loss of the letters described in that case, and the honest destruction of the letters in the present case, it being considered that they were no longer useful, make a real difference between the two cases; and I think I may fairly say here, as Lord Romilly said in that case, that the defendants have established their case (defence), "so far as to make out the existence of the written promise and the terms of it." True it is, we have not here the precise words of these letters. If the witnesses had agreed in giving the words with precision, this would have afforded ground for adverse remark.

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We have, however, all the material terms of a contract that I think would have been enforceable against the defendant Thomson, even if he should have pleaded the Statute of Frauds. There are shewn the parties, a definite promise, a definite consideration for the promise, and, I think, a sufficient description of the two properties. The only want of the sufficiency, if it were assumed that the letters existed as stated in the evidence mentioned on the argument, was as to this last; but "my farm in Osprey" and "my property in Elmvale," when, as was conceded, the writer owned but one farm in Osprey and but one property in Elmvale, would, I apprehend, do as descriptions. It may, however, not be necessary to go so far as this for the purposes of this case. I have no doubt that Thomson thought he was bound by the letters to make the conveyances of the two properties: *Re Tweedale, Ex p. Tweedale,* [1892] 2 Q. B. 216. There was, in my opinion, undoubtedly on the part of Thomson a duty pre-existing to convey the two properties to his wife: *Allan* v. *Clarkson*, 17 Gr. 570.

In my opinion, these considerations negative the existence of an intent to defraud, hinder, defeat, or delay creditors; and the intent so to do is a material thing for the plaintiffs to make out: *Carr* v. *Corfield*, 20 O. R. 218.

I must hold then, I think, that the conveyances of the two properties—the farm in Osprey and the property in Elmvale—are perfectly good conveyances, or, at all events, that the plaintiffs have failed to shew that they are not good.

The property in Orillia was paid for by money raised upon a mortgage upon these two properties and the one in Orillia—the mortgage including the three properties, and being for the sum of $2,000; and the Orillia property was conveyed by Tait directly to Mrs. Thomson.

True, Thomson had contracted to purchase it and had paid some small sums on account of the purchase money. How he was reimbursed these sums, or how considerable moneys were handled between him and his wife at or about this time, does not, I think, clearly appear by the evidence; but one thing is clear, namely, that the mort-

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gage money was more than sufficient to pay the purchase money of the Orillia place.

Again, after a careful consideration of the evidence, I am of the opinion that it has not been proved that the firm Jackson & Thomson were, or that Thomson himself was, in insolvent circumstances at the time any one of these three conveyances was made. The evidence on the subject is various, and there is room for divergent views; but if the concern of the partnership is looked at as a going concern, as I think it should be, the evidence fails, I think, to shew that the firm was insolvent. Nor does it, I think, shew that Thomson was insolvent at the time he made any one of these conveyances. It is, I think, clear that neither the members of the firm nor Thomson thought at the time any of the conveyances was made, that either the firm or he was insolvent or unable to pay the debts in full; and I repeat that I think it abundantly clear that it is not shewn that any of these conveyances was made with intent on the part of Thomson to defeat, hinder, or delay any creditors whatever. In respect to the interview spoken of by the witness Moffatt with regard to Thomson having said that his partner was putting property out of his hands, and that he would do the same thing, I do not, in all the circumstances, prefer the evidence of Moffatt to the evidence against it. And I think there is no reason whatever for supposing that Mrs. Thomson had any wrong intent in regard to these conveyances from the beginning to the end, or that she was party to any such scheme as that alleged in the statement of claim. I think there was no such scheme.

Such being my opinion respecting the case, I do not think I need consider the question as to whether or not the plaintiffs are, notwithstanding the assignment, in a position to maintain the action; that is, as to whether they have a *locus standi*, or any of the other matters argued.

I am of the opinion that this action should be dismissed, and I see no sufficient reason for withholding costs.

Action dismissed with costs.

[QUEEN'S BENCH DIVISION.]

YOUNG V. SAYLOR ET AL.

Contempt of Court—Justice of the Peace—Summary Convictions Act—Power to Commit for Contempt—Power to Exclude from Court-Room—Privilege of Counsel—Review by Court of Justice's Proceedings.

A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace, holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court-room, and imprisoned for an alleged contempt and for disorderly conduct in court.

In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment :—

Held, that the justice had no power summarily to punish for contempt *in facie curiæ*, at any rate without a formal adjudication and a warrant setting out the contempt.

Armour v. *Boswell*, 6 O. S. 153, 352, 450, followed.

2. That he had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the Court ; but, upon the evidence, that the plaintiff was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused ; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion.

If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the Court could not have reviewed the facts alleged therein ; but, there being no warrant, the justice was bound to establish such facts, upon the trial, as would justify his course.

Judgment of ROSE, J., at the trial, reversed.

Statement.

THE statement of claim alleged that the plaintiff was a barrister and solicitor, the defendant Saylor a justice of the peace for the county of Prince Edward, and the defendant Hyatt a constable ; that the plaintiff was employed to act professionally in the defence of Robert Parker and others in relation to a certain complaint laid by the defendant Hyatt against them, pending for trial under the Summary Convictions Act, before the defendant Saylor as such justice ; that on the 31st December, 1891, the plaintiff attended and acted as counsel for such persons on the trial of such complaint before the defendant Saylor, at the village of Bloomfield, in the county of Prince Edward ; that the plaintiff throughout the proceedings acted in a manner proper and becoming to his professional employ-

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ment and character; that at such time and place, and while the plaintiff was properly and legally acting in his professional capacity, the defendants, maliciously and without reasonable and probable cause, deprived him of his right of audience in a public and open court as counsel for the accused persons, by forcibly removing and excluding him from the room in which the defendant Saylor was holding his court, the defendant Saylor commanding and authorizing the defendant Hyatt to eject the plaintiff, and the defendant Hyatt thereupon ejecting him; that the defendants assaulted the plaintiff by seizing him, compelling him to leave his place in the room, pushing and drawing him through the audience, and forcibly putting him in the street; that the defendants by the acts detailed arrested and imprisoned the plaintiff; that the defendant Hyatt was present at the court and acted thereat as constable thereof; that in consequence of the wrongful acts detailed, the plaintiff suffered annoyance and disgrace and loss of professional credit and business, etc. The plaintiff claimed the benefit of the Summary Convictions Act, particularly sections 33 and 34, and all other Acts applicable. And he claimed $5,000 damages.

The defendants pleaded "not guilty by statute," citing R. S. O. 1887 ch. 73, secs. 1, 14, 15, 20, 21; R. S. C. ch. 178, secs. 2, 4, 5, 6, 42, 46, 109, 110; R. S. C. ch. 185, secs. 1, 2, 3, 4, 5, 6; 50 Vic. ch. 2, secs. 9, 15 (D.); R. S. C. ch. 156, sec. 2.

Issue.

The action came on for trial before ROSE, J., and a jury at the Picton Spring Assizes, 1892.

Only two witnesses were examined, the plaintiff and Robert Parker.

It appeared from their evidence that the plaintiff was acting in his professional capacity before the defendant Saylor, and was by his order ejected from the court-room during the trial of the case against Parker and the others, as set out in the statement of claim. The defendant Hyatt was the complainant, and acted for himself not

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being represented by counsel. When the first witness was called, Hyatt examined him, then Saylor examined him, and then the plaintiff cross-examined him. Both the defendants asked leading questions. The plaintiff did not object in the case of the first witness. When the second witness for the prosecution was being examined, the plaintiff objected to Saylor's questions, and asked him not to lead. Saylor then told the plaintiff to sit down and be quiet, and he obeyed. He objected again to the questions put by Saylor to the third witness, and Saylor said to him, "sit down and shut up your mouth," and he sat down. The same thing occurred in the case of other witnesses. The plaintiff stated that he objected regularly, once when Hyatt was examining each witness, and again when Saylor was examining, but the objections had no effect in any way. When a witness named Barker was called, Hyatt asked him a question to which the plaintiff objected that it had nothing to do with the case in hand. Barker asked Saylor if he must tell all he knew, and Saylor said "yes," and he went on to answer the question objected to. The plaintiff rose and objected again, and Saylor told him to sit down and shut up his mouth, and if he did not he would fine him. The plaintiff asked Saylor to note the objection, whereupon Saylor said: "I told you before to sit down and shut up your mouth, and if you do not do it I will arrest you and put you out of the room." The plaintiff said it was his right and duty to object to the evidence going in, and Saylor said "I will shew you," and told Hyatt to arrest the plaintiff and remove him, which Hyatt did in the manner described in the statement of claim. The plaintiff alleged that up to the time of his arrest and removal he did not make any observation that could be thought to be offensive to Saylor; that he was respectful in his demeanour, addressed Saylor as "your worship," and did not obstruct the business of the court, except by objecting to the questions. He denied that his interruptions were so frequent and continuous that it was impossible for Saylor to take down the evidence.

Statement. The plaintiff's case was not closed, but the defendants' counsel suggested that no additional witnesses could put the plaintiff's case higher than his own statement, and the plaintiff's counsel conceding that further witnesses would not materially vary the facts of the case, the learned Judge proceeded to dispose of it, and dismissed the action with costs, delivering the following judgment :—

ROSE, J. :—

I have come to the conclusion that it is not in accordance with any of the decisions that have been cited that judicial proceedings of the nature complained of, before a magistrate, should be reviewed or examined into, either by the Court or by a jury; that the determination of the magistrate, in the exercise of his judgment and discretion, was for himself alone; and that, if he has exercised it improperly, that is, in such a maner as to shew that he is unfit for the office, I must assume that, upon a proper case being made and laid before the executive, or those who have control over the magistrate, such control will be exercised. I do not assume, for the present, that the magistrate has committed an error, but, taking the plaintiff's evidence, as I must take it for the purpose of disposing of this motion, as stating facts, I certainly cannot approve of the conduct of the magistrate if it was as stated; but no doubt the testimony of the witnesses for the defence, as has been indicated by counsel, would be offered, if the case continued, to contradict the statements made on behalf of the plaintiff, so as to raise an issue as to these facts. It is not my province, nor would it be just to the magistrate, to express any opinion upon his supposed misconduct, further than to say this: if it was as stated by the evidence already in, it was not marked by that quietness and self-control that should always be exhibited by a judicial officer in the discharge of his duties. Of course I am aware that judicial officers are men and subject to like passions, and also subject to nervous irritation, which may sometimes be made very painful indeed by the

injudicious exercise of supposed rights by those who appear before them as advocates. While no doubt there is sometimes difficulty in the administration of justice by reason of Judges and counsel not always doing that which is right, the power to decide must be vested in someone, and that power of decision must be exercised oftentimes on the moment, without opportunity for consideration, but with a desire to carry into effect that which seems to be the best under all circumstances. Judgment. Rose, J.

In this case the action of the magistrate was not to prevent counsel appearing before him acting as counsel. What was done was to prevent the counsel continuing a course of conduct—which I will assume for the purposes of this motion was not improper—but which seemed to be so to the magistrate, and which he did not desire to be continued. The effect of requiring counsel to desist no doubt was to prevent him acting as counsel, but that was the consequence and not the object of the action.

In order that the power of the presiding officer should not be broken down, or that his authority should not be interfered with so as to prevent the controlling of the proceedings which take place before him, it has been thought in the interests of the public that judicial officers should be hedged around so as to free them from interference by those who appear before them and over whom they are called upon to preside, and I cannot but think it is better to suffer from acts of individuals rather than that the office itself should be degraded, or that the power of the office should be broken down by having the discretion exercised in such matters reviewed by other tribunals. Certainly it does not seem to me to be wise to submit to juries, not always competent to try such questions, the decision of a dispute as to whether a judicial officer acted properly or improperly in requiring counsel to desist from some course of conduct which was unpleasant to the Judge, especially as such decision by a jury must be on conflicting testimony, which might not reveal the fact.

I find these principles, not in terms, but much more

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happily expressed, in the cases cited, and at which I have glanced. With regard to magistrates, that most learned Judge, the late Chief Justice Robinson, says in *Re Clarke and Heermans*, 7 U. C. R. at p. 225: "Where a power resides in any court or judge to commit for contempt, it is the peculiar privilege of such court or judge to determine upon the facts, and it does not properly belong to any higher tribunal to examine into the truth of the case. But, however indecent may have been the conduct of the parties committed, we cannot do otherwise than discharge them from custody on this warrant. It is not denied that a justice of the peace, while sitting in the discharge of his duty, examining parties upon a criminal charge, has power to protect himself from insult, and to repress disorder by committing for contempt any person who shall violently or indirectly interrupt his proceedings, or conduct himself insultingly towards him. And it may be assumed for the present, that where any person present behaves himself in such a manner as to obstruct the justice's proceeding, he may order him at once into custody, and direct him to be withdrawn, so as to remove at once the obstruction to the administration of justice; or may commit him till he finds sureties to keep the peace."

In the present case it seems to me, on the evidence, that the plaintiff exercised his right as counsel to object to questions which probably were not in accordance with the rules of evidence. It may be assumed that the objections were tenable and should have been given effect to. It may be that the magistrate and the constable were not familiar with the rules of evidence and the forms of procedure, and it is very possible that the objections taken by the plaintiff were such as did not influence the minds of those to whom they were directed, that their force and effect were not observed, and that they seemed to be idle. It is certain that the objections met with no favour, and produced irritation, and provoked from the magistrate language calculated to arouse irritation in the mind of the counsel to

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whom it was addressed, but that the objections were repeated and insisted upon is manifest. Then there came a time in the examination of a witness when the counsel felt that it was his duty to press, no doubt with sufficient vigour, an objection to the course taken by the magistrate. The magistrate, if the language stated was used, most improperly addressed the counsel, and required him to keep silence, and threatened arrest or removal. The words then used by the plaintiff were words of persistence, and no doubt the magistrate was interfered with in the carrying on of the investigation in the manner in which he desired it to be carried on—thought it fit and proper to carry it on—and, as this interruption was of the kind already indicated, he did not propose to give effect to it. The magistrate then judging—it may be assumed not judging as one of us would have judged—determined to put a stop to the interruption which had thus been frequently made, and caused the plaintiff to be ejected from the room.

That he had jurisdiction to remove the plaintiff if he was misconducting himself, or was acting so as to obstruct the proceedings or to prevent him exercising the functions of his office, is beyond question. The case of *Re Clarke and Heermans* makes that clear. Having jurisdiction to remove upon cause, and facts having arisen which influenced his mind, the question remains, can I now, as a matter of law, declare that his discretion is reviewable? Can I now, as a matter of law, give such directions to the jury as will enable them to review this discretion thus exercised by the magistrate and say that no good cause existed to cause him to order the plaintiff's removal? I find that it is not in accordance with the principles that have been laid down in the cases as far as they have been cited to me. I think it would be better, if any principle is to be laid down in accordance with the plaintiff's contention, that it should be laid down by a tribunal in review in such a manner as will protect not only the public but all judicial officers whose conduct may be reviewed. I do not see that the plaintiff's case is strengthened by the fact that his right

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to act as counsel was given to him by statute, if the right to remove existed.

As to the constable who executed the order of the magistrate, the counsel for the plaintiff has candidly and most properly said that the two must stand together. If the magistrate had the right to direct the removal of the plaintiff, in the exercise of a jurisdiction or power which was vested in him, then the constable is protected; if there was no such power in the justice, then the question would arise as to whether the constable could still be protected in executing the order thus given. It is not necessary now to consider that question.

I must hold that the magistrate had jurisdiction to act as he did, and that the exercise of his judgment is not reviewable by this tribunal, and that, therefore, the action must fail.

During the Easter Sittings of the Divisional Court, 1892, the plaintiff moved to set aside the judgment of ROSE, J., and for a new trial.

This motion was argued before FALCONBRIDGE and STREET, JJ., on the 17th May, 1892.

On the 24th December, 1892, the Court ordered that the motion should stand for re-argument before the three Judges of the Queen's Bench Division.

It was argued accordingly on the 10th February, 1893. before ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ.

Aylesworth, Q. C., for the plaintiff. The defendant Saylor nowhere alleges that he had the plaintiff put out of court as a punishment for contempt. The only defence in the record is not guilty by statute. The defendant nowhere alleges that the plaintiff was obstructing the business of his court. Nothing of that nature was shewn, and no disrespect to the magistrate was shewn. The counsel for the defendant said at the trial that the defendant Saylor regarded the plaintiff's conduct as an

obstruction, but that was all. Unless it should be held that no Court can review the magistrate's conduct, it must be found on the evidence that there was no kind of provocation for what the defendant Saylor did. What took place did not amount to contempt of court or obstruction of business. Every superior court of record has inherent power to commit for contempt. But the authority of an inferior court of record is limited to contempt committed in the face of the court: *Regina* v. *Lefroy*, L. R. 8 Q.B. 134; *Ex p. Pater*, 5 B. & S. 299; *Carus Wilson's Case*, 7 Q.B. 984. It is said there is no right of appeal, no right to review the magistrate's acts. I concede that is the case as regards a court which has inherent jurisdiction to commit, though *Ex p. Fernandez*, 10 C. B. N. S. 3, shews there is an appeal to the Sovereign from a committal by a Judge of Assize. Courts which are not courts of record have no power at all to commit for contempt unless it is expressly conferred upon them by statute: *McDermott* v. *The Judges of British Guiana*, L. R. 2 P. C. 341. The magistrate here was not holding a court of record. Justices sitting in petty sessions are under that disability, as is hinted in *Rex* v. *James*, 5 B. & Ald. 894, per Abbott, C. J. In Oke's Magisterial Synopsis, 10th ed., note at p. 133, it is said that persons must conduct themselves at petty sessions in an orderly way, or they will be ejected, and the opinion is expressed that the justices cannot commit for contempt. A judicial officer is not absolute in his own Court and beyond review: *Willis* v. *Maclachlan*, 1 Ex. D. 376, a case of a revising barrister. Where a person has been wrongfully imprisoned, he may sue the ministerial officer and the judicial officer who caused the imprisonment, unless it be the Judge of a court of record: Rapalje on Contempts, ed. of 1884, p. 234; *Ex p. Yates*, 4 Johns. 317; *Yates* v. *Lansing*, 5 Johns. 282; *Yates* v. *The People*, 6 Johns. 337; *Yates* v. *Lansing*, 9 Johns. 395. An action against a justice of the peace is a common enough thing. There are here two causes of action, one for acting maliciously and without reasonable and probable cause; and the

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other for trespass, acting without any warrant. Where a person is committed, the cause of committal must be set out in a warrant: *Regina* v. *Jordan*, 36 W. R. 797; W. N. 1888, p. 152. The learned trial Judge based his view on *Re Clarke and Heermans*, 7 U. C. R. 223. This case is posited on the power of the Court to commit for contempt, and shews how it is to be exercised. It was conceded there that there was power to commit, and the remarks relied on are *obiter*. The same thing was laid down in *Re John Crawford*, 13 Q. B. 613. I rely on *Ex p. Lees and County Judge of Carleton*, 24 C. P. 214, where the proceedings were brought up by *certiorari*, and it was assumed that there was the right to review. The Court thought the Judge was right in fining for contempt. I adopt the argument of Mr. Patterson, counsel in that case. I also refer to the fact that it was thought necessary to give the power to commit to Division Courts by statute. Malice might be inferred from the evidence, given in this case, but the action is under both sec. 1 and sec. 2 of R. S. O. ch. 73; and under sec. 2 it is not necessary to shew malice. I refer also to *Doyle* v. *Falconer*, L. R. 1 P. C. 328; *People ex rel. McDonald* v. *Keeler*, 29 Albany L. J. 511; *Kilbourn* v. *Thompson*, 103 U. S. Sup. Ct. (13 Otto) 168; *Hunter* v. *The State*, 6 Ind. 423; *Re Ramsay*, L. R. 3 P. C. 427; *Cox* v. *Coleridge*, 1 B. & C. 37.

Clute, Q. C., for the defendants. The evidence shews a distinct dispute and trouble between counsel and magistrate; the plaintiff was interrupting, and the defendant Saylor could not take down the evidence. In the interests of public justice, as a matter of public policy, such an action does not lie. A magistrate must have power to enforce order and decorum in his own court. If a person will not be quiet, he must be put out. The magistrate has the power and he has the right to remove, and his exercise of it is not open to review in this Court. I refer to *Armstrong* v. *McCaffrey*, 12 N. B. Reps. 517; *Haggard* v. *Pelicier*, [1892] A. C. 61; *Garnett* v. *Ferrand*, 6 B. & C. 611;

Collier v. *Hicks*, 2 B. & Ad. 663; *Regina* v. *Scott*, 2 U. C. L. J. N. S. 323; *Re Crow*, 1 U. C. L. J. N. S. 302; *Re Clarke and Heermans*, 7 U. C. R. 223; *McKenzie* v. *Mewburn*, 6 O. S. 486; *Pike* v. *Carter*, 3 Bing. 78; *Graham* v. *Smart*, 18 U. C. R. 482; *Scott* v. *Stanfield*, L. R. 3 Ex. 220; *Kemp* v. *Neville*, 10 C. B. N. S. 523; *Brittain* v. *Kinnaird*, 4 Moo. 50; *Willis* v. *Maclachan*, 1 Ex. D. 376; *Fray* v. *Blackburn*, 3 B. & S. 576; *Ward* v. *Freeman*, 2 Ir. C. L. R. 460; *Calder* v. *Halket*, 3 Moo. P. C. 28; *Garner* v. *Coleman*, 19 C. P. 106; *Agnew* v. *Stewart*, 21 U. C. R. 396; Odgers on Libel, 2nd ed., pp. 142, 143; Paley on Convictions, 7th ed., pp. 386, 387, 394; *Burton* v. *Henson*, 10 M. & W. 105; 13 M. & W. 181. If the magistrate had jurisdiction, there is no right of action, though the plaintiff may be entitled to his discharge: *Ovens* v. *Taylor*, 19 C. P. 49. There was abundant evidence of interruptions by the plaintiff, and no evidence of malice on the part of the defendants. It is impossible to draw a distinction between courts of inferior and superior jurisdiction, where there is in both the power to fine and imprison. Even if the magistrate is liable, the constable is not. Argument.

Aylesworth, in reply. It is begging the question to say that the magistrate had the power to remove an obstructionist. Upon the testimony taken there was no obstruction. That is the question to be tried.

March 4, 1893. ARMOUR, C. J.:—

The prevailing opinion in England seems to be that justices sitting as this defendant was for the trial of offences for the commission of which they are authorized by law to convict summarily, have no power to commit for contempt.

In Stone's Justices' Manual, a book of recognized authority, 26th ed., at p. 727, it said that, "Pollock and Follet, when law officers of the Crown, advised that justices had no power to commit for contempt, and the

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proper course was to indict the offender;" and cases are there referred to which I have been unable to consult, as they are not in the library, viz., 26 J. P. 719; 37 J. P. 302. See also 48 J. P. 457; 19 Sol. Jour. pp. 569 and 578; *Rex* v. *James*, 5 B. & Ald. 894. And the reason for this opinion appears to be this, that the jurisdiction to try offences summarily has been conferred upon justices of the peace by the statute law only, and that they have no other powers than those which are given to them by such law, and the statute law confers no such power upon them: *Regina* v. *Lefroy*, L. R. 8 Q. B. 134; *Watson* v. *Bodell*, 14 M. & W. 57.

And in this country this opinion is strengthened by the fact that by section 109 of R. S. C. ch. 178, the Summary Convictions Act, it is provided that "every judge of Sessions of the Peace, police magistrate, district magistrate, or stipendiary magistrate, shall have such and like powers and authority to preserve order in the said courts during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any court in Canada, or by the judges thereof during the sittings thereof;" and the powers conferred by this section are not conferred upon justices of the peace sitting as the defendant was sitting.

But whether justices of the peace sitting as this defendant was sitting have power to commit for contempt or not, they have no power to do so except by warrant under their hands and seals, setting forth clearly the cause of commitment and all facts necessary to shew jurisdiction to commit: *Mayhew* v. *Locke*, 7 Taunt. 62; *Hutchinson* v. *Lowndes*, 4 B. & Ad. 118; Odgers on Libel, 2nd ed., p. 507.

In *Armour* v. *Boswell*, 6 O. S. 153, 352, and 450, the plaintiff was brought before the defendants, justices of the peace, charged with an offence under 4 Will. IV. ch. 4, for which the defendants had power to convict summarily; while before the defendants, the plaintiff, it was alleged, assaulted one of the defendants and insulted them, and

they directed a constable to arrest him, without issuing any warrant of commitment, and he was arrested and kept in custody for a short time, and for this he recovered damages against the defendants, because they had acted illegally in directing his arrest without a warrant.

That case appears to me to be decisive of this, for this case cannot be distinguished in principle from it.

There it was the defendant in the charge before the justices who was guilty of the contempt; here it was the counsel for the defendants in the charge before the justice who is alleged to have been guilty of it; but the cases cannot be distinguished in principle by reason of this circumstance.

The plaintiff in this case had a right by law to appear before the defendant on behalf of the persons charged before the defendant, and to cross-examine the witnesses who were called to give evidence in support of the charge; he had the right to object to the reception of testimony which he thought was not receivable; and he had the right to object to the putting of leading questions to the witnesses called in support of the charge.

The privilege of counsel in defending persons charged with offences is very wide, and it is not desirable in the interest of the public and of the accused that it should be abridged, but it should always be exercised in a becoming manner.

The evidence before us does not shew that the plaintiff, up to the time of his arrest, had exceeded his proper privilege, and it shews no ground for his expulsion from the court.

He was not a mere onlooker at the proceedings who was there neither as a witness nor as a party, and whose interference might have justified his removal from the court, within the principle of *Collier* v. *Hicks*, 2 B. & Ad. 663.

He was there performing his duty as a counsel, and had a right to be there, and the proper exercise of his privilege

Judgment. Armour, C.J.

as a counsel could not constitute an interruption of the proceedings so as to warrant his extrusion.

If the defendant had issued his warrant for the commitment of the plaintiff, and had therein stated sufficient grounds for his commitment, this Court could not have reviewed the facts alleged by him in his commitment: *In re John Rea*, 4 L. R. Ir. 345; but there being no warrant of commitment, the defendant will be bound to establish such facts upon the trial as will, under the charge of the learned Judge, justify the course taken by him.

And it may be that it will be advisable for the defendant to consider whether, under the circumstances of this case he is entitled to the benefit of R. S. O. ch. 73, and R. S. C. ch. 185, and whether he can rely upon a plea of not guilty by statute, and whether he should not plead specially the facts upon which he relies for his justification.

The case of *Armstrong* v. *McCaffrey*, 12 N. B. Reps. 517, is not binding upon us, and is at variance with the law by which we are governed, and the Court in that case seem to have misapprehended the effect of the passage therein cited from *Kemp* v. *Neville*, 10 C. B. N. S. at p. 552.

There must be a new trial, and the costs of the last trial and of this motion will be costs in the cause, and upon the High Court scale, to the plaintiff in any event of the suit.

FALCONBRIDGE, J.—(after stating the facts):—

The sections of the statute which have application to the case are R. S. C. ch. 178, secs. 33 and 34, which are as follows:—

"The room or place in which the justice sits to hear and try any complaint or information shall be deemed an open and public court, to which the public generally may have access, so far as the same can conveniently contain them.

"The person against whom the complaint is made or information laid shall be admitted to make his full an-

swer and defence thereto, and have the witnesses examined and cross-examined by counsel or attorney on his behalf."

Judgment. Falconbridge, J.

And the plaintiff lays stress on the fact that section 109, which is as follows: "Every judge of Sessions of the Peace, police magistrate, district magistrate, or stipendiary magistrate, shall have such and like powers and authority to preserve order in the said courts during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any court in Canada, or by the judges thereof, during the sittings thereof:" does not in express terms extend to justices of the peace.

The Imperial statute containing provisions similar to those of sections 33 and 34 is 11 & 12 Vic. ch. 43, sec. 12; and the first enactment, as far as Upper Canada is concerned, following the Imperial legislation, is to be found in 16 Vic. ch. 178, secs. 11 and 29.

It will be seen that most of the decisions to which I shall have occasion to refer were before these statutes.

A long line of decisions from *Mostyn* v. *Fabrigas*, 1 Cowp. at p. 172, to *Fray* v. *Blackburn*, 3 B. & S. 576, disposes of the question of the liability of judges—particularly judges of record—for acts done by them in their judicial capacity.

The questions at issue here are: (1) whether a justice of the peace, acting as such under the provisions of the Summary Convictions Act, is or is not a judge of record; (2) whether being a judge or not, he has the power summarily to punish contempts in *facie curiæ*; (3) whether, even if he has not such power, he has or has not the power to remove persons who by disorderly conduct obstruct or interfere with the business of the court; (4) whether such power, in whatever degree he may possess it, is subject to review by the superior Court.

Chief Justice Wilmot, on p. 254 of his Opinions, says: "The power which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident

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Falconbridge, J.

to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it;" citing 1 Vent. 1. He goes on to say, "I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society."

In *Groenvelt* v. *Burwell*, 1 Comyns at p. 79, dealing with the power of censors of the College of Physicians and Surgeons, per Holt, J., it was considered: "They (the censors) are judges of record, for they have authority to impose fine and imprisonment; and when a new authority is constituted, with power to fine and imprison, the persons invested with such authority are judges of record; for that very thing proves a court to be a court of record, viz., the power of fining or imprisoning; for courts which are not of record can neither set a fine nor commit any one to prison;" citing *Griesley's Case*, 8 Co. 38 *b*.

In Bacon's Abridgment "Courts" D. I., p. 392, it is said: "The less principal ones (courts of record) are such as are held by commission of gaol delivery, oyer and terminer, assize, *nisi prius*, etc., by custom or charter; as the courts of the counties palatine of Lancaster, Chester, Durham; or by virtue of acts of parliament, and the king's commission, as the courts of sewers, justices of the peace, etc.: Hale's An. 36."

In Oke's Magisterial Synopsis, 10th ed., vol. 1, p. 133, note 2, the author commenting on the section corresponding to sections 33 and 34, says: "It will be observed that this is not the case on the preliminary inquiry in indictable offences (11 & 12 Vic. ch. 42, sec. 19). The parties must conduct themselves orderly, otherwise they should be ejected. There appears to be no express authority in the justices to commit any person guilty of contempt of court,

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when a justice is sitting alone or in petty or special sessions; but an opinion has been often expressed that they may commit such a person until the rising of the court, or until he find a surety for his good behaviour;" and at p. 134 he says, discussing the question of ordering witnesses out of court, and their non-compliance with the order: "Nor have the magistrates any summary power of punishing them for the disobedience, but they may weigh the credit due to their testimony."

In Burn's Justice, 30th ed., vol. 3, at page 160, it is said: "In some cases a justice acts as a judge of record, as in case of riot, giving possession of deserted premises, etc.; and then the record is a conclusive answer to any action that may be brought;" citing *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; *Basten* v. *Carew*, 3 B. & C. 649. And the same author says on p. 142: "A magistrate has, it seems, a power to commit a person guilty of a contempt, by insulting him or otherwise, when acting in his judicial capacity, though not so when he is acting merely ministerially."

In *Rex* v. *Revel*, 1 Str. 421, there was an indictment against the defendant for saying of a justice of the peace in the execution of his office, "You are a rogue and a liar." *Per curiam*: It is true the justice may make himself judge and punish him immediately; but still if he thinks proper to proceed less summarily by way of indictment, he may: the true distinction is, that where the words are spoke in the presence of the justice, there he may commit; but where it is behind his back, the party can be only indicted for a breach of the peace. See *Burdett* v. *Abbot*, 14 East 1.

In *Rex* v. *James*, 5 B. & Ald. 894, Abbott, C. J., expressly declines to give an opinion upon the power of a justice of the peace to commit for a contempt, but holds the warrant in that case bad for not committing for a time certain. And it will be found in the more recent cases that the English Judges are careful to avoid expressing an opinion regarding the powers possessed by justices of the peace to commit for contempt, even in *facie curiæ*, except when sitting in sessions.

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Falconbridge, J.

In *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146, it was held that "if, at a County Court held for the election of knights of the shire, a freeholder interrupt the proceedings, by making a great noise and disturbance, the sheriff may order him to be taken into custody, and carried before a justice of the peace." Mansfield, C. J., says at p. 150: "But it is said that the sheriff has no authority to commit. He certainly has no authority to commit as a magistrate; nor did he in this case commit the defendant. The extent and nature of the powers appertaining to the office of sheriff are objects entirely foreign from the present inquiry. It is sufficient in this instance to observe that it was the duty of the sheriff to preserve order and decency. * * * * The defendant was not only justified in what he did, but it was his duty to adopt means (and what better could have been chosen?) to prevent the plaintiff from continuing to interrupt the proceedings of the court."

The case of *Cox* v. *Coleridge*, 1 B. & C. 37, is an illustration of the state of the law before the passing of the statutes to which I have alluded. That case refers to the right of a prisoner when examined before magistrates under a charge of felony, to have an advocate present on his behalf. It was there held that the prisoner was not so entitled as of right, it being a preliminary investigation only, and not conclusive upon him. Holroyd, J., in this case says (p. 51): "A magistrate, in cases like the present, does not act as a court of justice; he is only an officer deputed by the law to enter into a preliminary inquiry."

In *Garnett* v. *Ferrand*, 6 B. & C. 611, it is held that an action will not lie against a coroner for causing a person to be put out of the room after his refusing to depart; Lord Tenterden, C. J., remarking at p. 625 that "The court of the coroner is a court of record of which the coroner is the judge; and it is a general rule of very great antiquity, that no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions."

In *Daubney* v. *Cooper*, 10 B. & C. 237, it was held that

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the proceeding against a party in a summary manner under 5 Ann ch. 14, for keeping and using a gun to destroy game is of a judicial nature, at which all persons have a *primâ facie* right to be present; and, therefore, where a magistrate had, without any specific reason, caused a party, who claimed a right to be present, to be removed from a justice-room, where such a proceeding was going on, it was held, that he was liable to an action of trespass.

The case of *Smith* v. *The Justices of Sierre Leone*, 3 Moo. P. C. 361, decides that the Privy Council could make no order remitting a fine imposed by a court of record for contempt of court; and in *Re John Crawford*, 13 Q. B. 613, where the Court of Chancery of the Isle of Man, which is a court of record, had committed a party for contempt, the Queen's Bench refused to interfere by *habeas corpus*, there not being error in the manner and form of the proceeding.

In *McKenzie* v. *Mewburn*, 6 O. S. 486, Robinson, C. J., citing some older authorities, says, at p. 488: "Now, in this case, admitting, what I am not able to say rests on clear authority, that this defendant (a magistrate) might punish summarily for a contempt committed while he was executing his duty as a justice of the peace in his own house, and not presiding in any court, yet it must certainly appear that he did regularly convict the party."

Kemp v. *Neville*, 10 C. B. N. S. 523, is one of the leading authorities for the proposition that a judicial officer is not liable to be sued for adjudication according to the best of his judgment upon a matter within his jurisdiction: and a matter of fact so adjudicated by him cannot be put in issue in an action against him. There the Vice-Chancellor of the University of Cambridge was held to be invested by the charter of the University with judicial authority, and a judge of a court of record, and thereby entitled to all the protection attached by law to the judicial office.

The defendant here claims that this principle is applicable to him. One of the older cases cited in this judgment is *Hamond* v. *Howell*, 2 Mod. 219, where a judge

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who committed for an alleged contempt, where in truth no contempt had been committed, was held not liable in trespass, because he had jurisdiction over the question, and his mistaken judgment was no cause of action.

The absence of a warrant in the case of a court of record is immaterial, for "all judges have power to commit to the custody of their officer, *sedente curiâ*, by oral command without any warrant made at the time."

A very instructive case on the subject of punishment for contempt is *Ex p. Fernandez*, 10 C. B. N. S. 3. Its particular application however is only to Justices of Assize.

Agnew v. *Stewart*, 21 U. C. R. 396, following *Garnett* v. *Ferrand*, 6 B. & C. 611, holds that a barrister cannot insist upon being present at a coroner's inquest, and upon examining and cross-examining witnesses, etc., and can maintain no action against the coroner for excluding him from the room. The Court held that the second count did not state a good cause of action, notwithstanding that it stated malice and want of probable cause.

In re Clarke and Heermans, 7 U. C. R. 223, is strongly relied upon by the defendants; and the dictum cited in the judgment of the learned trial Judge is, if good law, amply sufficient to sustain the judgment appealed from. But it is argued by counsel for the plaintiff that that part of the judgment is *obiter dictum*, and in no way necessary for the decision of that case, and that it is opposed to the current of modern authority.

In *Ex p. Pater*, 5 B. & S. 299, the head-note is: "Every court of record has attached to its jurisdiction, as inherent in it, the power to punish for contempt: but if the court is one of inferior jurisdiction, the Court of Queen's Bench has authority to intervene and prevent any usurpation of jurisdiction by it; and, if it treats conduct as a contempt which there is no reasonable ground for so treating, may interfere to protect the party upon whom the power to commit or fine for contempt has been improperly exercised. * * * (3) The Court of

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Queen's Bench has, however, no jurisdiction to act as a court of appeal in such cases." The court in this case was the Quarter Sessions, which is a court of record. Lord Cockburn, C. J., says at p. 308: "We must not take upon ourselves the functions of a court of appeal; all we have to see is, whether the Quarter Sessions had jurisdiction in the matter complained of." He cites the case of *Carus Wilson*, 7 Q. B. 984. Blackburn, J., says at p. 311: "This Court has power to set right inferior courts if they act beyond their jurisdiction. But if the inferior court had before them reasonable evidence from which they could draw the conclusion that the facts which gave them jurisdiction existed, and they drew that conclusion, we cannot say that we do not draw the same conclusion and reverse their judgment. I agree that when we are considering a question of contempt we ought to see whether the inferior court had reasonable grounds for adjudging that a contempt had been committed; but we must bear in mind that the court is the judge whether it has been treated with contempt."

In *Doyle* v. *Falconer*, L. R. 1 P. C. 328, the question was as to the power of the Legislative Assembly of Dominica to punish a contempt. At p. 340 Sir James W. Colvile makes this observation: "It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation." *Mutatis mutandis*, this principle may have a bearing upon the case in hand.

In *Regina* v. *Scott*, 2 U. C. L. J. N. S. 323, it was held by John Wilson, J., that a magistrate had power to commit for contempt under the circumstances stated in the commitment, and if the same violent conduct was continued, he had the right to commit again and again as he did. The prisoner was held entitled to his discharge for want of certainty in the periods of imprisonment imposed upon him for these several offences. There is no note of

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the argument or anything to shew that the jurisdiction of the magistrate was attacked, except the memorandum that the discharge of the prisoner was asked for on the ground, amongst others, that the magistrate had no authority to commit the prisoner for the offence charged.

McDermott v. *The Judges of British Guiana*, L. R. 2 P. C. 341, is another case affirming the power of a court of record to commit for contempt, and that the exercise of such power, being discretionary, was not the subject of appeal.

Re Ramsay, L. R. 3 P. C. 427, decides that a Judge of the Court of Queen's Bench in Lower Canada, while sitting alone in the exercise of a criminal jurisdiction, has, under the authority of C. S. C. ch. 77, sec. 72, no power to pronounce a counsel in contempt for publishing two letters reflecting upon the judge's conduct, or to impose a fine.

Garner v. *Coleman*, 19 C. P. 106, was another case of a coroner.

In *Regina* v. *Lefroy*, L. R. 8 Q. B. 134, it is held that the jurisdiction of the Judge of a County Court was confined by 9 & 10 Vic. (Imp.) ch. 95, sec. 113, to contempts committed in court; and he had no power to proceed against a person for a contempt committed out of court; and *semble*, that inferior courts of record have only power over contempts *in facie curiæ*.

Ex p. Lees and Judge of the County of Carleton, 24 C. P. 214, follows *Ex p. Pater* 5 B. & S. 299.

Willis v. *Maclachlan*, 1 Ex. D. 376, is a case respecting the power of a revising barrister to order a person to quit the court. The Judge at the trial nonsuited the plaintiff on the ground that the question of interruption having been decided by the revising barrister, his discretion could not be reviewed before another tribunal; and it was held by the Court of Appeal that the special defence was not proved, and that the nonsuit was wrong. In this case the plaintiff was turned out of court for alleged past misconduct, and his expulsion was not in the nature of a

summary committal essential to the maintenance of order in judicial proceedings. Judgment. Falconbridge, J.

In the present case the plaintiff's counsel contends that there is no adjudication by the defendant Saylor that the plaintiff was disturbing or obstructing the business of the Court.

In *Haggard* v. *Pelicier*, [1892] A. C. 61, it was held that a British consul, while sitting and acting as judge of the consular court, was entitled to the same degree of protection which is accorded to a judge of a court of record. And Lord Watson says, at p. 68: "The remedy * * does not lie in an action of damages against the offending judge, but by making a representation to the authorities whose duty it is to see that justice is administered with due care and attention."

In Rapalje on Contempts, sec. 6, it is said: "It may well be doubted whether, at the common law, justices of the peace have any power to punish contempts either by fine or imprisonment, except, perhaps, those committed in *facie curiæ*. In some States of the Union a limited power to punish contempts of their authority has been conferred upon these officers by statute, provided the contempt be committed in their immediate presence, and while actually holding court. Thus in Illinois * * by a recent statute the power to punish is limited to a fine of $5, and imprisonment until such fine is paid."

See on the general subject of the jurisdiction of the different Courts, Oswald on Contempt of Court, pp. 7 to 11.

It may well be that any judicial officer has impliedly granted to him, by the authority which constitutes him, the power of removing and keeping excluded from the room where he carries on his deliberations, all persons who interrupt his proceedings, for such power may be absolutely indispensable for the proper exercise of his functions; but the power of punishing such offenders for their contempt of his authority may not be necessary for that purpose. See Maxwell on Statutes, 2nd ed., p. 438.

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In *Rhinehart* v. *Lance*, 43 N. J. L. R. 311, Depue, J., says at p. 320: "The power to remove persons who, by disorderly conduct, interfere with the business of the court, is a power essential to the very existence of the court, and is implied from the creation of the court."

But is the mere assertion by the judicial officer that the plaintiff was guilty of such disorderly conduct as to interfere with the business of the court, unaccompanied even by any formal adjudication, but only stated by counsel, final and conclusive so as to be a matter which cannot be passed upon by any other tribunal? I think not.

I refer also to *Mayhew* v. *Locke*, 7 Taunt. 62; *Armour* v. *Boswell*, 6 O. S. 153, 352, 450, cited by the Chief Justice.

The conclusions at which I have arrived, on the cases, are:

(1.) A justice of the peace, acting as such under the provisions of the Summary Convictions Act, has not the power summarily to punish contempts in *facie curiæ*, at any rate without a formal adjudication, and a warrant setting out the contempt.

(2.) He has the power to remove persons who by disorderly conduct obstruct or interfere with the business of the court.

I do not think that the plaintiff was disorderly in the sense of obstructing and interfering with the business of the court. He had a right to be there in the pursuance of his retainer and his duty as solicitor and counsel.

What he chose to say or do in the execution of such duty might be a contempt. But if it amounted to a contempt, and the justice thought fit to punish him therefor, he could do so only as pointed out above, by issuing his warrant.

Not otherwise could he legally order Hyatt to lay hands on the plaintiff, nor could Hyatt legally lay hands on the plaintiff.

I think, therefore, the defendants are trespassers, on the state of facts disclosed by the plaintiff's evidence and that of his witness, and that the case ought not to have been

withdrawn from the jury. The nonsuit will be set aside and a new trial ordered, with costs of the last trial and of this motion to be costs to the plaintiff in any event of the cause. Judgment. Falconbridge, J.

STREET, J., concurred.

[This case has been carried to the Court of Appeal.—REP.]

[CHANCERY DIVISION.]

MCCALLUM V. RIDDELL.

Will—Construction—Condition—Precedent—Formation of Partnership—Predecease of Intended Partner.

A testator by his will directed that "as soon as conveniently may be after my decease, a partnership be formed by my two sons * * in which partnership and firm my two sons shall be equal partners in every particular and sharing equally in the profits of the same. To the said firm so to be formed I give and bequeath as partnership assets, the building etc." The testator then proceeded to give and bequeath to the said firm certain specific lands and personal property, and ultimately the whole of his residuary real and personal estate. After the death of one of his said sons, who predeceased him, he made some codicils to his will, in which he referred to the above portion of his will and revoked some of the bequests to the said firm, but otherwise ratified his will:—

Held, that the formation of the partnership as directed was a condition precedent to the vesting of the gifts and bequests above mentioned, and that as one of the two sons predeceased the testator there was an intestacy as to them.

THIS was an action brought for the interpretation of the will of Peter McCallum, the elder, and for the administration of his estate. The plaintiffs were two surviving children of the testator, Charles Young McCallum, the only other surviving child being a party defendant, and the other defendants being the executors of the will of the testator and the executors of the will of Peter McCallum, a deceased son of the testator, who died on July 3rd, 1892, leaving issue. Statement.

Statement.

Peter McCallum, the elder, died on September 2nd, 1892, having made his will dated July 2nd, 1891, by which, after certain specific devises and bequests to his son Peter McCallum, the younger, and to his other children, he proceeded as follows:—

"*Tenth.*—I direct that as soon as conveniently may be after my decease a partnership be formed by my two sons, Peter McCallum, the younger, and Charles Young McCallum, under the name of 'P. McCallum & Bro.,' in which partnership and firm my two sons shall be equal partners in every particular and sharing equally in the profits of the same. To the said firm so to be formed I give and bequeath as partnership assets the building on the south side of King street, in the said town of Cobourg, now occupied as a dry goods store by my firm of P. McCallum & Sons, and also the land on which the same stands and all the storehouse, yards, lanes and roads, rights, privileges and appurtenances to the said store belonging or appertaining or usually enjoyed therewith, or any part thereof, subject nevertheless to the right of way for ingress, egress and regress, hereinafter devised to my son Charles Young McCallum in connection with the remaining buildings in the same block of buildings on the south side of King street, the said store to be partnership assets and without right of survivorship. And I further give and bequeath unto the said firm so to be formed, and as partnership assets, lot number five, on the east side of Spring street, in the said town of Cobourg, being the land conveyed to me and my said son Peter McCallum, the younger, by the late William A. Garratt by deed bearing date June 14th, 1862.

"*Eleventh.*—And I further give and bequeath unto the said firm so to be formed all the stock-in-trade, cash, book debts, notes, mortgages, assets and effects of the said firms of 'P. McCallum & Son' and 'P. McCallum & Sons,' (*a*) and also all and singular my other real and personal estate and effects of whatsoever kind and wheresoever the

(*a*) These were the names of the testator's two firms.—REP.

same may be situated, saving only the real and personal estate which I hereinbefore and hereinafter specifically devise or bequeath. Statement.

"The said Peter McCallum, the younger, and Charles Young McCallum are hereby directed to execute all such documents of transfer or otherwise as may be necessary or proper to carry this my will into full force and effect in every part thereof."

By a codicil dated July 26th, 1892, the testator directed as follows:—

"*First.*—I hereby revoke the legacy mentioned in the second paragraph of the codicil to my last will and testament, made the 21st day of January, A.D. 1892, of the five shares of the capital stock of the Bank of Toronto to the firm (*b*) as therein mentioned, and give and bequeath the said five shares of the capital stock of the Bank of Toronto unto my son Alexander McCallum.

"*Second.*—I further give, devise and bequeath unto my said son Alexander McCallum the twenty-five shares of the capital stock of the Canada Landed and National Investment Company (Limited), now standing in my name, and revoke the bequest of the same in the eleventh paragraph of my said last will and testament to the firm as a residuary bequest as therein mentioned.

"*Third.*—In all other respects I hereby ratify, approve and confirm my said last will and testament dated the said second day of July, A.D. 1891, and the codicil thereto dated the 21st day of January, A.D. 1892."

By a further codicil, dated August 9th, 1892, the testator revoked one of the specific devises which he had made to Peter McCallum the younger, and again added:

"In all respects I hereby ratify, approve and confirm my said last will and testament dated July 2nd, 1891, and the codicils thereto dated January 21st, 1892, and July 26th, 1892."

As set out in the statement of claim, the plaintiffs claimed

(*b*) This was the firm to be formed as directed in paragraph 10 of the will above set out.—REP.

Statement.

that under the above paragraphs 10 and 11 of the will, it was a condition precedent that the firm should be formed consisting of Peter McCallum the younger, and Charles Young McCallum, under the name of P. McCallum & Bro., and that to the firm when formed and so to be formed the residue of the estate of the late Peter McCallum the elder, should be given: and that the formation of such a firm having become an impossibility by the death of Peter McCallum the younger before the testator, the legacies, gifts and devises in the said paragraphs 10 and 11 could not vest or pass, as the conditions could not be satisfied, and so they failed absolutely, and there was an intestacy as to them.

By their statement of defence, the executors under the will of Peter McCallum the younger, contended as follows:

"These defendants say that it was not and is not a condition precedent to the gifts, legacies and devises in the said 10th and 11th paragraphs mentioned that the partnership intended should be formed, but that the intention of the said Peter McCallum was that the said gifts, legacies and devises in the said paragraphs mentioned should be divided equally between his two sons, the said Charles Y. McCallum and Peter McCallum the younger, in case they both survived him; or in case either died before him, then between the survivor and the personal representatives of the deceased son. And these defendants submit that in the case which has happened there is no lapse or intestacy, but that the said gifts, devises and legacies in the said 10th and 11th paragraphs are effective, and that the said defendants with the said C. Y. McCallum are entitled to the same."

The defendant Charles Young McCallum, in his statement of defence, claimed that he was entitled to the benefit of the legacies, gifts and devises in the said two paragraphs 10 and 11.

The matter came up on motion for judgment on May 5th, 1893, before BOYD, C.

Bain, Q.C., and *J. W. Kerr*, for the plaintiffs. No such firm as that to which the gift is given under clauses ten and eleven of the will was ever in existence. The gift, therefore, is void as being to a nonexistent person: *In re Boddington, Boddington* v. *Clairat*, 22 Ch. D. 597, 25 Ch. D. 685; *Re Ely, Tottenham* v. *Ely*, 65 L. T. N. S. 452. Moreover, there was a condition precedent that a firm should be formed composed of C. Y. McCallum and Peter McCallum, jun., and owing to the death of the latter such a firm cannot possibly be formed, consequently the legacy lapses. Section 36 of the Wills Act, R. S. O. c. 109, does not apply here, as the gift is not to the children, but to the firm. Argument.

[BOYD, C.—But the moving cause of the gift here is, that the legatees are the testator's sons, not that they are a firm.] I submit not. As to the condition of the formation of the firm being a condition precedent: Jarman on Wills, 5th ed., vol. 2, pp. 844, 849-50; *Lowther* v. *Cavendish*, 1 Eden 95; *Egerton* v. *Brownlow*, 4 H. & L. 1. The ratification of the will by the codicil cannot affect the lapses of the legacy: Jarman, *ib.*, vol. 1, p. 308.

J. W. Kerr, on same side.

Moss, Q.C., for the executors of Peter McCallum, jr. The testator clearly had no such final determination that such a firm should be formed as to desire that the legacy should lapse if it was not formed. His idea was simply to benefit his two sons. The expressions of the codicil would be inapt in any sense, if the legacy to the firm was intended to be read as contended. If the legacy lapsed, there would be nothing to revoke. By revoking it he recognized its existence up to that moment. The matter of the formation of the firm was, if a condition at all, a condition subsequent. Evidently a fair and reasonable time was intended to be allowed for the formation of the partnership. If so, the legacy vested, and the formation of the firm was a condition subsequent on non-performance of which the legacy would be divested. But the non-performance being the result of the act of God, it became unnecessary,

Argument. and the legacy is absolute: Theobald on Wills, 3rd ed., p. 374; *Duddy* v. *Gresham*, 2 L. R. Ir. 442; *Collett* v. *Collett*, 35 Bea. 312; *Parker* v. *Parker*, 123 Mass. 584; *Merrill* v. *Emery*, 10 Pick. 507. Even if a condition precedent, still the act being impossible at the time of the creation of the condition, then as regards personalty, the condition does not hold, and the legacy is good: Jarman, 6th Am. ed., vol. 2, p. 852-3. Taking the whole will, and having regard to the motive of the alleged condition, and the purpose for which it was imposed, there is no reason why the legacy should not take effect.

C. J. Holman, for C. Y. McCallum. My client is perfectly willing, so far as he is concerned, to form the firm. The testator used the word "firm" as a mere term of description. He did not specially desire the formation of a partnership, except as a method of working out the scheme and motive of his bounty: *Rishton* v. *Cobb*, 5 M. & Cr. 145. The motive of the bounty was not the formation of the firm. All he did was to shew in what way his partnership assets should be disposed of: *Yates* v. *University College*, L. R. 7 H. L. 438. *Re Boddington*, *Boddington* v. *Clairat*, 22 Ch. D. 597, 25 Ch. D. 685, seems rather a case in our favour. The marriage in that case was annulled at the suit of the wife, and yet notwithstanding this the Court said she could get the bequest. As to the residuary bequest, surely it cannot be contended that the formation of the firm was of any importance as to it: *In re Dendy*, 3 DeG. F. & J. 350. The two codicils clinch the matter.

Bain, in reply. The intention of the testator must be gathered from the will itself and nothing else, and from this the intention appears to be as we have contended.

May 8th, 1893. BOYD, C.:—

Darlow v. *Edwards*, 1 H. & C. 547, was upon a will by which the testator gave an annuity to his faithful servant Sarah, "provided she shall be in my service at the time of

my decease." He wrongfully dismissed her two days before his death: held she did not take, Wightman, J., saying, "the question turns upon the intention of the testator as shewn by the words used in his will." Judgment. Boyd, C.

Elton v. *Elton*, 3 Atk. 504, S. C. 1 Wils. 159, legacy to a granddaughter in case she marry with consent, and she died unmarried: held by Lord Hardwicke that the legacy never vested. He was of opinion from the whole texture of the will that the legal construction agreed with the intention of the testator, because he thought it plain that the gift was to prefer the granddaughter in marriage.

Reading the whole will, I think the testator meant the 10th and 11th clauses to apply only in case a partnership should be formed after his death by his two sons, and that the furnishing of that new firm with assets was the real motive of the devise and bequest. The sons are dealt with individually and bestowments of property made upon them and the other members of his family; and then he takes up a new subject, viz., the making provision for a firm to be constituted by his two sons, as equal partners, as soon as conveniently may be after his decease. The son Peter died before the father, and so the scheme became impossible by the act of God; but that result does not operate to divest the condition or to vest the gift. Section 36 of the Wills Act does not apply to prevent a lapse. The gift here was not to a child as such, but to one of his children as members of a firm to be formed after the testator's death. So that the will itself manifests an intention contrary to the application of this section to this will. The Courts have restricted rather than enlarged the operation of this section, *e.g.*, as not applying to a class even when there is but one of the class, because in such a case the gift is not to an individual named. *In re Sir E. Harvey's Estate, Harvey* v. *Gillow*, [1893] 1 Ch. 567. So here the designation of those to take is not the sons named by the testator, but the firm or partnership to be comprised of these sons,—a result defeated by the death of one prior to that of the testator. As adverted

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Boyd, C.

to in the judgment of Hagarty, C. J., in *Cosgrove* v. *Starrs*, 11 A. R. 160, the testator, himself a merchant, treated the firm as a "kind of impersonification."

I cannot read the codicils as changing what I take to be the plain and reasonable meaning of the will according to the words used. After the death of Peter, the son, the father makes two codicils, in the former of which he *revokes* part of the bequest made *to the firm*. He must then have known that the formation of the firm was impossible, owing to the death of Peter, and so it was needless to *revoke*. But I cannot impute such force to this technical word "revoke" as to extend the meaning of the will.

In the next codicil he uses the same word "revoke" with reference to part of the gift to his deceased son Peter —which is perhaps more appropriate, as section 36 would apply, in that case, to what was directly given to his son. But he proceeds to ratify and confirm his will in which he had named Peter as executor, which goes to show that the expressions in the codicils should not be overcharged with significance as against the unambiguous and repeated phrases of the will relating to the "firm to be formed."

I declare then that as the partnership cannot be formed owing to the death of Peter, that there is an intestacy under the 10th and 11th sections of the will. This, no doubt, is hard upon the other surviving son, who was disqualified as co-partner of Peter, but as the conditions do not and cannot arise under which he is to take, I cannot alter the result as to a moiety in his favour.

Costs out of estate.

As to gift to future partners see: *Stubbs* v. *Sargon*, 2 Keen 355, and 3 M. & Cr. 506, 513. Besides those cited, I have consulted as cognate cases: *Schloss* v. *Stiebel*, 6 Sim. 1; *Bullmore* v. *Winter*, 22 Ch. D. 619; *In re Morrieson*, *Hitchins* v. *Morrieson*, 40 Ch. D. 30; *Boyce* v. *Boyce*, 16 Sim. 476; *Priestley* v. *Holgate*, 3 K. & J. 286.

A. H. F. L.

[CHANCERY DIVISION.]

COOK V. BELSHAW.

Lien—Mechanic's Lien—"Prior Mortgage"—Mortgage Advances on Progress Certificates—Completion of Buildings and Advances before Lien Registered—Registry Act—R. S. O. ch. 126, sec. 5, sub-sec. 3.

"Prior mortgage" in sec. 5, sub-sec. 3 of the Mechanics' Lien Act means one existing in fact before the lien arises, though not necessarily prior in point of registration.

Under a mortgage advances were to be made from time to time as buildings progressed. Part of the work was done, and the mortgage was registered, the buildings completed and the further advances made before a lien was registered, and without actual notice of it:—

Held, that the mortgage had priority over the lien both as to prior and subsequent work, and as to the latter each further advance under the mortgage attracted to itself the advantage of the Registry Act so as to gain priority over the concurrent unregistered lien.

The increased value in such a case is not a benefit added to the pre-existing mortgage, but the periodical increase of value calls forth the periodical payments.

Statement.

THIS was an appeal from the report of the Master in Ordinary in certain Mechanics lien proceedings under the Act 53 Vic. ch. 37 (O.), the plaintiff claiming a lien upon the estate of the defendant, William Belshaw, in respect of carpenter's work done by him in connection with some buildings under agreement with Belshaw.

The facts are stated in the judgment of BOYD, C., but it may be added that the mortgage from William Belshaw to the Freehold Loan and Savings Company of October 22nd, 1892, purported to be for a received consideration of $28,150, the understanding as to the money being advanced only as the work of building the houses progressed not being expressed on the face of the mortgage. Under the proviso for redemption $2,000 of the principal money was to be paid in four consecutive annual instalments of $500 each, the first to be payable in one year after date, and the balance of principal money to be paid at the expiration of five years from date with interest.

In their defence in these proceedings the Freehold Loan and Savings Company set up as follows:—

Statement.

1. The said company only agreed to advance the moneys secured by the mortgage made by the defendant James Belshaw to them from time to time, as the erection of the buildings in course of erection at the date of the mortgage was proceeded with; and the moneys advanced upon the said mortgage being so advanced upon the property as improved, the said company are not prior mortgagees within the meaning of R. S. O. ch. 126, sec. 5, sub-sec. 3, and the plaintiff is therefore not entitled to priority over the said company to the extent that the selling value of the land has been increased by the plaintiff's work.

2. The moneys advanced by the said company upon their said mortgage were so advanced in good faith without any notice of the plaintiff's lien, and as the plaintiff's right to a lien arose on or before the thirteenth day of September, 1892, by his failure to register his lien before the registration of the mortgage to the said company, which is dated the twenty-second day of October, 1892, the said plaintiff is disentitled to any priority over the said mortgage of the said company.

The Master in Ordinary in his report, dated March 17th, 1893, found that the Freehold Loan and Savings Company were mortgagees of the land and premises in question under the mortgage, and were entitled to priority in respect of the mortgage to the value of their security before the buildings were commenced, and he added that upon the evidence adduced before him it appeared that the selling value of the lands had been increased by recent buildings erected by the plaintiff and the other lien-holders by the sum of $5,800, and that the lien-holders had priority in respect of this increased selling value.

The learned Master stated his reasons as follows:—

"I cannot find on the evidence before me that the Freehold Loan had that actual notice of the mechanics' liens in this case which the law requires, as defined in the case of *West* v. *Sinclair*, 12 C. L. T. 44. But, as the Loan Company registered their mortgage prior to these liens, I think I

must find that the Freehold Company comes within the definition of a prior mortgagee, and must be dealt with as a prior mortgage on this property under the provisions of sub-section 3, of section 5, of the Mechanics' Lien Act. Statement.

The evidence also satisfies me that the selling value of the land has been increased by the erection of these houses on the property, and, in applying the provisions of the Act in this case, I think the case of *Kennedy* v. *Haddow*, 19 O. R. 243, shows how the rights of mortgagees and lien-holders should be worked out. Following the interpretation of the law which is contained in that case the mortgage to the Loan Company, so far as it affects the real estate, was taken for two-thirds of what the land was sold by the company to Belshaw, which was $16,723. Two-thirds of this gives $11,149 as the value of the actual security for which the mortgage was to stand to the company in respect to the land.

Then, on the evidence as to the selling value of the land without the buildings, I find it to be, as stated by Mr. Stephenson, $80 a foot. This gives the selling value of the land to be $11,600, or very much the same as that for which the actual security of the company was taken. The evidence of Mr. Stephenson further shows that the increased value of the land by the erection of these buildings is $5,800. The actual value of land and buildings, according to Mr. Stephenson's evidence, is $17,400. The actual advance by the Loan Company I find to be $11,972, or a little over the amount for which they hold their security in respect of the land."

In their notice of the present appeal the Freehold Loan and Savings Company set up the following grounds of appeal, among others not necessary to mention here:—

1. The Master ought to have found that the plaintiff and the other lien-holders were and are not entitled to any relief against the said appellants.

2. The appellants registered their mortgage security herein long after the plaintiff had commenced to work

Statement.

upon the lands and premises in question herein, and long after the plaintiff and other lien-holders were entitled under the statute in that behalf to register liens in respect of their alleged claims for work done upon said lands, and the appellants advanced all moneys which have been advanced under said mortgage in good faith and without notice of the claims of the plaintiff and other lien-holders.

3. The plaintiff and other lien-holders, by reason of their default in not registering their said liens until after the registration of the mortgage of said appellants, have lost any rights as against the appellants. * * *

6. By reason of the agreement between the said defendant Belshaw and the appellants as to the manner in which the moneys secured by the said mortgage were to be advanced, and by reason of the manner in which the said moneys were, in fact, actually advanced, the said appellants are not prior mortgagees within the meaning of R. S. O. ch. 126, sec. 5, sub-sec. 3, so as to entitle the plaintiff and the other lien-holders to any priority over the said company in respect to any increased selling value of the said lands by reason of work done thereon by the plaintiff and the other lien-holders.

The appeal was argued on May 4th, 1893.

Hoyles, Q.C., for the Freehold Loan and Savings Company. The work of the lien-holders was begun before our mortgage, and before any money was advanced. We are not prior mortgagees within the meaning of R. S. O. ch. 126, sec. 5, sub-sec. 3, and by our registration before that of the lien we cut the liens out. They cannot take advantage of their own work in increasing the value: See section 5, sub-section 3, and section 21. As to "prior mortgage," see *Richards* v. *Chamberlain*, 25 Gr. 402; *Kennedy* v. *Haddow*, 19 O. R. 240. The lien-holders are cut out by their neglect to register: *Hynes* v. *Smith*, 27 Gr. 150; *McVean* v. *Tiffin*, 13 A. R. 1; *Makins* v. *Robinson*, 6 O. R. 1; *Reinhart* v. *Shutt*, 15 O. R. 325; *In re Craig*, 3 C. L. T. 501; *Reggin*

v. *Manes*, 22 O. R. 443; *Broughton* v. *Smallpiece*, 25 Gr. 290. Argument.

F. C. Jarvis, for the plaintiff. The mortgage was a "prior mortgage," and was in pursuance of a previous agreement to advance money: Jones on the Law of Liens, vol. 2, p. 1457; *Platt* v. *Griffith*, 27 N. J. Eq. 207; *West* v. *Sinclair*, 12 C. L. T. 119.

J. A. Mills, for George Phillips, a defendant and a lien-holder, referred to *Caldwell* v. *Hall*, 9 Gr. 110.

Hoyles, in reply. The mortgage is prior *qua* the Registry Act, but not *qua* the Mechanics' Lien Act.

May 5th, 1893. BOYD, C.:—

The appeal turns mainly upon the meaning to be given to the words "prior mortgage," used in the Mechanics' Lien Act, R. S. O. ch. 126, sec. 5, sub-sec. 3. The Master reads it as referable to priority in point of registration, whereas its true meaning relates to time. This results from the reason of the thing and the history of the clause. It first appears in 38 Vic. ch. 20, sec. 4, and is carried into the revision of 1877, ch. 120, sec. 7, in a form characterized by Proudfoot, J., in *Broughton* v. *Smallpiece*, 25 Gr. at p. 291, as "confused and involved," though "susceptible of an intelligible construction." It then ran, "in case the land * * is incumbered by a mortgage or charge existing or created before the commencement of the work or the placing of the materials * * upon the land." In the last revision of 1888 this is consolidated into "prior mortgage," a convenient condensation, suggested probably by the judgment in 25 Gr., where Proudfoot, J., glosses the words, as meaning "a prior mortgage." This greater brevity of phrase is not to be read as changing the legislative meaning. Prior mortgage means one existing as a fact before the lien arises: *Spahr* v. *Bean*, 1 O. R. 70; *McLaughlin* v. *Hammill*, 22 O. R. 493. In fact, you may omit "prior," and the same result would be reached when the reason of the provision is considered.

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Boyd, C.

Land with improvements being mortgaged, the mortgage attaches upon both, and both constitute the basis of value on which the security rests. But if improvements are put on the land after the mortgage the increase of value derived therefrom is to be saved for the mechanic who improves as against the prior mortgage by virtue of the Act (sec. 5, sub-sec. 3). The word "prior" is similarly used in the Registry Act (R. S. O. ch. 114, sec. 82), and it is the usual and primary meaning. This suffices to dispose of the whole appeal.

But on the reference back other points will arise which were discussed before me, and upon these I give my opinion.

These are the material dates: September 13th, 1892, the work begins. The mortgage is made and registered October 22nd, 1892. The work continues and is finished November 19th, 1892. Lien registered November 23rd, 1892, and summary proceedings begun December 19th, 1892.

Hence the mortgage subsequent in time being registered (as the Master finds) without notice of the unregistered lien gains priority over the lien by virtue of the Registry Act, and the decision of the Court of Appeal as pointed out in *Reinhart* v. *Shutt*, 15 O. R. 325. This, though it may be unsatisfactory, is clear, so far as the lien for the work already finished is concerned, but how stands the matter as to subsequent work and materials? As to this subsequent work, is the mortgage "prior" (in time) so that the increase of value therefrom derived is to go to the lien-men in priority to the mortgagees? Now, a distinction is to be observed between a mortgage where all the money is paid at once upon its execution, and one where payments are to be made from time to time. This mortgage was of the latter kind,—subsequent advances were to be made as the work progressed. The reason does not exist in such a case for giving priority to the increased value derived from subsequent work—for the increased value is not a benefit added to the pre-existing mortgage, but the

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Boyd, C.

periodical increase of value which calls forth the periodical payments. *Richards* v. *Chamberlain*, 25 Gr. 402, in effect determines this question adversely to the unregistered lien-men. The registration of the lien after the mortgage and prior to the subsequent advances would probably have intercepted payments thereafter made in respect of the mortgage. But as the mortgage was registered, each payment would attract to itself the advantage of the Registry Act, so as to gain priority over the concurrent unregistered lien, provided no actual notice of the lien came to the mortgagees.

This case affords another illustration of the unexpected complications which appear to be inherent in lien law so long as the legislature is unable to infuse honesty into the dealings of contractors and owners. Here innocent people must suffer from the contractor's default: the loss must fall on the lien-men or the mortgagees, and the result is worked out by first considering the mortgage as in one aspect prior to the lien, and in another as subsequent to the lien. Prior registration of the lien (which may be done before the work begins) would have bettered the condition of the lien-men: for here the scale turns in favour of the more vigilant mortgagees, who placed their security on record.

I allow the appeal: remit the matter to the Master and direct the mortgagees to add costs of appeal to their mortgage.

A. H. F. L.

[CHANCERY DIVISION.]

RE REED v. WILSON.

Crown Lands—Indian Lands—Mortgage before Patent—Notice—Registration in County Registry Office—Salvage—Priorities.

A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee duly registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department, though the mortgage was registered in the county registry office, and the plaintiff now sought to foreclose his mortgage:—

Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him.

Statement. THIS was a trial of an issue arising out of an appeal by the defendant Frederick W. Wilson from the report of the Master at Owen Sound, dated June 29th, 1892, made in this action which was brought by Robert Reed for foreclosure of a mortgage.

The defendants by original action were Lachlan M. Secord and his wife, Michael McGuire and his wife; and William McCleary, the Lion's Head Lumber Company, and Frederick W. Wilson had been added as parties in the Master's office.

The facts are set out in the judgment of MEREDITH, J., before whom the said appeal was argued on September 22nd, 1892, and who, in directing the present issue, gave judgment as follows:

October 12th, 1892. MEREDITH, J.:—

By deed bearing date September 20th, 1888, made in the usual form under the Act respecting Short Forms of Mortgages, the defendants Secord and McGuire granted and mortgaged to the plaintiff twenty-five lots of land in the township of Lindsay, to secure payment of $4,000 and interest; and this action was brought to foreclose that mortgage.

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Meredith, J.

The abstracts of title, brought into the Master's Office under Con. Rule 125, shew that as to thirteen of these lots the patents had issued before the making of the mortgage, and that the mortgagors had good title; as to eight, that nothing but the mortgage has ever been registered; and as to the remaining four, which are those in question upon this appeal, that the mortgage and the subsequent patent only have been registered.

The lands, according to the statements of counsel for each party, were what are known as Indian lands, subject to the provisions of the Indian Act; and, from the meagre evidence in the Master's office, it appears that on June 18th, 1887, David Porter acquired through the department of Indian Affairs, the timber upon the four lots in question with an option—to be exercised before January 1st, 1891—to purchase the lands; that by deed bearing date November 20th, 1889, David Porter assigned to Michael McGuire (*a*) absolutely, all his interest in the lands, described as 400 acres of timber; that by deed bearing date December 27th, 1889, Michael McGuire assigned to William McCleary, absolutely, all his interest in those lands, and in other 200 acres, described as 600 acres of timber limits; that by deed bearing date November 10th, 1890, William McCleary assigned to the appellant, absolutely, all his interest in the lands in question, described as 390 acres of land; that the last mentioned assignee, exercising the option to purchase, paid to the department the purchase money, $580; and that the patent was issued and the lands granted to him on March 20th, 1891.

The mortgage in question though registered as before mentioned was not registered with the superintendent general of Indian Affairs under the provisions of the Indian Act.

Judgment, in substantially the usual form in foreclosure actions was entered on October 24th, 1891, against the mortgagors and their wives; the appellant not being then a party to the action.

(*a*) McGuire took the lots for himself and Secord.—REP.

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Meredith, J.

The judgment was taken into the Master's office, and, according to the Master's report, it appearing to him by the Registrar's certificates that Frederick W. Wilson, not before a party to the action, had some lien charge or incumbrance upon the lands embraced in the plaintiff's mortgage, subsequent thereto, the appellant was on March 9th, 1892, made a party, in the Master's office, to the action. On the same day an affidavit of the plaintiff's solicitor was filed in the Master's office, setting out, among other things, the facts of the assignment by McGuire to McCleary, and by McCleary to the appellant, and the granting of the lands and issuing of the patent to him, and expressing his opinion that the appellant held the lands subject to the plaintiff's mortgage, and his belief that the appellant had actual notice of the mortgage in question when he took the assignment from McCleary.

The appellant attended upon the Master's appointments, and in the Master's office claimed to be entitled to the lands in question, under the patent, free from any claim of the plaintiff; to have title paramount—that by reason of the non-registration of the mortgage in the department of Indian Affairs it was invalid against his so registered assignment; and that, at all events, the plaintiff could not recover or have the benefit of the lands without first repaying him the amount of purchase money paid by him and interest, putting this claim as one in the nature of a claim for salvage; whilst the plaintiff claimed and urged that the appellant took and holds the lands subject to his mortgage; and the Master has given effect to this contention, but has also found the appellant to be an incumbrancer, for the amount of the purchase money and interest, subsequent to the plaintiff.

Now, it seems to me, as pointed out during the argument, that the proceedings in the Master's office were plainly irregular, so far as this claim was concerned. The appellant was made a party, according to the Master's report, under Cons. R. 124 *et seq.*; but in no sense could he be looked upon as a subsequent incumbrancer, or treated

Judgment. Meredith, J.

as such. If his main contention be right he holds the lands free from any claim of the plaintiff; if he be wrong in that respect and right in his minor claim—if an incumbrancer in any sense—he is certainly not a subsequent one; whilst if he be wholly wrong, and the plaintiff's contention be right, he is merely the owner of the equity of redemption of a part of the mortgaged property. So that I am quite unable to perceive how the finding in question can in any view of the case properly stand.

The question now is: What should be done upon this appeal?

The parties seem to desire an expression of opinion, even though not binding upon them except they choose to so treat it; and although opinions expressed under such circumstances are not as a rule satisfactory, or by any means sure of saving litigation, I would, in the hope that this might prove an exception to the rule and save the parties some trouble and costs, be willing to express my views of the parties' rights in all respects, but that the facts do not seem to me to be so fully discovered, nor the means of working out in this action such rights sufficiently clear to enable me to do so in a manner satisfactory to me.

If the provisions of the Indian Act are to prevail and override all other considerations, then the appellant is owner of the lands in question, free from the plaintiff's mortgage and claims; his assignment was "valid against all assignments previously executed," because unregistered in manner provided for in that Act: R. S. C., ch. 43, sec. 43, unless indeed the patent can be successfully attacked or questioned under section 53 or section 50, (see *Church* v. *Fenton*, 28 C. P., 384, 4 A. R., 159, 5 S. C. R., 239); which obviously cannot be done in the Master's office, or in this action at all now; whilst if it be held that the provisions of that enactment are only for the protection or benefit of the Crown or the department, and do not affect any property or civil rights between the parties, especially after the granting of the patent, and that such rights are given to the plaintiff under the provincial enactment,

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R. S. O., 1887, ch. 27, sec. 27, if not under the Registry Act, the appellant would (apart from his claim in the nature of a claim for salvage) be simply the owner of the equity of redemption of the lots in question, and one of the persons entitled to redeem, and one who should have been made a party to the action originally; in which capacity he has not been dealt with in the Master's office, or provided for in the Master's report, but has been dealt with and provided for as if, and only as if, a subsequent incumbrancer in respect of his purchase money and interest, an untenable position in any case: for if he be not entitled against the plaintiff, how can he be entitled at all; from whom could he claim salvage? How can he be a subsequent incumbrancer in this respect? See *Lally* v. *Longhurst*, 12 P.R., 510; *Paterson* v. *Holland*, 8 Gr. 238; *Buckley* v. *Wilson*, *ib.* 566.

And apart from these and other considerations and difficulties in dealing with these questions now, I may again mention the facts that the mortgage in question was made before the assignment to McGuire; and made, not by McGuire, but by Secord and McGuire, and that there is no evidence even of identity of the McGuires, or anything to account for or explain the nature of the transactions, or their connection, if any: and may call to mind such questions as are suggested by such cases as *Vance* v. *Cummings*, 13 Gr. 25; *Casey* v. *Jordan*, 5 Gr. 467; *Holmes* v. *Moore*, 12 Gr. 296; and *Goff* v. *Lister*, 13 Gr. 406, and 14 Gr. 457; and which may possibly have some bearing upon the parties' rights, but which so far seem to have received no consideration.

Under all the circumstances it seems to me that the best course to adopt now is, to amend the Master's report by striking out the finding that the appellant is a subsequent incumbrancer: to set out that he has been made a party in the Master's office in respect of any claim he might have as a subsequent incumbrancer, and (if he be willing, as doubtless he will be, there seeming to be nothing for him in the property if he has taken it subject to the mortgage)

in respect of any rights he may have, in the equity of redemption of the mortgaged lands or any part of them; but not in respect of, and expressly reserving, any rights or claims he may have to the lands in question upon this appeal free from the mortgage in question or, if he have not title paramount, then to the amount of the purchase money paid by him and interest in the nature of a claim for salvage against the plaintiff or any other person claiming title to or possession of these lands: see *Crooks* v. *Glenn*, 8 Gr. 239; Cons. Rules 306 and 46. Thus the plaintiff may proceed without delay to redemption or foreclosure in respect of the whole property, a comparatively small proportion of which only is affected by these questions, whilst the plaintiff's rights or claims will be amply protected and can be determined by independent litigation unless the parties adopt some more profitable means of effecting a satisfactory settlement, which one would think advisable looking at the inconsiderable amount really in question between them. The report will therefore be amended accordingly. Judgment. Meredith, J.

It is not a case for costs; the plaintiff proceeded irregularly against the appellant, and the latter ought to have moved against the order adding him as a party in the Master's office; each is at fault and must bear his own costs. There will therefore be no order as to costs of this appeal; and no costs will be allowed to either party against the other of any of the proceedings in the Master's office which have proven useless.

The parties subsequently appeared before the learned Judge, and it was then arranged that no order should go upon this judgment, but that the final disposition of the appeal should be postponed until after the trial of an issue, which was then settled, between the appellant and the plaintiff.

The order provided that in the issue the present plaintiff, Robert Reed, should be plaintiff, and the defendant Wilson defendant, and that the question to be tried should

Argument.

be whether the mortgage of the plaintiff took priority to the patent from the Crown of the four lots in question under which Wilson claimed, and if so, whether Wilson was entitled to a lien in respect of the purchase money paid by him to the Crown for the said lands in priority to and freed from the mortgage of the plaintiff, and the order in the meanwhile stayed all proceedings in the Master's office so far as the interests of Wilson were concerned.

The issue was tried at Owen Sound on April 11th, 1893, before BOYD, C.

Masson, Q. C., for the plaintiff referred to R. S. O. ch. 27, secs. 5, 21, 27; *ib.* ch. 114, secs. 76, 80; R. S. O. ch. 43, secs. 42, 43, 45; R. S. O. ch. 24, sec. 17; *Church* v. *Fenton*, 28 C. P. 384; *Dinsmore* v. *Robinson*, tried before Blake, V. C., at Owen Sound in 1877 (unreported).

Rykert, Q. C., for the defendant, Wilson. The Ontario registry law does not affect Dominion lands: *Watson* v. *Lindsay*, 27 Gr. 253, 6 A. R. 609; *Casey* v. *Jordan*, 5 Gr. 467; *Holland* v. *Moore*, 12 Gr. 296; *McQuestien* v. *Campbell*, 8 Gr. 242.

April 13th, 1893. BOYD, C.:—

The lands in question are Indian lands and prior to patent were controlled by the Dominion under the provisions of Revised Statutes of Canada, ch. 43. The mortgage in question held by the plaintiff was taken upon the interest of McGuire & Secord in four lots which the Crown had agreed to sell to one Porter, who had assigned his right to the mortgagors. The Indian Act makes no provision for any assignment other than absolute and does not refer to the case of a mortgage of rights prior to patent. No provision is made for the registration of such an instrument. Instruments registered were to be so in the office of the superintendent-general (section 43), and

Judgment.

Boyd, C.

I regard the registration of this mortgage in the registry office of the county under the Ontario statute as a nugatory proceeding, so far as it is relied on to affect the defendant with notice of its existence. Actual notice of the contents of the mortgage is not proved as against Wilson or McLeary whose nominee he is. The transaction was unusual in this, that McGuire & Secord bought patented and unpatented lots from Reed (*a*); but in the conveyance only the patented lots were described or referred to, whereas in the mortgage to secure the purchase money both kinds were set forth at large. McLeary admits that he agreed to take subject to a mortgage to Reed on the land conveyed to McGuire & Secord, but he did not know that the mortgage covered the unpatented lots in question. This was a very likely mistake to fall into having regard to the frame of the papers.

It appears that there was no consideration in money paid for the assignment of the right to purchase the four lots as between McLeary and McGuire & Secord—they were to get shares in the Lion's Head Lumber Company to represent the consideration—and it is this company as represented by McLeary and Wilson which is really interested as purchasers of the four lots.

That being so, Wilson has no equity to hold under the patent as by title paramount to the mortgage so as to extinguish it *in toto*. He obtained the patent by virtue of his *status* as assignee of Secord and McGuire, who made the mortgage, and as such he should rank as subsequent incumbrancer, after being paid as a first charge, the amount expended in procuring the Letters Patent of the four lots. Being thus assignee of the original purchaser, he lawfully expended money to procure the title in fee without notice of the mortgage existing upon the lots in respect of which the patent issued. To the extent of this purchase, he is a *bonâ fide* holder for value without notice, and takes priority accordingly over the mortgage. But he

(*a*) McGuire & Secord bought from Reed, but the unpatented lots in question stood in Porter's name in the Indian department, and it was he who assigned them to McGuire & Secord.—REP.

Judgment.

Boyd, C.

ought not in equity to use the title under the patent to destroy the mortgage—that remains a valid security for what it is worth as against him and the mortgagor—after satisfaction is first made for the purchase money of the fee from the Crown.

This does not appear to me to be a case in which the subsequent acquisition of title by the assignee of the mortgagor should enure to feed the interest conveyed by the mortgage because of the want of notice of the scope of the mortgage on the part of the assignee.

The questions in the issue will be answered in accordance with this judgment, and if I have to dispose of costs, they should be added to purchase money paid to the Crown.

A. H. F. L.

[CHANCERY DIVISION.]

VIVIAN & Co. v. THE CORPORATION OF THE TOWNSHIP OF MCKIM.

Assessment and Taxes—Person complaining of his own Assessment—Court of Revision—Notice of Sitting—R. S. O: ch. 193, sec. 64, sub-secs. 4, 7, 9.

A person appealing against his own assessment to a Court of Revision is not entitled to a personal notice of the time and place of the sitting of the Court under sub-section 9 of section 64 of the Consolidated Assessment Act.

He is sufficiently notified by the publication of the advertisement required by sub-section 7, and by the posting of the list under sub-section 4.

Where there is jurisdiction to assess, any appeal from a Court of Revision, must be to the County Judge or stipendiary magistrate, as the case may be.

THIS was an action brought by H. H. Vivian & Co., limited, and Sir H. H. Vivian, who were proprietors of mines carrying on business in the township of McKim, against the corporation of the township of McKim and J. W. Carmichael, collector of taxes for the township, to recover back the amount of certain payments in respect of taxes paid by them under circumstances which are fully set out in the judgment of the trial Judge. Statement.

The action was tried at the Autumn Chancery Sittings in the city of Toronto on December 16th and 17th, 1892, by ROBERTSON, J.

A. B. Aylesworth, Q. C., for the plaintiffs.
G. E. K. Cross, for the defendants.

The cases cited on the argument are specifically referred to in the judgments.

December 19th, 1892, ROBERTSON, J.

The action is brought to recover damages as stated in the plaintiffs' statement of claim, for certain wrongs therein complained of: but on the opening of the case counsel for the plaintiffs stated that the action is really to recover

Judgment.

Robertson, J.

back money paid under protest, as money had and received, such money being for taxes claimed by the defendant corporation, and the complaint arises because, as the plaintiffs allege, they had not been heard in support of their appeal to the Court of Revision against the assessment for the year 1891.

The plaintiffs are proprietors of mines and are carrying on business in the township of McKim and are the owners of lands there.

It appears that the defendant Carmichael, who was the assessor for the township, assessed the plaintiffs' property for the year 1891, as follows: Real property, enumerating the several lots, $952; personal property, $5,000, in all $5,952. The township rate was fifteen mills on the dollar making $89.28. The school rate was eighty mills on the dollar making $476.16. The total amount of the taxes was $565.44, besides twenty-one days statute labour, $21.

On the assessor leaving the assessment slip with Mr. Henriksen (who was the agent and manager in charge of the plaintiffs' works) setting forth the above particulars, it turned out that one of the lots enumerated therein did not belong to the plaintiffs, and that Mr. Henriksen considered the personal property was assessed at altogether too high a sum, and that no deductions had been made for roads and right of way which passed through the plaintiffs' property. Whereupon he gave notice of appeal to the Court of Revision such notice being at the foot of the assessment slip left, setting forth the grounds of the appeal, and was with the assessment slip, sent to the clerk of the municipality.

The plaintiffs allege that they never received any notice of the day fixed or appointed for the first sittings or in fact any sittings of the Court of Revision, under sub-section 9 of section 64 of the Assessment Act, R. S. O. 1887, ch. 193, as they claim they were entitled to, and that the first intimation in the matter which they had after they had given notice of appeal was on the 23rd of November, 1891, when

they received from the collector a printed and written notice setting forth the particulars of their assessment, shewing the amount due on the whole $586.44, which included $21 for statute labour. Afterwards on the 7th of December another notice was received from the collector drawing attention to the fact, "That the time is due for you to pay your taxes. You will attend to this and save costs and oblige, J. W. Carmichael, Collector."

In reply to that letter Mr. Henriksen wrote to the clerk of the township on the 11th of December, in the following words:

"T. J. Ryan, Esq., clerk, township of McKim, Sudbury, Ont. Dear Sir—In the month of July last we received the assessment paper upon the property held by our company, and during the same month returned it to you with our reasons for appeal, expecting that we should get due notice of the sitting of the Court, in order that we might be heard on the subject. On August 5th we received a notice from you bearing date August 3rd notifying us that the Court would sit on the 4th of August at ten o'clock in the morning. This letter we received from the postoffice, bearing the postmark on the envelope of the 4th of August p.m., so that it was impossible for us upon such notice to attend the Court. Having learned that the whole of the business was not transacted on the 4th, and that an adjournment had been made, we applied for information from the Reeve, who could give us none, as to the sitting of the adjourned Court, and we never received any notice from any quarter, so that in fact we have been debarred the opportunity of appealing against the assessment. We have now to ask you to lay our letter before the council, and to request that an opportunity be still afforded us of being heard on our appeal, failing which we shall be under the necessity of resisting any attempt to enforce payment of the taxes by an appeal to the higher courts, inasmuch as the directions contained in the statute have not been complied with. Yours truly, for H. H. Vivian & Co., limited, G. Norman Henriksen."

Judgment.

Robertson, J.

The clerk laid that letter before the council and that body after considering the contents passed a resolution directing the collector to go on and levy the amount of taxes due; whereupon the collector on or about January, 28th, 1892, visited the premises of the plaintiffs and requested from Mr. Henriksen payment of the amount, which being refused he threatened to seize certain goods and chattels, the property of the plaintiffs, for such taxes. Mr. Henriksen protested, complaining then, that he was entitled to at least fourteen days' notice, but after some discussion he paid the amount under protest, telling the collector that he would take the necessary steps to recover back the amount. And the reason why he paid the money instead of allowing the collector to levy by distress was, to prevent great loss by the stopping of plaintiffs' works which would have been necessary if the goods and chattels threatened to be seized, had been seized.

The case was brought on for trial before me on the 16th and 17th of December instant, and it appeared that the notice of appeal was received by the clerk of the municipality in due time, and the names of the plaintiffs were placed on the list of appeals, against the assessment for that year; which list was stuck up in the office of the clerk of the municipality, under sec. 64, sub-sec. 4 of the Assessment Act, R. S. O. ch. 193, and at the foot thereof the date and hour and the place of the first sitting of the Court of Revision were stated, namely, the 5th of August, 1891, at 10 a.m., at the fire-hall in the village of Sudbury; and the evidence is conclusive that the clerk also advertised in the "Sudbury Journal," a newspaper published in the municipality the time at which the Court would hold its first sittings for the year, and that advertisement was published on the 2nd, 9th and 16th of July, being more than ten days before the time appointed for such sittings. This was in compliance with sub-sec. 7 of the aforesaid sec. 64, but it is contended on behalf of the plaintiffs that they were entitled to notice under sub-sec. 9 of sec. 64 which enacts that the clerk shall prepare a notice in the

form there given "for each person with respect to whom a complaint has been made." Judgment. Robertson, J.

But the plaintiffs' do not rest their case here—they now at the trial, not having raised the question by their pleadings, contend that the defendants had no jurisdiction to levy or collect taxes at all from them for the year 1891, for the reason, that having assessed the plaintiffs for the whole of the acreage of the lots in which their lands are situate, without deducting what is occupied or used for road allowances, rights of way, railways, etc., passing through their property, the whole assessment is *ipso facto*, null and void.

There are, therefore, two questions involved. First as to the right or jurisdiction to levy or collect taxes from the plaintiffs for 1891 which goes to the very root of the matter and is paramount and independent of the other question raised. Second, whether the notice given of the time and place of the sittings of the Court of Revision under sub-sec. 7 was a sufficient compliance with the Assessment Act, or whether it was the duty of the clerk to give the notice under sub-sec. 9.

In support of the first question or contention, Mr. Aylesworth relies on *Watt* v. *The City of London*,* the report of which I have not been able to see, it not having yet been published, but from Mr. Aylesworth's statement of the facts of that case, in my judgment it does not apply.

There, there was no jurisdiction to assess the plaintiffs' property at all, there was nothing on which an assessment according to law could be made, the goods assessed were merely in a warehouse for distribution, the plaintiffs' place of business being in the city of Brantford, the goods having been sent to London as a distributing point.

Here the plaintiffs were assessable for such real and personal property as they owned or were in possession of in the township. If they were assessed too high or for property which did not belong to them and for which they were not assessable, with such property as they were rightly assessable for, their remedy was to go before the

* Since reported in 19 A. R. 675. REP.

Judgment. Robertson, J.

Court of Revision. They cannot lie by and take advantage of an error or mistake of that kind for the purpose of getting rid of paying the rates on the property, on which such rates can be legally levied. The plaintiffs, therefore, not having availed themselves of their undisputed right to go before the Court of Revision, cannot, after the assessment roll has been confirmed, dispute the jurisdiction to collect or levy the amount of the rates, otherwise legally imposed. There was a jurisdiction to assess, the question of its correctness can only be disputed before the Court of Revision, or if not successful there, before the Judge of the County Court, or in this case the stipendiary magistrate. I am therefore of opinion that this objection must fail.

Then as to the second question. After due consideration I have no doubt whatever, so far as these plaintiffs and their appeal are concerned, that the notice referred to under sub-section 3 of sec. 64 applies only to those persons against whom any elector may appeal for the reasons in such sub-section enumerated; that sub-section providing that the clerk shall give notice to such persons and the assessor. That is not the case now before me, although Mr. Aylesworth cited in support of his contention the dictum of the learned Chief Justice of the Queen's Bench Division in the case of *Tobey* v. *Wilson*, 43 U. C. R. at page 235, which was an action of replevin brought to replevy goods which had been improperly seized for taxes. The learned Chief Justice says in his judgment in that case: "Under 32 Vic. ch. 36, sec. 60, sub-sec. 8 (which is now sub-sec. 9 of sec. 64 of ch. 193, R. S. O. 1887), the clerk shall prepare a notice in the form following for each person with respect to whom a complaint has been made." (Giving the form.) And in parenthesis he says: "And this applies to the section in review as well as to the other sections authorizing complaints." In order to ascertain what the learned Chief Justice really meant by this expression, I had an interview with him and he says he meant to convey no such opinion as is urged by Mr. Ayles-

worth. He meant and had in his mind only such of the sub-sections of the Act as authorize others than those who are complaining against their own assessment to appeal against the assessment of other persons. Judgment. Robertson, J.

Speaking for myself I certainly cannot construe sub-sec. 9 of sec. 64 in the manner contended for, and my interview with the learned Chief Justice satisfies me that he is of the same opinion as I now express. No other authority has been cited to me, nor can I find any myself, to warrant me in coming to the conclusion contended for by Mr. Aylesworth. I think it clear that sub-section 9 refers to a different state of matters than is presented in this case. And that being the case the defendants, the municipality, have complied with the statute in every particular in regard to cases like the present.

The clerk made out a list of the appeals and stuck it up in a public place in the municipality and in that list the plaintiffs' appeal appeared. At the foot, the time and place were mentioned for the holding of the first sittings of the Court of Revision. Notice was also published in a newspaper published in the municipality in accordance with sub-section 7, and so far as this objection is concerned I think the plaintiffs have also failed. This being the case the plaintiffs have no legal ground of complaint.

[The learned Judge then considered some evidence not material to this report, and concluded by dismissing the action with costs.]

From this judgment the plaintiffs appealed to the Divisional Court, and the appeal was argued on February 20th, 1893, before BOYD, C., and MEREDITH, J.

Aylesworth, Q. C., for the appeal. The plaintiffs were entitled to notice of the time when the Court of Revision would sit. The only notice they received was a letter from the clerk, dated August 3rd, that the Court would sit *tomorrow* which letter was not received until the 5th, and the evidence shews was not posted until the 4th. The Court of Revision, as a matter of fact, sat on the 5th.

Argument

Under sec. 64, R. S. O. ch. 193, there are three kinds of appeals: 1. A case like this, of overcharge, etc.; 2. Any elector against another; and 3. By the assessor. The statute provides that notice shall be given in Nos. 1 and 2, by sub-sec. 9, which provides that the clerk shall prepare a notice "for each person with respect to whom a complaint has been made." The trial Judge has interpreted this as "*against* whom." Sub-sec. 6 shews what "respecting whom" means, viz., "self." The marginal note on sub-sec. 9, "complained against," does not control the construction of the statute: Hardcastle's Construction of Statutes, 2nd ed., sec. 216. Notice by the clerk shall be given in respect to "other sections authorizing complaints:" *Tobey* v. *Wilson*, 43 U. C. R. at p. 235, per Armour, J. I also refer to Broom's Legal Maxims, 6th ed., 106, "*Audi alteram partem*"; *The Queen* v. *The Court of Revision of Cornwall*, 25 U. C. R. 286; *Watt* v. *The City of London*, 19 A. R. 675.

Cross, contra. Notice was posted under sec. 64, sub-sec. 4, and advertized under sub-sec. 7. The clerk's letter did not mislead the plaintiffs, as it was not received until after the sitting of the Court of Revision. The person complaining is not entitled to any notice: sub-sec. 3. If notice under sub-sec. 9 is to be given to all, why not under sub-sec. 3. The assessment is valid, and can only be varied by the Court of Revision: *The Queen* v. *The Court of Revision of Cornwall*, 25 U. C. R. 286. There was really no appeal here, only a notice not followed up: *The Law Society of Upper Canada* v. *The Corporation of the City of Toronto*, 25 U. C. R. 199. Even if notice was necessary and the action of the Court of Revision invalid, a previous good assessment would not be invalidated; besides which there was an opportunity of going to the County Judge by way of appeal, not taken advantage of.

Aylesworth, in reply. Even if we declined to appeal, our right of action is not taken away. [MEREDITH, J.—But the statute makes the original assessment valid until got rid of.] We did all the statute requires and the township officials did not.

May 10, 1893. BOYD, C.:—

Judgment.

Boyd, C.

In *The Queen* v. *The Court of Revision of Cornwall*, 25 U. C. R. at p. 291, an interpretation has been given to that clause of the Assessment Act now before us as R. S. O. ch. 193, sec. 64, sub-sec. 9. The judgment of the Court was pronounced by a Judge of great experience in matters municipal, Morrison, J., who said, "The legislature clearly intended that in all cases of objection by third parties a notice of complaint must be given to the party complained against at least six days before the sitting of the Court at which it is to be heard." That is to say the words used, "each person with respect to whom a complaint has been made" clearly intend "the party complained against." If so, they do not also intend "the party who complains." The language of the learned Judge appears to be in truth the foundation for or origin of the form of expression now found as the marginal annotation of this part of the statute. The decision in 1866 was upon the Consol. Stat. U. C., ch. 55, sec. 60, sub-sec. 7—then having as marginal note only this, "To prepare notice." The Assessment Act was amended and consolidated in 1869, 32 Vic. ch. 36 (O.), and then first appears the marginal note as at present continued into the revision of 1887, as follows, "And prepare notice to person complained against." True, marginal notes are not part of the statute, and are not to be regarded as authorized exposition of its meaning (See 50 Vic. ch. 2, sec. 1, (O.)); but in this instance the marginal gloss is judicially anticipated, if not inspired, and may well be regarded as offering a correct clue to its scope and purport.

On general principles, I should regard this provision as to personal notice as not meant to apply to the case of one who is himself the party making complaint. He who initiates an appeal in ordinary litigation is not the one who gets personal notice of the sitting of the Court, to which he is about to resort: that kind of notice is reserved for the one brought before the Court against his will by the action of another. To such an one personal notice must

Judgment.
Boyd, C.

be given on ordinary principles of justice before his rights can be affected. It is to be observed also that the form of notice provided exemplifies the same idea of personal service, only upon the person complained against. General notice is given by public advertisement and posting in the clerk's office, as to the time when the Court of Revision meets, and one who is himself the complainant about his own assessment is thus sufficiently notified according to the scheme of the Act. *Tobey* v. *Wilson*, 43 U. C. R. at p. 235, makes nothing against this position. It merely shews that when the assessor is the complainant notice must be given, as in other like cases.

This construction of the notice clause has strong confirmation, and indeed legislative interpretation by the subsequent provisions as to the ultimate appeal to the County Judge. By sec. 68 (2), the person appealing is to serve notice of appeal upon the clerk, and by sub-sec. (4) the clerk is to give notice to all parties appealed against in the same manner as is provided for giving notice in a complaint under sec. 64 of the Act (the section with which we are directly concerned). That completes the scheme for hearing appeals: before the County Judge the appellant gets no personal notice, only the person appealed against, and that is declared to be in the same manner as is provided for giving notice in the case of appeals to the Court of Revision. The whole system is thus harmonious and in conformity with the analogy of ordinary litigation.

It is not needful to go further, but I would be against the plaintiffs' right to sue in this case for other reasons. His proper course is indicated in the judgment of Hagarty, J., in *The Law Society of Upper Canada* v. *The Corporation of the City of Toronto*, 25 U. C. R. 199. That is to say: his appeal came before the Court of Revision, and upon his default the assessment was confirmed, and thereupon the roll, as finally passed by that court, became valid notwithstanding any defect or error, etc., as provided by sec. 65, subject to appeal to the County Judge. The Court of Revision had no power, probably, to grant a new hearing,

but the remedy was to appeal to the County Judge, wherein the plaintiffs failed, though they had the opportunity and the requisite knowledge to enable them so to do: *In re Allan*, 10 O. R. 110; *In re Marter and Gravenhurst*, 18 O. R. 243. Judgment. Boyd, C.

There was jurisdiction to assess the plaintiffs' property. That assessment remains till got rid of or reduced by some proper proceedings under the statute, *i.e.*, by appeal to the Court of Revision, and afterwards to the County Judge; *London Mutual Ins. Co.* v. *City of London*, 15 A. R. 629. If the appellants failed to reduce the amount originally assessed, that stands good and must be paid, and for this reason also the action fails.

Judgment should be affirmed with costs.

MEREDITH, J.:—

The plaintiffs never complained that they ought not to have been assessed at all; they admit that it was right to assess them: their complaint has always been that their assessment was too high; that they were overcharged by the assessor.

The assessor having, therefore, the power to assess, the jurisdiction to remedy any errors in or omissions from the roll rested in the Court of Revision, and of appeal from that court, constituted by the Assessment Act, and not in this or any other court.

The remedy, if those courts refused or neglected to perform their duties, would be on a proper application to this Court to compel performance.

The complaint was properly made, and it was entertained and adjudicated upon by the Court of Revision; and the roll was finally passed and certified so as to be valid, and bind all parties concerned, under sec. 65 of the Act.

The plaintiffs, with every opportunity for doing so, neither appealed to the County Judge, under sec. 68, nor applied to this Court to compel the Court of Revision to rehear their complaint after notice to them.

Judgment.

Meredith, J.

It would be strange if, for an error of the clerk who acts under the provisions of the Act and not under the direction of the municipality or as its servant in the matter—for instance, if he failed to effect service in manner provided for in the Act—the assessment should become invalid and the ratepayer be freed from taxation altogether.

The assessment stands until changed in manner provided for in the Act, and it is confirmed by the certification of the roll. The person assessed must procure the change through the machinery provided by the Act.

Upon this ground, in my opinion, the plaintiffs' claim clearly fails, and this motion should be dismissed.

The other ground—that upon which the action was dismissed—does not appear to me quite so clear: there seems to me to be room for argument, at all events, that notice ought to have been given to the plaintiffs under sub-secs. 9 and 10 of sec. 64.

The position of a person complaining against his assessment is not the same as that of a party prosecuting a claim in a Court of justice; there he would give notice of trial, or of the hearing of his application, and must know of the proper time for it, he is *dominus litis*; here he has no control over the proceedings, whatever notice is given must be given by the clerk of the court.

But I am unable to consider that it sufficiently appears, from the provisions of the Act, that the complainant, in such a case as the plaintiffs', is entitled to the notice, and that is enough to require my concurrence with the judgment of the trial Judge, and that just delivered, that the plaintiffs were not entitled to notice under the sub-sections in question.

G. A. B.

[QUEEN'S BENCH DIVISION.]

SEGSWORTH ET AL. V. ANDERSON ET AL.

Assignments and Preferences—Assignment for Benefit of Creditors under R. S. O. ch. 124—Purchase of Insolvent Estate from Assignee—Arrangement between Purchaser and certain Creditors—Payment of Claims in Full—Liability to Account—Parties.

An insolvent trader having made an assignment of all his estate for the benefit of his creditors, under R. S. O. ch. 124, his stock-in-trade was purchased by his wife from the assignee; the defendants, who were creditors of his, and one of them the sole inspector of the estate, becoming responsible to the assignee for payment of the purchase money, and, by a secret arrangement made beforehand, receiving security from the wife upon the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband.

In an action by another creditor for an account:—

Held, that the estate was entitled to the benefit of whatever advantage the defendants derived from the transaction, and that they should account to the assignee for the difference between the amount of their claims and the amount they would have received by way of dividend from the estate:—

Held, also, that the assignee was a necessary party to the action.

Statement.

THE plaintiffs in this action were John Segsworth & Co., and the defendants were A. C. Anderson and T. H. Lee, all wholesale jewellers carrying on business in the city of Toronto.

On the 1st of December, 1891, one Theodore Jorgenson, a retail jeweller in the city of Toronto, failed, and, being insolvent, made an assignment for the benefit of his creditors under R. S. O. ch. 124, to one Barber, who accepted it.

At the date of the assignment Jorgenson was indebted to the plaintiffs, and also to each of the defendants, in a considerable sum of money for goods supplied.

At a meeting of the creditors of the estate, claims aggregating $6,648.26 were presented, and the defendant Lee was appointed sole inspector of the estate.

The plaintiffs by their statement of claim charged that, in pursuance of a certain agreement made between Jorgenson, his wife, and the defendants, the defendant Lee was, upon motion of the defendant Anderson, appointed sole

Statement.

inspector, and, also upon motion of the defendant Anderson, the disposal of the estate was left in the hands of the defendant Lee as inspector; and, in further pursuance of such agreement, immediately after the meeting of creditors, Jorgenson's wife made an offer to purchase the estate, to be secured by the indorsement of the defendant Anderson, which offer and security the defendant Lee, as inspector, procured the assignee to accept, and the defendant Lee at the same time informed the assignee that he would be personally responsible for the payment of the agreed purchase money; and thereupon the transaction was carried out, the sale completed, and the estate transferred to her, and she thereupon, as agreed, gave security to the defendants for the whole amount of their claims against the estate, including the amount of the agreed purchase price of the estate.

The plaintiffs claimed that the defendants were liable to account for the profit and advantage obtained by them, and should be ordered to pay over to the assignee of the estate, for ratable distribution among all the creditors of the estate except the defendants, all profit and advantage.

The defendants by their statement of defence denied all the material allegations of the statement of claim, and alleged that the sale of the estate to Jorgenson's wife was *bonâ fide*, and in the best interests of the estate.

The action was tried before MEREDITH, J., at Toronto, on the 10th January, 1893.

The following documents were given in evidence at the trial:

Tender for purchase of the stock of the estate, at the rate of thirty-seven cents on the dollar; one quarter cash, balance at two, four, and six months, secured; fifty dollars for book accounts; signed by Rhoda Jorgenson; dated 14th December, 1891; marked at foot, "Accepted. T. H. Lee, Inspector."

Statement.

Letter dated 14th December, 1891, addressed to Barber, the assignee, signed by the defendant Lee, authorizing the assignee to accept the tender of Rhoda Jorgenson.

Chattel mortgage, dated 15th December, 1891, made between Rhoda Jorgenson, mortgagor, and the defendant Anderson, mortgagee, reciting that the mortgagee had indorsed the promissory notes of the mortgagor for $1,171.72 for the accommodation of the mortgagor, and that the mortgagor had agreed to give the chattel mortgage for the purpose of indemnifying and saving harmless the mortgagee from payment of the promissory notes or renewals, and for the purpose of securing the sum of $1,663.54, and, in consideration of the premises and of $1,663.54, mortgaging all the stock-in-trade, and all the stock which might be afterwards placed upon the premises where the business of Jorgenson was carried on, during the continuance of the security.

Memorandum of agreement, dated the 15th December, 1891, between the defendant Anderson, of the first part, and the defendant Lee, of the second part, reciting that Rhoda Jorgenson had purchased from the assignee of the estate the assets thereof for $1,171.72, and had given her promissory notes therefor; that, at her request, and in consideration of $1,663.54 to be paid by her to the defendant Anderson, the latter had indorsed the notes to secure payment thereof; that she had executed the chattel mortgage above mentioned for the purposes therein mentioned; and that the defendant Lee had agreed to indemnify the defendant Anderson against his indorsement to the extent of three-quarters of the amount; and witnessing that the defendant Lee agreed to indemnify the defendant Anderson as recited; that the defendant Anderson agreed that after Rhoda Jorgenson should have paid off the notes, he should, out of the moneys paid to him by her on account of the $1,663.54, from time to time pay to the defendant Lee three-quarters of the same, etc.

The sum of $1,663.54 was the aggregate amount of the claims of the defendants Anderson and Lee against the estate of Jorgenson.

Statement. The effect of the oral testimony is set out in the judgment of the trial Judge.

James Parkes, for the plaintiffs.
J. W. Curry, for the defendants.

February 8, 1893. MEREDITH, J.:—

I have been referred to no case in point—indeed only to *Morrison* v. *Watts*, 19 A. R. 622, and *Thompson* v. *Clarkson*, 21 O. R. 421—and have found none quite so; but much assistance is to be obtained from those cases which expound and exemplify the stringently wholesome provisions of the law respecting agreements in fraud of creditors, as they are generally termed. In such cases there are, indeed, the paramount considerations that the debtor is to be released, and that equality among the creditors is of the essence of the transaction; and, therefore, the foundation of it is struck at by any secret arrangement under which any advantage is gained by one over others. But, more than this, public policy requires that transactions of such character be conducted in good faith by all concerned, and that no arrangement or contrivance by which that equality which is of the very essence of the whole matter—not of an ordinary character between and concerning the two or few parties, but one of more or less extended and general nature—is secretly prevented, shall be permitted.

Now, though in the matter in hand there was to be no release of the common debtor by the creditors, in consideration of an honest composition, as to which all were to be upon an equality, the principles and the cases adverted to seem to me very helpful to a right decision in this case; for here there is to be equality; statute imposed equality; the proceeds of the debtor's estate under the assignment—given very full effect to by the provisions of the 4th section of the Act—passed to the assignee for the benefit of the creditors "ratably and proportionately and without preference or priority;" so that there is, not only the con-

currence of the creditors, but also the provisions of the Act upon which this equality is based; besides the proceedings provided for in the Act—which may be designated quasi-judicial—for giving effect to it. Judgment. Meredith, J.

Anything, therefore, which secretly prevents or interferes with that equality is not only contrary to the understanding upon which creditors come in and act, and against public policy, as in case of composition with creditors, but is against the expressed intention and provisions of the Legislature.

Treating the defendants in their capacity of creditors merely, I would, therefore, reach the conclusion that, if by their acts they have really bargained for any benefit or advantage out of the estate beyond what other creditors would get, they cannot retain it.

What they say is this: We took the security for the old debts in consideration of our guaranteeing payment of the purchase money by the purchaser of the assets of the assigned estate; we never expected to be paid the whole, if any, of these old debts; but we desired the benefit of the old business, to be carried on at the old stand, in the old way, as an outlet for our goods to be supplied from time to time; and we took the chattel mortgage rather as a security for payment for the goods to be so supplied, and the sum for the payment of which we had become guarantors, than for the old debts or anything to be realized upon them.

Except that I think, and find, that the defendants did expect and intend, through the transaction in question, eventually to recover a substantial portion of the balance of the old debts, over and above their dividends out of the proceeds of the sale of the assets of the estate through the assignee, there is no sufficient reason for discrediting or doubting their testimony, or the substantial accuracy of their statement of the reality of the transaction.

There were circumstances in connection with the appointment of the sole inspector, and with the tenders and the transactions otherwise, enough to put a suspicious

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Meredith, J.

mind upon inquiry, and, perhaps, to call for a clear explanation from the inspector; but, upon the whole evidence, I am bound to say, that all suspicions of any intentional wrongdoing are quite removed—that the defendants did not intend to violate any principle of law; indeed, that they were, and more particularly the inspector was, anxious to avoid doing so; though each was willing and anxious to advance his own interests and to take advantage of the existing state of affairs to benefit himself in so far as he thought, or was advised, he lawfully might: see *Shaw* v. *Jeffery*, 13 Moo. P. C. 432, at p. 455.

Now, in *Wood* v. *Barker*, L. R. 1 Eq. 139, the Court unhesitatingly declared invalid and set aside a secret transaction by which a creditor of the common debtor, who had compounded with his creditors, was to receive payment in full of his debt in consideration of his becoming surety for the payment of the composition.

If, therefore, the principle applied to that class of cases be applicable to the case in hand, that case is a direct authority against the defendants' contentions. And why is it not so applicable? Here the only consideration suggested, and that a most inadequate, though I do not say pretended, one, is the suretyship of the defendants for the payment of the purchase money of the assets of the estate. The wife of the insolvent debtor was to be the purchaser; the business was to be carried on at the old stand; and the debtor was, according to his own testimony, to devote more of his attention to it. Having regard to all the circumstances of the case, the transaction was one interfering to some extent with the basis of the whole assignment, the policy of the law and the express provisions of the statute requiring perfect equality among creditors of the same rank in the proceeds of the estate assigned for the benefit of creditors generally; and the transaction being also a secret one, the defendants cannot have the benefit of it, in so far as it does so interfere; even if they were merely creditors.

The case against the defendants is stronger for the fact

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Meredith, J.

that the defendant Lee was the sole inspector of the estate; occupying a position of trust towards all creditors; the one person appointed with the very object of conserving their interests, and aiding in the carrying out of the purposes of the assignment and the provisions of the Act; an officer appointed under the Act which was passed for the very purpose of preventing preferences and securing the desired equality among creditors. That position he occupied, not only to the knowledge of his co-defendant, but upon his motion, and against the desire and motion of the plaintiff that another inspector be appointed to act jointly with the defendant Lee.

Persons occupying positions of trust—whatever such positions may be—cannot be too plainly made to understand they must not let their own interests conflict with their duty; that they shall not make profit of the office.

Here, by a secret arrangement between the sole inspector, who was also the largest creditor, and another creditor for a large amount, and the nominal purchaser of the assets of the insolvent's estate—the insolvent's wife—with the concurrence of the insolvent himself, who was an essential factor in the arrangement, for his skill and knowledge in the trade and business was to be, more than ever before, devoted to it, a purchase by the wife without such assistance being out of the question, these defendants are to have the full amount of their claims assumed by the purchaser and secured upon the property purchased and all after-acquired property.

In these circumstances, I cannot but think it was the duty of the defendant Lee to have first disclosed, not only the fact that he was entering into some agreement in reference to the property—which was under the assignment virtually the creditors'—but also the whole nature of the transaction: see *Tate* v. *Williamson*, L. R. 2 Ch. 55.

Why should other creditors not have the like opportunity for advancing their own interests? No one can tell what results might have flowed from a knowledge of the facts by all the creditors. A greater price might possibly have

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Meredith, J.

been obtained, and a larger dividend eventually paid. If the purchaser could afford to undertake to pay, and give security for the payment of, these two creditors' whole claims against the insolvent debtor, she could afford to give something more than her purchase money.

If it be said that she would not have given more to any other then these favoured creditors, and that she could do as she pleased with her own, the reply is, that would be a sufficient answer if the defendants had disclosed the facts and given others a chance to try, in the interests of all, before taking, themselves, any advantage out of the common property.

The case is very different from that of a security taken in good faith against the guaranty of payment of the purchase money only; in such a case it would be difficult to suggest any reason why the transaction with a creditor merely would not be perfectly valid; it has been so held in England, where a bankrupt had compounded with his creditors, and secured one of them against his guaranty of payment of a part of the composition; the reasons being that such a transaction is no fraud upon creditors, and the compounding debtor can do as he pleases with the property which under the agreement becomes his own: see *Ex p. Burrell*, 1 Ch. D. 537; see also *Ex p. Allard*, 16 Ch. D. 505. The difference here, as in *Wood* v. *Barker*, L. R. 1 Eq. 139, is that the secret arrangement gives the creditors who effected it some preference over others in respect of the old debts; that it interferes more or less with that equality, in the one case in the property assigned, and in the other in the consideration for the release of the debtor, which is essential in transactions of the kind.

The defendants, therefore, cannot retain any benefit or advantage which they have obtained over the other creditors out of the estate in question; and there must be a reference to the local Master to ascertain and state what that benefit or advantage is and the value of it.

This may be a difficult task, and I do not intend to prejudice or anticipate it, or deal with the contention that the

defendants are bound by the writings, and should not be permitted to prove any less gain or advantage than they indicate, further than to say that I adhere to my opinion upon the subject expressed in *Campbell* v. *Wynne*, (Divisional Court, Chancery Division, not reported). Judgment. Meredith, J.

The plaintiff's right to maintain the action, as now constituted, was not questioned, but I must interfere to this extent: the plaintiff must add or substitute the assignee as plaintiff, with, of course, his consent as required by the Consolidated Rules; or—if he refuses to be so added—the plaintiff must add him as a defendant; and all necessary amendments, etc., must be made and had to give effect to such addition to the parties; for the fruits of the action should go to the assignee, as part of the estate, for the benefit of the creditors generally, subject to any right the plaintiff may have as to solicitor and client costs.

The costs of the action up to and including the judgment to be entered hereupon must be paid by the defendants to the plaintiff forthwith after taxation; further directions and the question of costs otherwise will be reserved until the Master shall have made his report, for the plaintiff ought not to have the reference and the conduct of it entirely without risk as to costs.

The defendants appealed from this decision, and their appeal was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.,) on the 18th May, 1893.

Aylesworth, Q. C., for the defendants.

James Parkes and *W. C. McKay*, for the plaintiffs.

May 19, 1893. The judgment of the Court was delivered by

STREET, J. :—

The estate of the insolvent is entitled to the benefit of whatever advantage the defendants derived from the

Judgment. Street, J.

understanding which the learned trial Judge has found, and, as we think, most properly found, to have existed between them and Mrs. Jorgenson upon the sale of the stock of the insolvent to her. The advantage they stipulated for was payment of their debts against the insolvent in full. The amount they should pay to the assignee is the difference between the amount of their debts against the insolvent estate, and the amount they would have received by way of dividend from the estate in common with the rest of the creditors. The judgment of the learned trial Judge should be amended by fixing this as the basis upon which the defendants' liability is to be calculated. It will hardly be necessary to direct a reference, but if the parties are unable to agree upon the amount, they may mention the matter to us again. With this variation the motion will be dismissed with costs.

[CHANCERY DIVISION.]

JOHNSTON v. BURNS.

Assignments and Preferences—Sale of Debts—Action by Purchaser—Set off of barred Claim—R. S. O. ch. 124, sec. 20 sub-sec. 5,—sec. 23.

Statement.

THE plaintiff moved before the Divisional Court (BOYD, C. and FERGUSON, J.), against the judgment in this action, reported *ante* p. 179, and the motion was argued on February 27th, 1893.

J. M. Clarke, for the motion.
Frank Denton, contra.

June 7th, 1893.—The Court dismissed the motion, agreeing with the judgment of the trial Judge.

G. A. B.

[CHANCERY DIVISION.]

RE ALGER AND THE SARNIA OIL COMPANY.

Damages—Appeal Bond—Security for Damages—Vendor and Purchaser.

In winding-up proceedings a property was sold by tender under the power of sale in a mortgage with the consent of the liquidator, and an appeal by an unsuccessful tenderer to a Judge from the report confirming the sale was dismissed, whereupon a further appeal to the Court of Appeal was allowed upon the appellant giving security by bond to the successful tenderer to answer the damages which the latter as purchaser might sustain by being prejudicially affected in his purchase, by the appeal allowed, in case such appeal should fail. Possession was not taken by the purchaser until after the failure of the appeal. The conditions of sale provided that possession would be given upon payment of the balance of the purchase money within a time fixed, but the money was not paid, nor did it appear that it had been set aside for that purpose, nor was any provision made in the conditions as to the payment of interest or taxes :—

Held, that under the bond the purchaser was not entitled to payments made by him for care of the property or taxes, nor was he entitled to interest on the purchase money, or to damages for deterioration of the property.

Statement.

THIS was an appeal from the report of a Referee finding certain damages payable under the terms of a bond given as security under the following circumstances:

In the winding-up proceedings of the Sarnia Oil Company, the property (an oil refinery) had been sold by tender by a mortgagee with the consent of the liquidator, and under an order of the Court, and one General Alger had been declared the purchaser by the Referee.

From the Referee's report an appeal was had by the Imperial Oil Company and one Jacob L. Englehart, two unsuccessful tenderers, to a Judge and dismissed, reported 21 O. R. 440.

From this judgment an appeal was had to the Court of Appeal, but as a condition to granting leave for such appeal an order was made as a condition precedent, directing the appellants to give security to the extent of $2,500, which the said Alger "as a purchaser of the property," might sustain in the event of the appeal being unsuccessful. The latter appeal was unsuccessful and was

Statement. dismissed with costs, reported 19 A. R. 446, and an order was made directing a reference to ascertain what damages General Alger had sustained. The remaining facts are fully set out in the judgment on this appeal.

The appeal was argued on April 20th, 1893, before FERGUSON, J.

W. R. Meredith, Q. C., for the appeal contended that as the bond had by its wording limited the security to such damages (if any) as General Alger had sustained "as purchaser of the property," none of the items of damage found by the report and set out in the judgment were sustained by him in that capacity, by reason of the unsuccessful appeal; and cited *Fisken* v. *Wride*, 11 Gr. 245, at p. 248, and *Bank of Montreal* v. *Fox*, 6 P. R. 217, at p. 219.

E. R. Cameron, contra, contended that the security was given to compensate for the delay caused by any further unsuccessful litigation; and that the effect of the bond was to substitute the obligor for the vendors as to the payment of damages caused by the appellants in the Court of Appeal and not by the vendors; and that the words "as a purchaser," were not inserted because it was desirable to shew a distinction between damages to a vendor and a purchaser, but because General Alger was not only the purchaser, but was also one of the largest creditors of the Oil Company, and the sale by the trust company was really as trustee for him, and it was advisable to discriminate between the damages he might sustain "as a purchaser," rather than in any other capacity.

Meredith, Q. C., in reply.

June 1st, 1893. FERGUSON, J.:—

The learned Referee on the 26th day of September, 1891, by his report declared the tender of Alger to be the highest tender for the property, and further declared that he, Alger, was the purchaser thereof at the price mentioned in the report.

Judgment. Ferguson, J.

From this report there was an appeal which was heard before the Chancellor, who on the 19th day of October, 1891, made an order dismissing the appeal. This order was entered on the 29th day of October, 1891.

On the same 29th day of October, 1891, an order was made by the Chancellor upon the application of the Imperial Oil Company and Jacob L. Englehart, allowing them to appeal to the Court of Appeal for Ontario, from the order of the 19th of October, 1891, upon their giving the usual security as to costs and further security to Alger to answer the damages (if any) to the extent of $2,500 which he (Alger) *as purchaser of the property*, might sustain by being prejudicially affected in his purchase by the appeal allowed, in case the appellants should fail in their appeal, the amount of such damages to be determined, in case the parties should differ about the same, by an officer of the Court to be named by the Chancellor on an appointment in Chambers.

The security was given and the appeal had to the Court of Appeal, which appeal was dismissed by the Court of Appeal on the 21st day of June, 1892.

The bond or covenant given as security to the extent of $2,500, follows the words of the order, and has relation only to such damages (if any) as he, Alger, "as purchaser of the property" might sustain by being prejudicially affected in his purchase by the appeal to the Court of Appeal in case the then appellants should fail in that Court.

On the 28th day of September, 1892, an order was made by which it was referred to the Junior Judge of the County Court of the county of Lambton, to enquire and report what damages (if any) the said Alger, as purchaser of the property, had sustained by being prejudicially affected, if he had been prejudicially affected, in his purchase by reason of the said appeal.

On the third day of April, 1893, His Honour, Mr. McKenzie, who is the Junior Judge aforesaid, made his report by which he finds:—

1. That Alger, as purchaser of the property, has sus-

Judgment.
Ferguson, J.

tained damages by being prejudicially affected in his purchase by reason of the appeal to the Court of Appeal, and was delayed and prevented from entering into possession of the refinery and property of the Sarnia Oil Company, of which he was the purchaser from the 29th day of October, 1891, to the 21st day of June, 1892, a period of 236 days.

2. That the evidence adduced on behalf of Alger with regard to the profits he might have made, through operating the refinery between the dates aforesaid (from the 29th day of October, 1891, to the 21st day of June, 1892), was of too vague and indefinite a character to justify any sum for damages being allowed therefor.

3. That the damages following had been sustained by Alger by reason of the delay above mentioned.

(*a*) The amount disbursed by him for the safe keeping and guarding of the refinery and property day and night during the delay aforesaid 236 days at three dollars per day, $708.

(*b*) Interest on $12,500 (the purchase money), for the same period, at six per cent per annum, $484.92.

(*c*) Share of taxes for 1891, $99.11.

(*d*) Share of taxes for 1892, $126.62, and

4. A proportion of damages by deterioration of the property, such proportion being attributable to the delay aforesaid $300.

The total amount of damages thus found seems to be $1,718.65:—from this report is the present appeal.

The property was sold by tender and the conditions of sale, such as they are, appear to have been in the tender, a copy of which I find in the appeal book, pp. 8 and 9. The condition respecting the possession, is as follows:

"Possession shall be given upon payment of the balance of the purchase money within thirty days from the acceptance of the tender, but if the purchaser shall desire possession at an earlier date, he shall be entitled to get same at once upon increasing his deposit to fifty per cent of his tender."

Judgment.
Ferguson, J.

I do not see, nor has attention been called to any condition or provision regarding the payment of interest, taxes, etc.

The liquidator, sheriff Flintoft, who was in fact in possession during the whole of the period of the delay spoken of says that he made no arrangement whatever with Alger as to payment of possession money or taxes; that he was not put into possession by Alger; that he took possession in the first place, because the creditors claimed that the mortgage (the one under which the sale took place) was void; and that that possession continued down to the time he gave up possession in July, 1892, when he did make an arrangement with Alger. He says that up to that time he had simply been acting in his official capacity as liquidator. As will be seen, this point of time was after the determination of the appeal to the Court of Appeal.

It appears from the evidence of Alger himself that one McColl was his agent to whom he left the conduct on his part of the contention or dispute as to title on the ground that the mortgage was void; and McColl says that he did not suppose this matter of dispute as to the title was fully settled till the vesting order was made in September, 1892.

A petition was presented which bears date 18th of July, 1892, by Alger, and the Buffalo Loan Trust and Safe Deposit Company, praying for a confirmation of the report on sale and for the confirming of the sale to Alger and asking for a declaration that upon paying into Court the balance of the purchase money and interest, Alger should be entitled to obtain an order vesting in him all the right, title and interest of the Sarnia Oil Company, and of the liquidator of, in, and to the property, and to be let into possession of the same, and that the Buffalo Loan Trust and Safe Deposit Company should be entitled to have the purchase money paid out of Court to them.

The 8th clause of this petition states that a meeting of the creditors and contributories of the Sarnia Oil Company

Judgment.

Ferguson, J.

was held on the 22nd of June, 1892, when a resolution was passed and the liquidator was instructed to take proceedings to set aside the mortgage and the sale made thereunder; and the liquidator was instructed, and he undertook to take no proceedings and do no act to confirm the sale.

The 9th clause of this petition after stating that Alger was ready to pay his purchase money into Court, etc., states that owing to the refusal of the liquidator to consent to an order confirming the sale, and the action of the creditors and contributories of the company, the title to property was then in dispute.

The 10th clause states that the liquidator was then in possession, and refused to deliver the possession to the petitioners or either of them.

The affidavit of McColl sworn the 16th day of July, 1892, seems to verify this petition; and in the 8th clause it says: "Yet by reason of the said proceedings taken by the company, the title to the said property is in dispute, and the said Alger cannot get possession of the same or complete his purchase until the said litigation is ended, or the interests of the company are vested in him by an order of the Court;" and in the 23rd clause this affidavit of McColl says: "The liquidator is now in possession of the said property and under instructions from the creditors refuses to deliver up possession."

The vendors of the property, the Buffalo Loan Trust and Safe Deposit Company, were trustees and made the sale under a power of sale contained in a mortgage from the Sarnia Oil Company to them. The Buffalo L. T. and S. D. Company are joint petitioners with Alger in the petition above mentioned, that is to say, the vendors and the purchaser joined in stating in this petition, verified by the affidavit of the authorized agent of the purchaser, that at a period long subsequent to the disposal of the appeal to the Court of Appeal aforesaid, the vendor was unable to give possession to the purchaser owing to the action of the creditors and contributories of the Sarnia Oil Com-

pany; and the fact that the liquidator was in possession under instructions from a meeting of creditors and contributories to hold possession which he, the liquidator, had promised or undertaken to do. Judgment. Ferguson, J.

The 12th clause of the affidavit of McColl verifying the aforesaid petition, shows, I think, that Alger did not even think that he could obtain the possession until he obtained an order vesting in him all the interest of the Sarnia Oil Company and its contributories and liquidator, for the reason that his title without this would not be a perfect one. McColl says that he was advised of this by Alger's solicitors, and such an order was not obtained until September, 1892.

Alger did not in fact pay the balance of the purchase money, being nearly the whole of it, as I understand, till some time in October, 1892, and there seems to be no evidence that he had set it apart in any way, or that he had not the use of it till the time that he paid it.

It is not shewn that but for the pendency of the appeal to the Court of Appeal, Alger would and could have obtained possession of the property at any point of time earlier than he did obtain it. There was the objection, or alleged objection, to the title from the time of the sale.

It may well be that the creditors and the contributories did not during the pendency of the appeal to the Court of Appeal urge their objection or act in regard to it as they otherwise would have done, in the hope or expectation that the result in that Court would be the opposite of that which it was. This, however, assuming it to be so, leaves one to conjecture only, as to when, but for the appeal, Alger would have obtained possession. It does not appear that Alger so complied with the conditions of sale as to place himself in a position to demand possession from his vendors and sustain an action for damages for non-compliance with such demand: *Engell* v. *Fitch*, L. R. 4 Q. B. 659. If he had done so, he could perhaps properly have made a claim upon his vendors.

Judgment.
Ferguson, J.

Although a purchaser must bear all damage which property sustains after the date of the contract from causes which are necessarily beyond the control of either party, such as arise from flood, earthquake, fire, or the like, yet until the seller places the purchaser in a position in which the latter can prudently take possession, the seller must at his own risk take care of the estate and see that the property is protected from injury, as far as the watchful care of a prudent owner could protect it. See *Fisken* v. *Wride*, 11 Gr. 245, and the cases referred to in that case.

The case *Bank of Montreal* v. *Fox*, 6 P. R. 217, seems to show that the vendor must pay the taxes, or the proportion of them, until such time as the title is completed; see also the case *The Peoples' Loan, etc., Co.* v. *Bacon*, 27 Gr. 294, where it is shewn, as I think, that Alger was not liable to his vendor for any interest on the purchase money. Even if it be assumed that there was delay or prevention from entering into possession of the property by reason of the appeal falling under the terms of the security to which damages for the want of user of the property, if any there were, could be attributed, the learned Referee has considered the evidence too vague and uncertain to allow any amount as such damages.

The question seemed to be whether or not the purchaser had he got the possession, could have worked the refinery making any profit. The evidence on this subject is necessarily to an extent resting in opinion in a business matter, aided of course by results in the operation of other refineries during the same period, and such evidence is more or less in conflict, that is the opinions and conclusions of witnesses differ. On the whole of this evidence, the conclusion that I would arrive at is, that had the purchaser been in possession and worked the refinery during the period, he would have done so at a loss. This, however, in the view that I have taken as to the rights of the parties, does not appear to me to be of great materiality.

Taking then the items of damages allowed :

Judgment.

Ferguson, J.

1. The sum of $708 for safe keeping and guarding the property during the period. From what has been said as to the possession by the liquidator and the conduct of the creditors and contributories of the company it seems plain that the mortgagors were in possession and refused to give up the possession. It was the duty of the mortgagees, the vendors, to obtain possession for their purchaser: *Engell* v. *Fitch*, *supra*. This they did not do, nor did they place their purchaser in a position in which he could prudently take possession. The vendors were therefore bound as regard the rights and interests of the purchaser to take proper care of the property: *Fisken* v. *Wride*, *supra*, and it is, as between them and their purchaser, they who should bear and pay this money if it is the proper sum to be paid for the caretaking. The purchaser could not be called upon to bear or pay this.

2. The item of $484.92 interest on the purchase money.—There was no express stipulation to pay interest from whatever cause the delay might arise. Fraud, vexatious conduct or the like, is not charged, and I think *The Peoples' Loan, etc., Co.* v. *Bacon*, *supra*, and the case decided by Lord Cottenham there referred to, constitute authority for saying that, in the circumstances here, one of which is, that the vendors had not shewn and were not able to shew a good title or give the possession to the purchaser, he, the purchaser, was not liable to pay any interest on the purchase money until a good title was shewn, which was confessedly at a point of time after the expiration of the period in question.

3. As to the proportions of the taxes.—The case *Bank of Montreal* v. *Fox*, 6 P. R. 219, referred to in *The Peoples' Loan, etc., Co.* v. *Bacon*, shews, as I think, that the vendor should pay the taxes or proportion of them up to the time of the completion of the title, which was after the period in question.

4. As to the $300 allowed for deterioration of the property.—The deterioration took place before a good title was shewn, and before the purchaser was bound to take posses-

Judgment.
Ferguson, J.

sion of the property and the vendor was *primâ facie* accountable for it: *Fisken* v. *Wride*, *supra*, and as I think, the purchaser was entitled to compensation to the extent of such deterioration.

It was contended that the effect of the order for the security was, when the security was given to place it in the position of the vendor, to substitute it for the liability of the vendor to the purchaser to the extent to which the security reached; but I cannot take this view.

The purchaser was not, as I think, at liberty to voluntarily forego claims against his vendor and seek to recover the amounts of them upon the security. And I am of the opinion that it has not been shewn that the purchaser Alger has, as purchaser, sustained any damages by being prejudicially affected in his purchase by the appeal to the Court of Appeal. As "purchaser," he should have availed himself of all his rights against his vendor; and if he had done so, he would have nothing to complain of in respect of any one of the four items of damages allowed him by the report of the learned Referee, at least, such is my opinion.

This appeal should, I think, be allowed, and I do not see any sufficient reason for withholding costs.

I need not, as I think, here refer separately to each of the grounds of appeal as is often if not usually done.

The appeal is allowed with costs.

G. A. B.

[CHANCERY DIVISION.]

IN RE EATON.

Life Insurance—Insurance for Benefit of Wife "Her Executors, Administrators or Assigns"—Predecease of Wife—R. S. O. ch. 136, sec. 5.

A married man insured his life, the policy being made payable "to his wife, Sarah, her executors, administrators, or assigns." The wife died before her husband, who married again, and died leaving a widow and children without having assigned the policy or altered the direction as to payment in it:—

Held, that the policy fell under the provisions of the Act to secure to wives and children the benefit of life insurance, and was for the benefit of the wife absolutely, the words of limitation having no effect; that the provision for payment lapsed by the death of the wife, and that the policy moneys belonged to the personal estate of the husband.

THIS was a special case stated under circumstances which are set out in the judgment.

The case was argued on April 19th, 1893, before FERGUSON, J. Argument.

W. H. Blake, for the administratrix of John Eaton. The will is of no consequence, because on the death of the wife the right went to her husband, but even if it were otherwise, the will contains no precatory trust in favour of the children: *Wicksteed* v. *Munro*, 10 O. R. 283; 13 A. R. 486: *Mearns* v. *Ancient Order of United Workmen*, 22 O. R. 34; *Mingeaud* v. *Packer*, 21 O. R. 267; 19 A. R. 290; *Re Cameron, Mason* v. *Cameron*, 21 O. R. 634; Jarman on Wills, 5th ed., vol. 1, pp. 307-8, 361, 365-6.

[FERGUSON, J., referred to *Bank of Montreal* v. *Bower*, 17 O. R. 548; 18 O. R. 226.]

G. F. Shepley, Q. C., for the official guardian of the infant children of the testator by his first wife, who had also been appointed administrator *ad litem* of the estate of their mother. There is nothing in the policy to indicate that it was intended to be under the Act as to insurance for the benefit of wives and children, R. S. O. ch. 136, at all. It is sustainable under 14 Geo. III., ch. 48, the Insur-

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ance Gambling Act: Bunyon's Law of Life Insurance, 3rd ed., pp. 1-16; *Wicksteed* v. *Munro*, 10 O. R., at pp. 287-8, 13 A. R., at p. 488. If the money in question passed under the will, it passed clothed with a trust in favour of the infant children; if it did not so pass, it went to her administrator. The will creates a trust in favour of the children. The testatrix virtually says: "I give my husband this property to make a devise of it to my children, and for no other purpose." She thought that as the money would not be payable till the husband's death, it might be necessary for him to make a will of it. *Bank of Montreal* v. *Bower*, is clearly distinguishable. I refer to Theobald on Wills, 3rd ed., at pp. 353-361; Bunyon's Law of Life Insurance, 3rd ed., ch. 21, at p. 434 *seq*.

Blake, in reply. The insurance is surely within the Act: *Swift* v. *The Provincial Provident Institution*, 17 A. R. 66; *People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262-272; 47 Vic. ch. 20, sec. 9 (O.).

May 2nd, 1893. FERGUSON, J.:—

This is a special case stated for the opinion of the Court professedly under the provisions of the Consolidated Rules in this behalf, and, as stated on the argument, in pursuance of leave given or an order made by myself.

As stated in the case, John Eaton, late of the town of Evansville, in the district of Algoma, died on the 28th day of January, 1892.

By a policy of insurance dated the 18th day of September, 1890, he (John Eaton) had insured his life in (with) the Manufacturers' Life Insurance Company. By the policy the company in consideration of certain statements and agreements, and of certain payments then made, and to be made by the said John Eaton, insured his life and promised to pay "to his wife, Sarah Eaton, her executors, administrators, or assigns," the sum of one thousand dollars upon certain conditions as to payment of premiums and proof of the death of the said John Eaton.

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John Eaton died without having assigned the policy or in any way altered the direction as to payment. The insurance company have paid into Court under the provisions of the Trustee Relief Acts the sum of $774.62, which they say is the full amount owing in respect of the policy.

Sarah Eaton was the first wife of John Eaton, and died during his lifetime, leaving a will dated the 23rd day of January, 1891, by which she gave and bequeathed all her real and personal estate to her husband the said John Eaton, absolutely, and appointed him sole executor of the will "to devise, if necessary, for the benefit of her children," and she left her surviving, several children who were children of herself and the said John Eaton.

John Eaton never made any disposition whatever of the estate of Sarah Eaton devised and bequeathed to him by the said will.

After the death of Sarah Eaton, John Eaton married one Mary Eaton, who survived him, and has been duly appointed his administratrix, and claims have been made by creditors of the said John Eaton.

The official guardian was appointed administrator *ad litem* of the estate of the said Sarah Eaton.

The questions are:

1. Whether the provision in the policy for payment of the moneys to Sarah Eaton, her executors, administrators, or assigns, lapsed upon her death during the lifetime of the insured.

2. Whether the insurance moneys are personal estate of the said John Eaton, or personal estate of the said Sarah Eaton.

3. Whether if the moneys are personal estate of the said Sarah Eaton, they become under her will personal estate of the said John Eaton free from any trust in favour of the children of the said Sarah Eaton.

During the early part of the argument I called the attention of counsel to the position of Mary Eaton, the widow of John Eaton, and the concluding words of the first sub-

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section of section 7 of R. S. O. ch. 136, which Act for the purposes of subsequent amending Acts has been called "The principal Act." They (counsel) concurred, and, I think rightly, in saying that the widow, Mary Eaton, can have no interest other than as administratrix in the subject of contention, especially as by the terms of the policy the money was to be paid to Sarah Eaton, the first wife of John Eaton, she being specifically named in the policy as the payee.

It was contended on behalf of the administrator *ad litem* of the estate of Sarah Eaton, that this policy is not to be taken or considered as a policy under the provisions of the Act R. S. O., ch. 136, and amending Acts being and known as Acts to secure to wives and children the benefit of life insurance, counsel referring to the 23rd section of this chapter, Bunyon on Life Insurance, pp. 1 to 16, as well as certain passages in the judgments in the case *Wicksteed* v. *Munro*, 13 A. R. 488, and 10 O. R. 283.

This section 23 provides that nothing in the Act contained shall be held or construed to restrict or interfere with the rights of any person to effect or assign a policy for the benefit of his wife or children, or some or one of them in any other mode allowed by law, and is taken from the Act of 1884, 47 Vic. ch. 20 sec. 22. This policy does not on its face refer to or in any way mention the Acts, or any of them. It does, however, make the money payable to the wife, her executors, administrators, or assigns. It was contended that these words "executors, administrators, or assigns," having been used, the effect was to substitute the personal representative or the assignee, as the case might be, as payee instead of the wife in case she should assign her rights, or should die before the death of her husband, when the policy would fall in or become payable.

In construing a will, where one is searching for the real intention of the testator, it has been held that the circumstance that in regard to personalty words of limitation are not requisite to carry the absolute interest, the use of these

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words is not sufficient to denote the intention to make the executors, etc., substituted and independent objects of the gift (Jarman on Wills, 5th ed., pp. 308 and 309, and cases therein referred to), and notwithstanding the ingenious arguments of counsel as to this branch of the case, I am unable to discover any sufficient reason for saying that the fact that these words "executors, administrators, or assigns" are used in the policy makes it different from what it would have been if the words had not been used. I think it a contract to pay to the wife absolutely, and nothing more or less, in this particular respect.

Then, assuming this to be correct, the policy is a policy of insurance effected by a man (married man) on his life, expressed upon the face of it to be for the benefit of his wife; and the fifth section of the Act (ch. 136) provides that such a policy shall enure to the benefit of the wife for her separate use according to the intent so expressed.

I cannot perceive any distinction that should exist in respect of the particular point here, between a policy providing on its face as here, that the money shall be paid to the wife, and a policy in which it is otherwise on its face expressed to be for the benefit of the wife. I am, I may say clearly of the opinion that the policy in question here is a policy falling under the provisions of the Acts to which I have referred; and I do not see that any of the amending Acts have the effect of varying or disturbing the parts of section 5 of ch. 136, on which I rely, or in part rely, for my conclusion.

True it is that section 23 provides, as I have already stated, but if I am right in regard to the true character or description of the policy, section 5 virtually declares that it is a policy under the Acts. Then assuming the policy to be a policy under the Acts, I am still of the opinion that I expressed in *Wicksteed* v. *Munro*, at p. 290, in respect to the 9th section of the Act of 1884, 47 Vic. ch. 20, which, however, was not then applicable to the case. The particular part of the section there referred to appears now as part of sec. 9 of ch. 136. The words are: "And if all the persons

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so entitled die in the lifetime of the insured, the policy and the insurance money shall form part of the estate of the insured." This provision must, I think, apply to a case where there is only one person "so entitled," and he or she die in the lifetime of the insured which, according to my view, is the case here.

1. I am of the opinion that the first question submitted by the case should be answered in the affirmative. I think the provisions in the policy for payment of the insurance money to Sarah Eaton, her executors, etc., lapsed and became void upon her death in the lifetime of the insured.

2. As to the second question submitted, I am of opinion that the insurance money in question is personal estate of John Eaton named in the question, and not personal estate of Sarah Eaton, also named in the question.

3. It is clearly unnecessary that I should say anything in answer to the third question if my answers to the other questions are correct ones.

The special case seems to be silent as to any disposition of costs. Counsel were, so far as I recollect, also silent on this subject, and at present I shall follow these examples and be silent too. Probably there is an understanding on the subject. If not, and it is desired and proper, I will hear anything that may be said by counsel.

A. H. F. L.

[CHANCERY DIVISION.]

BROWN V. THE TRUSTEES OF THE TORONTO GENERAL HOSPITAL.

Negligence—Landlord and Tenant—Agreement to Repair—Notice—Damages.

An express contract between a landlord and his tenant that the former is to repair the demised premises does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the disrepair.

In such a case the tenant should himself repair, at the expense of the landlord.

THIS was an appeal from the judgment at the trial, in an action brought by Henry Box Brown against the trustees of the Toronto General Hospital, tried at Toronto, on January 18th, 1893, before ROSE, J., with a jury. Statement.

H. M. Mowat and *R. G. Smyth*, for the plaintiff.

B. B. Osler, Q. C., and *H. D. Gamble*, for the defendants.

At the close of the evidence for the plaintiff, by which it appeared that the plaintiff was a monthly tenant of a house owned by the defendants, and that the steps to the front door had become out of repair, and that the plaintiff had notified the defendants' secretary of the fact and requested him to have them repaired, which he had promised to do, but nothing was done until the plaintiff, in using the steps, broke through and was injured, counsel for the defendants argued that the damages to the plaintiff were not in contemplation between the parties, and that there was contributory negligence, citing *Coultas* v. *Victorian Railway Commissioners*, 13 App. Cas., 222, and *Tucker* v. *Linger*, 21 Ch. D. 18; *Hobbs* v. *The London and South Western R. W. Co.*, L. R. 10 Q. B. 111; *McMahon* v. *Field*, 7 Q. B. D., at p. 596; and counsel for the plaintiffs that the damages were not too remote under the decision in *The Notting Hill*, 9 P. D. 105, and that the plaintiff was not

Argument. aware of the latent defect, and cited *Gott* v. *Gandy*, 2 E. & B. 845.

The learned Judge withdrew the case from the jury and gave the following judgment :—

ROSE, J. :—

The way it strikes me is this : The plaintiff relies upon contract and upon breach of contract, the contract being to keep these steps—I am stating it for him, not as stated—in such a state of repair as would make them safe for him to pass over or upon in order to get from his house to the street.

By action of the elements and other causes, they came into a state of disrepair, so as to appear to him to be dangerous, and of that fact, I will assume he gave his landlord, the corporation, notice, and I will further assume, that those in charge of the houses had notice of the dangerous condition of the steps; but the notice and knowledge which the landlord thus had, or the agent of the landlord thus had, could not be higher or greater than that conveyed by the notice, and could not be higher or greater than the knowledge of the persons giving the notice, and therefore could not be higher or greater than the knowledge of the tenant himself. The tenant therefore knew of the condition of the steps as well as the landlord, and if the landlord knew the steps were dangerous, the tenant, *a fortiori*, must have known the steps were dangerous. The steps being dangerous, the danger of which the landlord had notice being that they might break down when the tenant should use them, the tenant chose, they being in that condition, to use them, running the risk of their breaking down, and now, seeks to charge the landlord with the consequent injury to himself from the user of the steps.

They were not the only mode of ingress to and egress from the house ; there was another way, perhaps not quite so convenient, requiring a few steps further in order to reach

the street; there was no physical difficulty, no practical difficulty in the tenant having these steps repaired, and, if his contract is proven, no difficulty in law in his recovering the amount of such repairs from his landlord (if no contract is proven, of course the case fails); but he chose, instead of going to the expense of repair, to go on the dangerous steps. It seems to me carrying the law pretty far to say the landlord could be liable for more than the costs of the repair; and the repairs were not undertaken, and the tenant cannot claim on that ground. Judgment. Rose, J.

Owing to the condition of the parties I shall impose the obligation upon the landlord, which counsel do not hesitate accepting, namely, that if the Court shall be of opinion that I am wrong in my opinion of the law and shall send the case down for a new trial, the costs of the motion for a new trial and of this trial must be paid as a condition precedent by the defendant. I give judgment for the defendant, dismissing the action with costs.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on February 10th, 1893, before BOYD, C., and MEREDITH, J.

Herbert Mowat, for the appeal. The evidence shews that the defendants knew that the steps were out of repair, and promised to repair, but neglected to do so; but does not shew that the plaintiff knew that there was any danger in using them. There was an express contract to repair, which takes the case out of the ordinary rule that the tenant should repair. The defendants' neglect to repair, was not only a breach of a contract but a tort. The owner was liable to any one coming on the steps. The defect not being apparent, the promise of the defendants to repair kept the plaintiff using the steps while waiting for the repairs, and so led him into danger. I refer to *Picard* v. *Smith*, 10 C. B. 470; *Gott* v. *Gandy*, 2 E. & B. 845; *Walker* v. *Hobbs*, 23 Q. B. D. 458; *The Parana*, 2 P. D. 118; *The Notting Hill*, 9 P. D. 105; *Gordon* v.

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The City of Belleville, 15 O. R. 26. The damages are not too remote: *Charsley* v. *Jones*, 5 Times L. R. 412; *Donohue* v. *Kendall*, 50 N. Y. S. C. 386; *Sawyer* v. *McGillicuddy*, 10 Am. St. R. 260; *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274; *Lee* v. *Riley*, 13 W. R. 751; Sedgwick on Damages, 8th ed., sec. 209. The case should have been allowed to go to the jury: *Edgar* v. *The Northern R. W. Co.*, 11 A. R. 452; *Maw* v. *Townships of King and Albion*, 8 A. R. 248.

H. D. Gamble, contra. In the absence of express contract there is no liability on the part of a landlord to make repairs, and here there is no contract shewn. The mere fact of a landlord habitually doing repairs is no evidence of a liability on his part to repair, because a landlord will frequently make repairs in order to keep a tenant. But assuming that there was a contract to repair, and that the defendants were liable to repair, the damages claimed by the plaintiff are too remote. The only damages recoverable would be the cost of the repairs, that is to say, the lessee should repair and charge the landlord with the cost of repair. Here the plaintiff did not make any repairs. The plaintiff was guilty of contributory negligence. The plaintiff's own evidence shews that whatever notice the defendants had of the want of repair the plaintiff had, as the defendants obtained their knowledge from the plaintiff. The cases cited by the plaintiff's counsel in support of the contention that a landlord is liable for damages caused by want of repair, apply to two classes of cases: First, where the party injured through the want of repair was a stranger and had no notice, or if he had notice, had no right to make any repairs, or interfere. Secondly, where the lack of repair was in a common stairway or hallway owned by a landlord, and of which the tenant only had the use in common with others, and over which he had no control as to repairs: *Nelson* v. *The Liverpool Brewery Co.*, 2 C. P. D. 311; *Rich* v. *Basterfield*, 4 C. B. 783; Pollock on Torts, 2nd ed. 371; *Denison* v. *Nation*, 21 U. C. R. 58; Woodfall's Landlord and Tenant,

12th ed. 568; Mayne on Damages, 3rd ed. 60; *Cook* v. *Soule*, 56 N. Y. R. 420; *Sparks* v. *Bassett*, 49 N. Y. S. R. 270; Sedgwick on Damages, 8th ed. 209; *Hobbs* v. *The London and South-Western R. W. Co.*, L. R. 10 Q. B. 111; *Humphrey* v. *Wait*, 22 C. P. 580; *Hadley* v. *Baxendale*, 9 Ex. 341; *McMahon* v. *Field*, 7 Q. B. D. 591; Mayne on Damages, 4th ed. 10 & 60; *The Notting Hill*, 9 P. D. 105; *Makin* v. *Watkinson*, L. R. 6 Ex. 25; *Green* v. *Eales*, 2 Q. B. 225; *Tucker* v. *Linger* (referred to in Mayne, 4th ed. p. 60). *Gott* v. *Gandy*, 2 E. & B. 845, and other cases like it were decided under the English Housing of the Poor Act, which imposes certain obligations on landlords. There is no similar Act in force in Ontario. The trial Judge's course is justified by *Williams* v. *The City of Portland*, 19 S. C. R. 159. Argument.

Mowat, in reply. We had no right to repair and sue for the costs after the landlord's promise to repair.

May 10th, 1893. BOYD, C.:—

This is a case of monthly tenancy, and the defendants undertook to repair, so that it may be assumed the obligation rested on them to make good the defective steps at the front of the house.

As between landlord and tenant the former is not liable to repair during the term in the absence of contract. Therefore the tenant's remedy rests not upon the negligence of the owner, but upon the contract to repair. In the case of slight repairs the tenant is justified after notice of want of repair, and a reasonable time elapses, to expend what is needed in making the repairs and charging it against his landlord or taking it out of the rent. There is a singular dearth of English or Canadian authority on this head of law; but it was so laid down in an old case, (*Beale' & Taylor's Case*, 1 Leonard's Rep. 237), and though not apparently sanctioned by Lord Kenyon in *Weigall* v. *Waters*, 6 T. R. 488, it has been recognized in later cases, as by Bramwell, B., in *Makin* v. *Watkinson*, L. R. 6 Ex. at

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p. 29, and by Wills, J., in *Huggall* v. *McKean*, 1 Ca. & Ell. at p. 394, (a decision affirmed in appeal: 33 W. R. 588.)

In the present case the disrepair existed for over a year, and repeated notice was given to the agent of the hospital, but nothing was done either by landlord or tenant. A small outlay would have remedied what was needed, probably not over eight dollars, which was the monthly rent. But nothing was done, and though the plaintiff had reason to believe the steps to be unsafe he continued to use them, till one day he broke through, or the framework collapsed and he was badly hurt. Can damages be recovered on the contract for these personal injuries? That is the whole question in the case.

I find no decision outside of those in the States, but they are, though not uniform, preponderant in favour of restricting the landlord's liability; because as the tenant has the remedy in his own hands (in the case, at all events, of trivial repairs) he should take steps to reduce the danger, and not lie by knowing better than any one else all the risks that are run; *Sparks* v. *Bassett*, 49 N. Y. S. C. 270, (1883). It was not within the contemplation of the parties, besides, that such results should follow from the nonrepair of the steps as were sought to be compensated by this action.

The plaintiff did not believe he would have been hurt when going on them, otherwise he would have used the back door;* and if he used them knowing the danger, he contributed to the result by his own incaution, and so should not recover. But if he did not suspect such danger, neither could the landlord; and the damages sustained were not the natural and expected consequences of the failure to repair.

The true rule of damages would seem to be what the repairs would have cost if made by the tenant, or the loss

* It was said there was no evidence of a back door, but this is not so: this house is spoken of as one in a row of four; front door is spoken of; and back door; and counsel so understood at trial.

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of the use of the premises during the period required for making the repairs, or the difference in value of the use of the premises as they are, and as they ought to be under the contract to repair; and also for consequential damages to chattels caused by want of repair, *i. e.*, if there is unreasonable delay in making the repairs; *Green* v. *Eales*, 2 Q. B. 225; *Makin* v. *Watkinson*, L. R. 6 Ex. 25; *The Manchester etc., Co.* v. *Carr*, 5 C. P. D. at p. 511; *Arnold* v. *Clarke*, 45 N. Y. S. C. 252 (1879).

In the last cited case, it is adjudged that the mere agreement to repair in no way contemplates any destruction of life or injuries to the person or property of any one which might accidentally result from an omission to fulfil the agreement, and that no warrant exists in principle or authority for the proposition that a landlord under such a contract, is liable to his tenant as in tort for wilful refusal or neglect to perform his obligation.

I hold that the damages in the present case did not naturally arise from the breach of contract fairly and reasonably considered as between landlord and tenant, nor were they supposably within the contemplation of the parties as likely to arise when the contract was made.

The judgment should therefore stand, dismissing the action.

MEREDITH, J.:—

The landlord's liability depends upon his contract, beyond that there can be none in the circumstances of this case, though probably both landlord and tenant would be liable for an injury to a third person in the lawful use of the steps, for in such a case there would be a duty imposed by law upon them; *primâ facie* the tenant would be liable: see *Payne* v. *Rogers*, 2 H. Bl. 349; *Chauntler* v. *Robinson*, 4 Exch. 163, and *Russell* v. *Shenton*, 3 Q. B. 449.

And under the contract to repair, no liability to the tenant for nonrepair would arise without notice to the

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landlord of the want of repair, for it is said, that "the lessee cannot charge the lessor for breach of repair without notice, for the lessor may not know that repairs are necessary;" and that by the rule of common sense there ought to be imported into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good: *Makin* v. *Watkinson*, L. R. 6 Ex. 25.

So that the position of the parties—landlord and tenant—is a peculiar one; and their rights in a case of this character are not made plain by any of the cases or in the books. Indeed there seems to be no authority upon the question of remoteness of damages arising here.

Under ordinary circumstances it would seem unusual that damages sustained through an injury of the character here in question should not be recoverable. A contract to keep in repair steps to be used as the main way into the house, and an injury arising from a breach of that contract after notice of the need of repair—an injury sustained in the use of the steps, in the very purpose for which they were erected and were to be kept in repair. And at first sight it would seem strange that a stranger might recover for a like injury whilst he who has been careful enough to procure the express contract in his favour, should fail.

Nor does there seem to me to be any analogy between the case of a contract by a builder to do work and a landlord covenanting to repair, though such seems to have been much relied upon in *Tuttle* v. *Gilbert Manufacturing Co.*, 5 N. E. Rep. 168, cited in a foot note in Woods' Landlord and Tenant at p. 857, a Massachusett's case in point in the defendant's favour upon the question of remoteness of damages.

But the absence of any case in point, having authority here, supporting the plaintiff's claim in this respect is a very grave difficulty in his way. If, under the circumstances of this case, a tenant is entitled to recover, there would doubtless be authority for it, there would be some-

thing in the books supporting the claim: see *Gott* v. *Gandy*, 2 E. & B. 845: and as I have said before, the position of the parties is peculiar. Judgment. Meredith, J.

None of the cases referred to in support of the claim seem applicable. I find cases in the Courts of the United States of America which support the claim, but I also find quite as many looking the other way.

However, in my opinion, the judgment in question can be supported upon the plainer and simpler ground first dealt with and given effect to by the trial Judge, and I prefer to affirm it upon that ground. The plaintiff knew of the damage; he sufficiently admits that in the following parts of his testimony at the trial:—

[The learned Judge then referred to the evidence to the effect mentioned, and continued.]

To make the steps safe was an easy and inexpensive matter; that which he might have done at the cost of the landlord: he chose to take the risk himself and to allow others to take it, though as to strangers it may have been his duty as well as the landlord's to guard against the danger, and therefore he cannot recover.

In view of all that was said upon the argument of the case at the trial, the plaintiff's contention that there is no evidence of any other way into the house is futile if not unfair.

I therefore agree in dismissing the motion and affirming the judgment directed to be entered.

NOTE.—See *Miller* v. *Hancock*, 41 W. R. 578.

G. A. B.

[CHANCERY DIVISION.]

MORSE V. LAMBE.

Registry Laws—Registrar's Charges—Subdivision of Township Lots by Registered Plan.

The decision of ROBERTSON, J., *ante* p. 167, reversed.

THIS was an appeal from the judgment of ROBERTSON, J., reported *ante* p. 167.

Argument. The appeal was argued on February 2nd, 1893, before a Divisional Court composed of BOYD, C., and MEREDITH, J.

Shepley, Q. C., for the appeal. The judgment appealed from seems to decide that because the plans were not binding on the mortgagee, he should be treated differently from a stranger in getting an abstract. The Registrar cannot decide in what capacity a party comes who requires an abstract. He must search all subsequent plans to ascertain all who are interested in the lands—each plan registered is a new starting point. After a plan is signed and registered, the Registrar must keep an index to follow it, and all instruments affecting the land must conform to it: R. S. O. ch. 114, sec. 84, sub-sec. 2. The Registrar shall register every instrument; section 60: and make an entry in the abstract and alphabetical index books: 52 Vic. ch. 19, sec. 5, (4) (O.) He must enter each separate lot: R. S. O. ch. 114, sec. 32: if so, he is entitled to separate fees under sec. 95, sub-sec. 2; see the language "afterwards subdivided into smaller lots." That applies here. In *Macnamara* v. *McLay*, 8 A. R. 319, the Court was unanimous, and the Registrar is within that decision—not only entitled to the clerical work, but to the searches and verification.

Laidlaw, Q. C., contra. The judgment appealed from is very full, and can hardly be added to. If no plan is filed, the Registrar is only entitled on the township lots. No plan was filed here that the mortgagee was in any way a party

to or consented to. He should not be charged for another's act. All he wishes to know is, who is entitled to redeem. He has an abstract, as asked for, on the township lots. That is sufficient. The work is not increased by the plans, so the fees should not be increased. Sub-section 3 of section 95 of the statute does not help the Registrar unless the words "each lot" is read into it. Argument.

Shepley, Q. C., in reply.

May 10th, 1893. BOYD, C.:—

Ordering an abstract implies that the Registrar shall search and certify the state of title as found in his office. The question here arises as to what fees are allowed in case of searches made in respect of a township lot, which, after being mortgaged, has been subdivided by the mortgagor according to plans duly registered.

The registration of such plans is made compulsory, and thereafter all conveyances of the parts must conform to the plan in order to be duly registered. The plans of the subdivisions of lots become a starting point for the purpose of search and registration, according to the scheme of the Registry Act (R. S. O. ch. 114, sub-secs. 23, 32, and 84). I adopt in effect the language of Morrison, J., in *Re Thompson and Webster*, 25 U. C. R. at p. 242; the chain of title and instruments affecting the land after Crown patent, are to be registered and indexed against the original lot, as described in the patent; but after subdivision and registration of a plan of the subdivisions, the registration is to be on these subdivided lots, in the same manner as if the particular lots were from that time described as such in grants from the Crown.

The statute, section 95 (2), permits fees for search upon each township lot as patented, and upon each particular lot shewn by any registered plan. For each of such lots, if in patent as a whole or in plan as subdivided, the fee for search is allowed.

Judgment.

Boyd, C.

The precise point was decided by Strong, J., in *Lindsey* v. *The Corporation of the City of Toronto*, 25 C. P. at p. 345, which, though in a dissenting judgment, is not affected by the views of the majority.

According to the course of practice in the Master's office upon this foreclosure, the plaintiff must add all parties interested in the equity of redemption, and to do this he must exhaust all registrations upon the township lots, and also upon the particular subdivisions of these whole lots, as shewn upon the registered plans. This necessitates the certificate of the Registrar as to both township lots, and as to each particular lot exhibited on the plans as registered. The written requisition for abstract of lots six and seven in first concession east of Yonge street, did not call for all that must be furnished; and the Registrar need not and should not have gone further than to certify down to the registration of the plans, (unless perchance there were subsequent conveyances dealing with the township lots as such). Then the plaintiff must have required the abstract to be continued by including the devolution of title consequent upon the registration of the plan.

To satisfy this requisition, the officer must search theoretically as to each lot on the plan, though it may happen that no dealing has been had therewith.

But though the written requisition does not ask for more than what is registered as to the township lots, it was well understood and discussed orally, that the plaintiff needed to trace the changes of title after the plan was registered, though it was supposed in the treaty as to the aggregate of fees, that there was only one plan instead of three plans. I think, therefore, that the real contract or demand was that such information should be certified by the Registrar, as should enable the plaintiff to make his foreclosure effectual by the inclusion of all parties entitled to redeem.

For this service and the necessary searches the Registrar should be paid, as he has charged in his account, which does not err in principle. He should amend his abstract

which is not accurate in point of form, so as to certify not only in respect of the township lots, but in respect of all the subdivided lots contained in the registered plans which cover the same territory as the original township lots. Judgment. Boyd, C.

Having regard to all the circumstances, I think there should be no costs *inter partes*, but so far as the Registrar is concerned, I would suggest that it is highly reasonable that his costs should be deducted out of the surplus of fees payable to the municipality.

MEREDITH, J.—I agree.

G. A. B.

[CHANCERY DIVISION.]

PARK V. WHITE ET AL.

Nuisance—Permanent or Temporary—Right of Action—Occupancy by Tenants—Injury to Reversion—Liability of Owner of Premises.

The owner of houses occupied by tenants can maintain an action in his own name for damages and to restrain the continuance of a nuisance arising from privy pits on the land of an adjoining owner, if the nuisance is of such a nature as to be practically continuous and permanent.

The owner of the adjoining land, although also occupied by tenants, is liable for the nuisance caused by them if the pits are so constructed that the constant use of them will necessarily result in the creation of a nuisance, or if allowed by the owner to remain in an unsanitary condition where there is power to remedy the grievance.

Decision of MACMAHON, J., at the trial affirmed.

THIS was an appeal by the defendants from the judgment at the trial, in an action brought by William Park against Thomas L. White and Sarah White, his wife, to restrain a nuisance occasioned by smells arising from privy pits located near the walls of the plaintiff's houses. Statement.

The action was tried at the Toronto Assizes on November 22nd, 23rd and 24th, 1892, before MACMAHON, J., with a jury.

Statement.

George Ritchie, for the plaintiff.
R. L. Fraser, and *S. W. McKeown*, for the defendants.

It appeared that about seven years ago, when the locality was not so thickly settled, the defendants built a row of cottages on the rear of their lot, and common closets were constructed for the use of the occupants. Subsequently the plaintiff became the owner of the lot immediately adjoining, and constructed a row of cottages with the rear wall eighteen inches from the privy pits. The plaintiff complained that the pits were a nuisance to the occupants of the cottages belonging to him, and that some of his tenants had left, and some were threatening to leave on account of the bad smells arising therefrom.

It also appeared that the pits were on the property of the defendant Sarah White, and a judgment of non-suit was entered in favour of the defendant Thomas L. White, her husband.

The trial Judge left certain questions to the jury, which, with the answers to them, are set out in his judgment.

On the answers, as found by the jury, the Judge gave the following judgment:—

January 4th, 1893. MacMahon, J.:—

Tried before me with a jury, at the Toronto Assizes, on the 22nd, 23rd and 24th November. The motion for judgment on the findings of the jury being made on the 5th and 12th of December.

The action was to restrain the defendants from continuing a nuisance by means of privy pits on their premises adjoining the premises of the plaintiff, consisting of a number of houses rented by him to tenants.

The writ was issued on the 8th September, 1892.

The following questions were submitted to the jury with their answers thereto:

1. "Did the closets prior to August, 1892, cause a nuisance to Park's tenants?" A. "Yes."

Judgment. MacMahon, J.

2. "If you find a nuisance was caused, did any of the tenants leave on account of the nuisance existing?" A. "Yes."

3. "Did any of the tenants threaten to leave on account of the nuisance?" A. "Yes."

4. "Did Mrs. White cause the closets to be properly cleaned out on the 24th of August, 1892?" A. "Yes."

5. "Did any nuisance exist on the 8th of September by reason of the closets?" A. "Yes."

6. "What (if any) damage has Park suffered by reason of such nuisance?" A. "Nine dollars ($9.00.)"

The nuisance complained of, and found by the jury to exist, although not very great, is one that ought not to be submitted to on the one hand, or inflicted on the other: See Kerr on Injunctions, 3rd ed., sec. 166.

But it was urged that as the plaintiff was not in possession, there being no injury to the reversion, the plaintiff could not recover unless a tenant of the property is joined as party-plaintiff. It is necessary that a tenant should be joined, where a nuisance is to a dwelling-house or houses of business, "the action is usually brought by the occupier; but where the house is unoccupied the owner may sue on the ground of damage to his property." If the house is inhabited the owner may sue either alone or conjointly with the occupier: Kerr on Injunctions, 3rd Ed. 192; *Wilson* v. *Townend*, 1 Dr. & Sm. 324; *Jackson* v. *The Duke of Newcastle*, 3 D. J. & S. 275, at p. 284.

Where the house is inhabited, and the person suing is the owner, the Court will in general look for evidence from the tenant in support of the allegation of nuisance: *Cleeve* v. *Mahany*, 9 W. R. 882; *Radcliffe* v. *The Duke of Portland*, 3 Giff. 702; *Curriers Co.* v. *Corbett*, 4 D. J. & S. at p. 771.

Were it necessary that a person in occupation should be joined as a party-plaintiff in order to entitle the plaintiff to succeed, I think I was wrong in refusing to add as party-plaintiff James Donegan, a tenant of one of the houses, who had consented to be so added. When the case

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MacMahon, J.

of *Hathaway* v. *Doig*, 6 A. R. 264, was cited to me in opposition to the motion to add Donegan as plaintiff, it escaped my attention that in that case the plaintiff (the husband) had no *locus standi*, and the suit had therefore no proper existence, and another person (the wife) who had the right could not, the Court said, be substituted for one who had no right to institute the proceedings.

Park had a *locus standi* in the present case to institute the proceedings, being the owner of the freehold, and were it necessary for the purposes of the suit to make Donegan a party-plaintiff, that should be done, following the judgment of Jessel, M.R., in *Broder* v. *Saillard*, 2 Ch. D., at p. 698, where he says: "I think it is the duty of the Court to avail itself of the means placed at its disposal by the new Act of Parliament, and to allow amendments with a liberal hand, so as to really put the facts in issue." Counsel stated that Donegan was not asking damages; there could therefore be no objection to his being added as plaintiff to the action.

There must be judgment for the plaintiff for $9, with an order enjoining the defendant Sarah White from continuing to maintain the privy pits referred to in the statement of claim, and requiring the filling up thereof, or removal of the nuisance created thereby within five months from this date.

The plaintiff is entitled to his costs, but I think they should be on the lower scale.

From this judgment the defendant Sarah White appealed to the Divisional Court, and the appeal was argued on February 16th, 1893, before BOYD, C., and MEREDITH, J.

C. H. Ritchie, Q. C., and *McKeown*, for the appeal. The defendant is not appealing on the evidence.* If there was any nuisance it was caused by the defendant's tenants after they went into possession, and not by the defendant. The defendant may have been the owner, but the nuis-

*No evidence was furnished to the Divisional Court Judges, and the argument was confined to the judgment on the questions and answers.—REP.

ance, if any, was to the tenants of the plaintiff. The plaintiff cannot recover, not being in possession. He must shew that the nuisance was permanent or injured the reversion. Even if there was a nuisance before the 24th August, the plaintiff has got a verdict of $9 for that, but is not entitled to the judgment given: *Wilson* v. *Townend*, 1 Dr. & Sm. 324; Garrett on Nuisances, pp. 203, 204, 209. At the time of the trial the houses were all occupied by tenants: *Mott* v. *Shoolbred*, L. R. 20 Eq. 22; *Jones* v. *Chappell*, L. R. 20 Eq. 539; *Broder* v. *Saillard*, 2 Ch. D. 692; *Rust* v. *Victoria Graving Dock Co.*, 36 Ch. D. 113, at p. 135; *Lawrason* v. *Paul*, 11 U. C. R. 534, at p. 538. The injury should be permanent: see *Mumford* v. *The Oxford, etc., R. W. Co.*, 1 H. & N. 34; *Simpson* v. *Savage*, 1 C. B. N. S. 347. Argument.

Geo. Ritchie, contra. The questions and answers should be read in their largest sense. The privy pits are necessary for the use of the occupants of the defendant's houses, and the user of them in any manner creates bad smells. The nuisance being permanent the inheritance is damaged. The cases cited on behalf of the defendants were mostly in respect to premises not so permanent as residences. A tenant can be added as plaintiff if necessary to shew damage to one in possession: *Broder* v. *Saillard*, 2 Ch. D. 692; *House Property, etc., Co.* v. *H. P. Horse Nail Co.*, 29 Ch. D. 190. I refer to *Wilson* v. *Townend*, 1 Dr. & Sm. 324; *Smith* v. *Humbert*, 2 Kerr (New Brunswick) 602; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685; *The Directors of the Imperial Gas Light etc., Co.* v. *Broadbent*, 7 H. L. C. at p. 612; *Jesser* v. *Gifford*, 4 Bur. K. B. 2141.

C. H. Ritchie, Q.C., in reply.

May 10th, 1893. BOYD, C.:—

The plaintiff's pleadings are grounded on his ownership of land which is injuriously affected by disagreeable and noxious odours arising from privy pits on the land of the defendant. He does not sue as reversioner, but alleges that

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his tenants have from time to time vacated his houses, and that by the frequent remarks of tenants, his houses are getting an ill-repute, and that he fears he will be unable to rent them, all on account of the filthy condition and foul smells of and from the said privy pits, and he further alleges that the tenants now in occupation threaten to leave if the said nuisance is not abated.

The chief ground of contention was on the issue, nuisance or no nuisance, and the plaintiff has succeeded. Questions were submitted and answered, and on the answers merely and only, the defendant now moves against the judgment directed to be entered for the plaintiff.

[The questions and answers are set out in the judgment of the trial Judge.]

The evidence is not in any particular before us, and we cannot assume anything against the findings.

It is urged that the nuisance was from the acts of the defendant's tenants, and she is not liable. That depends on circumstances. If the pits were so constructed that the constant user of them would necessarily result in the creation of a nuisance, or if they were allowed to remain in an unsanitary condition when the defendant had the power to remedy the grievance, then upon her, personal liability may be fixed. Many of the cases are collected in Garrett on Nuisances, p. 208, etc. I would refer particularly to *Rex* v. *Pedley*, 1 A. & E. 822; *Harris* v. *James*, 45 L. J. Q. B. 545; *Chibnall* v. *Paul*, 29 W. R. 536; *White* v. *Jamieson*, L. R. 18 Eq. 303.

It is urged again that the plaintiff had no right of action. Some cases were cited to the effect that a reversioner pure and simple would have no right of action in respect of a mere temporary nuisance. The most notable case on this head is *Jones* v. *Chappell*, L. R. 20 Eq. 539. But the neat point in that was, the plaintiffs in an action to restrain a nuisance of a temporary nature must be the occupiers, and not merely the reversioners of the property affected by the nuisance. Had a tenant been added as co-plaintiff the action would have succeeded. This course

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was taken during the course of the trial in *Broder* v. *Saillard*, 2 Ch. D. at p. 698, and the trial Judge in this case held in suspense a similar application, which he did not deem necessary to act upon. But as a matter of precaution, the permission to amend should now be given as the whole matter in controversy was as to the existence of a nuisance.

I should deem the nuisance here to be not of a temporary character, but of such a recurring nature as to be practically continuous and permanent: *Draper* v. *Sperring*, 4 L. T. N. S. 365. If so, the reversion is prejudicially affected because the injury was likely to last in the ordinary course of things down to the time, when the reversion would come into possession. In fact, it was said that some of the short tenancies had determined; and as to the damages given, it was in respect of a vacant house.

The frame of action without amendment seems justified by such cases as *Wilson* v. *Townend*, 1 Dr. & Sm. 324; *Tucker* v. *Newman*, 11 A. & E. 40; *Swain* v. *The Great Northern R. W. Co.*, 4 DeG. J. & S. at p. 215; *Smith* v. *Humbert*, 2 Kerr, (New Brunswick) 602; and *Cleeve* v. *Mahany*, 9 W. R. 882. This last case is similar to the present, and Kindersley, V. C., said "the plaintiff had not suffered personally, except that he said he could not let his house; and if that loss ensued by reason of the continuance of the operation (of brickburning) then he might be entitled to the injunction," p. 883.

The motion should be dismissed with costs.

MEREDITH, J.:—

It may, I think, be fairly considered that the jury found that in the use of the privies, for the purposes and in the manner intended by the landlord in letting the premises, they became a nuisance, and therefore she is answerable for the wrong done: *Harris* v. *James*, 45 L. J. Q. B. 545.

The contention now made by the defendant that the questions submitted to the jury were not sufficient for the

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determination of the matters in issue, comes with ill grace from him; for at the trial he made no such objection, but treated them as sufficient: see *Empson* v. *Fairfax*, 8 A. & E. 296; *The Toronto Brewing & Malting Co.* v. *Hevey*, 13 O. R. 64, at p. 67; *Hollinger* v. *Canadian Pacific R. W. Co.*, 20 A. R. 244, at p. 255.

The other ground of the motion, if there be anything in it, is completely met by the adding of the plaintiff's tenant as co-plaintiff in accordance with leave granted by the trial Judge.

The motion wholly fails, and must be dismissed with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

POLL v. HEWITT.

Master and Servant—Accident—Negligence—Defect in Machine—Volenti non fit Injuria.

In an action by a servant against a master to recover damages for injuries sustained by the plaintiff, owing to an accident which occurred by reason of a defect in the machine which he was working, the defect being the giving way of a string which worked a brake automatically, thus saving the necessity of an attendant to work the brake by hand, it appeared that the plaintiff knew of the defect and of the likelihood of an accident, he having frequently replaced the string when worn, and that he worked and continued to work the machine without help from any other person, and without any complaint:—

Held, that the plaintiff was *volens* and could not recover at the common law.

Statement.

THE plaintiff by his statement of claim alleged: (2) That in the month of March, 1891, he entered into the service of the defendant as a farm servant at the defendant's farm in the township of Blenheim, and was in such service at the time he received the injuries thereinafter complained of. (3) That on the 15th day of March, 1892, it was part of the plaintiff's duty as such farm servant to engage in the work of chopping turnips, which was done by means of a turnip cutter propelled or driven by a horse-power. (4) That on the said last-mentioned day, owing to the unsafe and defective condition of the said horse-power, and particularly of the apparatus used for applying a certain brake which formed part of the said machine, and was used for checking the speed of the said horse-power, the driving-wheel of the said horse-power suddenly broke and flew into pieces, which pieces were driven with great force, and one piece thereof struck the plaintiff violently upon the left arm while the plaintiff was properly discharging his duty of applying the said brake to the said wheel. (5) That the defendant, at the time and previous to the plaintiff receiving the injury complained of, knew, and the plaintiff did not know, of the unsafe and defective condition of the said machine or horse-power, and it was altogether owing to the negligence of the defen-

Statement.

dant that the same was not put into a safe and sound condition. (6) That in consequence of the premises the plaintiff's said left arm had been seriously and permanently injured, and had become perfectly useless, and the plaintiff had lost all control thereof, nor could he move the same, and the plaintiff had endured much pain and suffering, and had been put to great expense for medical and other attendance, and he had been rendered utterly unable to earn a livelihood. (7) That the said injury so sustained by the plaintiff as aforesaid arose and was caused wholly by reason of the negligence of the defendant in permitting the said horse-power to remain in a defective condition.

The defendant denied the statements contained in the fourth paragraph of the plaintiff's statement of claim, and alleged that the horse tread-power and the apparatus used for applying the brake and checking the speed of the horse-power was not defective in any way, and that the breaking of the driving-wheel was not owing to any defect in the machinery, or any part thereof, but the plaintiff suffered the injuries complained of owing to his own negligence and not owing to any negligence on the part of the defendant or defect in the machinery used by the plaintiff. The defendant denied knowing that the machinery was unsafe or defective, and said that it was the duty of the plaintiff before working the same to see if any part thereof was out of order, and if so, to have repaired the same, and alleged that if defective the plaintiff allowed the same to become so by his own acts and neglect, and without the knowledge or consent of the defendant. The defendant also stated that he was not aware of the extent of the injuries, if any, caused to the plaintiff, and alleged that if he had any they had been caused by his own neglect and improper manner of doing his work; and the defendant denied that he had in any way been negligent, or that he had permitted the said horse-tread power to get out of order.

Issue.

The cause was tried at the Spring Sittings of this Court, 1893, at Berlin, by ROSE, J., and a jury. Statement.

It appeared that the defendant was a farmer, and that the plaintiff hired with him as a farm servant on the 24th March, 1891, for one year. The defendant in November, 1891, purchased from B. Bell & Son, of St. George, "Bell's Improved Railway Horse-Power," a machine propelled by the tread of horses, and capable of being used with one horse or two according to the power required for doing the work required to be done. This machine was used, among other things, for driving turnip-cutters, straw-cutters, and pumps for pumping water. For driving a turnip-cutter or for pumping water, one horse only was required, but for doing both at the same time, two horses were required. This machine was provided with a brake, by the application of which by the hand it could be stopped, or its speed could be reduced, and there was a contrivance by which when the machine went too fast the brake was applied automatically for the purpose of reducing its speed; a part of this contrivance was a string from the governor, which, when the machine attained a certain speed, was wound up and by it the brake was applied. This machine was set up at the defendant's farm by the foreman of B. Bell & Son, who explained to the plaintiff the manner in which the machine worked; and it appeared that the plaintiff knew quite as much about the machine and the working of it as the defendant did. The string referred to was liable to wear and to break, and this happened several times, and the plaintiff replaced the string when it so broke; and the effect of the breaking of the string was that the brake would not then be applied automatically, and unless some one was near to apply the brake the machine would run away, and the horse or horses be thrown out, but no danger was apprehended to any person. The machine had run away from this cause before the time in question, and both plaintiff and defendant had equal knowledge of its having so run away, and of the

Statement. cause of it—the breaking of the string. On the day of the accident the plaintiff, by the defendant's orders, went out to cut turnips and pump water with the machine, which was set on the barn floor, the turnip-cutter being in the cellar, and the plaintiff put two horses upon the machine, and went into the cellar to attend to the turnip-cutter. After the machine had been in operation about twenty minutes, he found the speed of the turnip-cutter greatly increased, and, knowing that the machine was running away, hurried up stairs to it and was just about applying the brake when a wheel, which was revolving with great velocity, burst, and one-half of it went through the roof of the barn, and the other struck the plaintiff, injuring him severely. The cause of the machine running away was the breaking of the string. The plaintiff had frequently run the machine before the day of the accident, and had never complained of having to run it, and had never complained of not having any help when he was running it.

The learned Judge left the following questions to the jury, which they answered as follows:—

(1) What caused the wheel to break? A. Too high speed.

(2) Was the defendant guilty of negligence? A. Yes.

(3) If so, in what did such negligence consist? A. Not having sufficient help.

(4) If you find that the defendant was guilty of negligence, state whether such negligence caused the accident, and if so, how? A. By not having sufficient help to take care of the machine properly.

(5) Could the plaintiff (Poll) have avoided the accident by the exercise of reasonable care and caution? A. Yes.

(6) If so, state what he did that he should not have done, or what he did not do that he should have done. A. By using defective cord.

(7) If the defendant should pay damages, name a fair sum for him to pay. A. The defendant to pay the plaintiff the sum of four hundred dollars.

The learned Judge thereupon gave judgment dismissing the action with costs.

Argument.

At the Easter Sittings of the Divisional Court, 1893, the plaintiff moved to set aside the said judgment and to enter judgment for him for $400 and costs, because the learned Judge erred in so entering judgment upon the findings; or to set aside the findings of the jury in answer to the fifth and sixth questions, and to enter the judgment for the plaintiff, because on the undisputed evidence the plaintiff was entitled to recover; or to set aside the findings of the jury in answer to the fifth and sixth questions submitted to them, and for a new trial, for misdirection and nondirection of the trial Judge in laying down the law as to the relative rights and liabilities of the parties, and because the findings of the jury as to the fifth and sixth questions were perverse and against the weight of evidence, and because the damages found by the jury were too small.

The motion was argued on the 22nd May, 1893, before ARMOUR, C. J., and STREET, J.

McCarthy, Q. C., for the plaintiff. The only remedy the plaintiff can contend for is at common law. This is a case in which both the plaintiff and defendant knew of the danger. There was no contributory negligence on the part of the plaintiff. The defendant knew that the attendance was insufficient. I refer to *Smith* v. *Baker*, [1891] A. C. 325, at p. 356.

Alfred S. Ball, for the defendant. The plaintiff knew all about the machine, and had more than once put in a new cord. On the day of the accident the cord was worn, and two horses were being used. The plaintiff knew the danger which might arise, and took the risk. *Volenti non fit injuria.* There is no evidence that it was necessary to have more help in running the machine; that was first suggested by counsel for the plaintiff in addressing the jury at the close of the case.

McCarthy, in reply, referred to *Thompson* v. *Wright*, 22 O. R. 127; *Thomas* v. *Quartermaine*, 18 Q. B. D. at p. 694.

Judgment. June 10, 1893, the judgment of the Court was delivered
Armour, C.J. by

ARMOUR, C.J. :—

It was conceded by the learned counsel for the plaintiff upon the argument that if the plaintiff could not recover damages for the injury which he sustained at the common law, he could not recover them at all.

This case belongs to a class of cases referred to by Lord Watson, in *Smith* v. *Baker*, [1891] A. C. at p. 357, where he says: "The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as *volens*."

The defect in the machine which the plaintiff was engaged to work was the liability of the string by which the brake was automatically applied to become worn and break, and when this happened, the brake not being automatically applied, the machine ran away.

This defect was well known to the plaintiff, and he was perfectly aware that there was a constant likelihood of the string becoming worn and breaking and of the consequent result, and he worked and continued to work the machine without any complaint, and must be regarded as *volens*.

The jury, however, found that the defendant was guilty of negligence, and that such negligence consisted in his not having sufficient help to take care of the machine properly.

I presume that what the jury meant by this finding was that the defendant ought to have had some person near enough to the machine when it was working to apply the brake by hand for the purpose of reducing the speed of or of stopping the machine.

But the very object of the contrivance for applying the brake automatically was to obviate the necessity of keeping a person near to apply the brake by hand, to reduce the speed of the machine when it was working. Judgment. Armour, C.J.

The plaintiff had, however, been in the habit of working the machine without any person to help him, and without making any complaint; and, under the circumstances, the authorities, I think, shew that he must be regarded as *volens*.

In *Skipp* v. *The Eastern Counties R. W. Co.*, 9 Ex. 223, the plaintiff, who was in the employment of the defendants, a railway company, his duty being to attach the carriages of the baggage trains to the locomotive engine, was thrown under the carriages and severely injured. There was evidence that the company's staff for the performance of this work was not sufficient, but the plaintiff had been employed in this particular service for several months prior to the accident, and had not made any complaint to the company, and it was held that he was *volens* and could not recover.

In *Saxton* v. *Hawksworth*, 26 L. T. N. S. 851, the plaintiff was a sheetroller in the service of the defendants at their steel works, and had been so for three years. Five steam engines properly constructed were used in the factory. Some stood at a distance from the others, but two men only were employed to attend to them all, as the plaintiff well knew. During the necessary absence of both the engine tenters, without negligence on their part, an engine ran away or revolved too fast, and caused a drum connected with it to fly to pieces, one of which, passing through a yard, entered the mill where the plaintiff worked, and hurt him. The runaway engine might have been stopped in time to prevent mischief if an attendant had been near it. And it was held that the plaintiff, being aware of the dangers incidental to his employment, contracted to take the risks, and therefore could not recover.

Willes, J., in delivering the judgment of the Exchequer Chamber, said: "This is one of a great number of cases

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Armour, C.J.

which have occurred in which the jury have invariably found for the employé—cases where a servant chooses to enter into an employment of which the system is well known, and one of them after an accident has happened suddenly finds out that the master was exceedingly wrong not to have a greater number of servants * * * but under such circumstances a servant has no ground to complain of the master in a court of law."

That case would have been more like the present case had the action been brought by one of the engine tenters, but no case has gone the length of holding that under such circumstances the engine tenter would have been entitled to recover.

I refer also to *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; *Feltham* v. *England*, L. R. 2 Q. B. 33; *Griffiths* v. *London and St. K. Docks Co.*, 12 Q. B. D. 493; 13 Q. B. D. 259; *Miller* v. *Reid*, 10 O. R. 419; *Rudd* v. *Bell*, 13 O. R. 47.

I am of the opinion that, under the circumstances of this case, the plaintiff has no remedy against the defendant at the common law for the injury which he has sustained, and that the motion must be dismissed with costs.

[CHANCERY DIVISION.]

RE THE UNION ASSURANCE COMPANY,

AND

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY AND J. W. LANG.

Fire Insurance—Mortgage—Loss payable to Mortgagees—Consolidation.

The owner of a parcel of land mortgaged the same, and subsequently mortgaged it to the same person again, the second mortgage containing other lands on which were buildings, and also a covenant to insure. The mortgagor subsequently made an assignment for the benefit of his creditors, and the equity of redemption was sold by his assignee, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings included in the second mortgage in his own name "loss if any payable to the mortgagees as their interest might appear," subject to the conditions of the mortgage clause. A fire took place by which the buildings in the second mortgage were destroyed, the insurance moneys payable being more than sufficient to pay the balance due on the second mortgage which was in default, and the mortgagees claimed the right to apply the surplus in payment of the first mortgage which was also in default:—

Held, that the mortgagees were not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys, but were restricted to the right to recover the amount remaining unpaid on the second mortgage.

Statement.

THIS was an appeal from a judgment of ROBERTSON, J., affirming a judgment of the Master in Chambers.

The matter originally arose in an application by the Union Assurance Company for leave to pay into Court the amount of insurance moneys due by them for a loss occasioned by a fire on October 18th, 1892, which moneys were claimed by the London and Canadian Loan and Agency Company (limited) as mortgagees and one J. W. Lang as owner of the property insured.

The facts fully appear in the judgment of the Master.

The application was argued in Chambers on January 30th, 1893, before the Master.

Arnoldi, Q. C., for the London and Canadian Company.
Coatsworth, for J. W. Lang.

Judgment.

Master in Chambers.

February 7th, 1893. THE MASTER IN CHAMBERS:—

This is an application on behalf of the Union Assurance Company for an order permitting them to pay the amount of a policy of insurance into Court under the following circumstances:

On the 5th October, 1881, one Gray executed a mortgage upon certain lands in the townships of Allan and Billings, now in the district of Manitoulin, in favour of the London and Canadian Loan and Agency Company (limited), to secure the payment of $1,000, moneys advanced by the mortgagees to the mortgagor. This sum with interest became payable on the 1st October, 1891, and on the 18th October, 1892, there was due for principal $1,000, and for interest $148.64.

On the 18th April, 1887, the said Gray executed another mortgage in favour of the said company upon the lands mentioned in the mortgage of 5th October, 1881, and other additional lands, to secure the repayment of $3,000 advanced by the company to Gray, together with interest, and there is now due and unpaid on said mortgage $550 for principal and $43.71 for interest.

On the 22nd October, 1888, the said Gray executed a mortgage in favour of J. W. Lang on the lands mentioned in the second mortgage to the company, for securing the payment of $3,790.55; this mortgage was assigned by Mr. Lang to W. A. Mitchell on the 29th January, 1889.

Gray becoming insolvent and unable to meet his liabilities, and subsequent to the execution of the above mortgages, executed an assignment for the benefit of his creditors to one W. S. Gibbon, of all his estate including the lands above mortgaged.

The said Gibbon, with the consent and approval of the inspectors of the said estate, sold all the right and interest in the said estate to the said J. W. Lang; and by conveyance dated the 28th May, 1889, executed by the said Gibbon, the inspectors of the estate, and the said Lang, the said assignee did sell, assign, transfer and set over unto

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the said Lang (*inter alia*), all the equity of redemption vested in the assignee of the insolvent estate, as such assignee, of, in and to those lands in the district of Manitoulin, more particularly described in the mortgage thereof from Gray to Lang, dated October 22nd, 1888, and subject to the three mortgages above referred to, which Lang was to assume and pay off. And in the said conveyance the said Lang entered into the following covenant, namely:

"And the party of the third part (J. W. Lang), for himself, his heirs, executors, administrators and assigns, covenants, promises and agrees with and to the party of the first part, his executors and administrators, that he, the party of the third part (J. W. Lang), his heirs, executors, administrators and assigns, or some or one of them will pay the principal money and all interest secured by the said mortgages to the London and Canadian Loan and Agency Company (limited) as and when the same shall respectively become due, and will indemnify and save harmless the party of the first part, his executors and administrators, and the said insolvent estate, from and against payment of the same and all loss, costs and damages in connection therewith."

By the policy of insurance in question herein No. 942168, and dated December 16th, 1890, issued in favour of J. W. Lang, loss, if any, payable to the London and Canadian Loan and Agency Company (limited), mortgage clause attached, the Union Assurance Company insured certain buildings, dwellings, etc., set forth in said policy and therein stated as being "all owned by the assured (J. W. Lang), and situate as per diagram, on his application to the company in the village of Kagawong, district of Algoma, Ontario. The diagram referred to shews (it is admitted) the buildings, etc., insured to be situate on a part of the property conveyed to the London and Canadian Loan and Agency Company by the mortgage of the 18th April, 1887, but not on the lands mentioned in the mortgage of the 5th October, 1881.

A fire having taken place on the 18th October, 1892,

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there became due under and by virtue of the said policy of insurance, the sum of $1,203.30, now desired by the Assurance Company to be paid into Court in consequence of the claims made to this sum by the above claimants.

Mr. Lang is willing that the London and Canadian Loan and Agency Company should retain the balance due under the mortgage of the 18th April, 1887, from the said sum, but claims that he is entitled to the remainder of that sum.

On the other hand the London and Canadian Loan and Agency Company claim the right to receive the whole of the insurance under their two mortgages, contending that they have a right to consolidate both mortgages against Mr. Lang, and that he is not entitled to a discharge or release of one without paying the other, and that they are further entitled to the whole sum under the following clause in their mortgage of 18th April, 1887, namely: "And that the mortgagor, his heirs and assigns, will pay all taxes, rates, and insurance premiums, from time to time, in respect of the mortgaged lands and premises, and that in default the power of sale and other remedies shall become exercisable, and that if the mortgagees at any time pay, which they shall at all times be entitled to do, any such rates, taxes, or insurance premiums, or any charge or incumbrance upon the said premises or any part thereof, all amounts so paid shall be a charge upon the said premises, with interest at the rate aforesaid, and that the mortgagor will pay the same and interest as aforesaid forthwith to the mortgagees, and in default the principal money hereby secured shall, at the mortgagee's option, become payable, and the power of sale and other remedies hereby given be enforced."

The question as to the time when the London and Canadian Loan and Agency Company claimed to be entitled to consolidate their mortgages is in dispute.

For the claimant Lang it is contended that he is only a surety for the payment of the balance due under the second mortgage, and therefore as soon as it is paid off he

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is entitled to be paid the surplus of the insurance moneys; that the policy is a collateral security merely for payment of the amount due under the second mortgage, and there can be no consolidation of the policy with the first mortgage: and further, that there is no consolidation, inasmuch as at the date of the fire both mortgages were not due or in arrear; and further, that the first mortgage did not cover lands on which the buildings covered by the insurance policy were erected, and that the only claim to the insurance moneys being under their second mortgage, which contains the covenant for insurance, there can be no consolidation.

I must hold under the authority of *Muttlebury* v. *Taylor*, 22 O. R. 312, that Lang by reason of the conveyance to him from Gibbon, and the covenants in it above set out, became as between him Gibbon and Gray's estate, primarily liable to pay both the mortgages to the London and Canadian Loan and Agency Co. I do not, however, hold that this company has any direct remedy against him. I say nothing as to that; his character is that of a principal, and not of a surety. He insured the buildings as principal under the covenant contained in the mortgage to the company.

As to the insurance moneys, they take the place of the property destroyed, and are collateral till applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment to convert the security: *Edmonds* v. *The Hamilton Provident and Loan Society*, 18 A. R. 347.

With reference to the contention that there can be no consolidation of the mortgages, as both were not due when the insurance moneys became due, it appears that the fire took place on the 18th October, 1892; that by condition 17 in the policy of insurance the loss shall not be payable until thirty days after completion of the proofs of loss unless otherwise provided for by the contract of insurance, so that nothing was payable under the policy until long after the first day of November, 1892, when the interest on $500 became due and was in arrear, and being

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so unpaid and in arrear the principal remaining unpaid becomes payable under the acceleration clause in the mortgage.

But if it should be held that the acceleration clause is inoperative or that the money was payable on the 18th October, and that therefore there was nothing due on the mortgage secondly mentioned, I am not satisfied that under the circumstances herein, that the results can be different from the ordinary case of a consolidation. It is quite true that there can be no consolidation where the plaintiff applies to foreclose two mortgages, one of which is not due, but here the claimant, Lang, is asking to be at liberty to redeem one without the other, and that with money which the London and Canadian Loan and Agency Company, as mortgagees, are entitled to hold until the maturing of the mortgage under which the insurance is payable and without abatement in the interest payable under such mortgage: *Austin* v. *Story*, 10 Gr. 306; *Green* v. *Hewer*, 21 C. P. 531.

I am of opinion that the principle laid down in *Cummins* v. *Fletcher*, 14 Ch. D. 699 as to there being no consolidation unless both mortgages are due, does not apply to the facts herein; but I am of opinion that both mortgages were in arrear when the money in question became payable and that the London and Canadian Loan and Agency Company is entitled to consolidate both mortgages as against the claimant Lang. In *Selby* v. *Pomfret*, 3 D. F. & J. at p. 598, Lord Campbell said: "The defendants sold the mortgaged premises under the power of sale contained in the mortgage deed. As transferees of the mortgage they were lawfully entitled to receive the whole of the purchase money, and therefore they had a right to apply the surplus beyond what was due under this mortgage to satisfy the sum due to them on the other mortgages executed by the bankrupt, as if they had been defendants in a suit to redeem or plaintiffs in a suit to foreclose."

I hold therefore that the London and Canadian Loan and Agency Company are entitled to receive the amount

of insurance due by the Union Assurance Company, and apply the same on their two mortgages and that the claimant Lang should pay the loan company the costs retained by the insurance company, inqurred in making this application, as also the loan company's costs of and incidental to the motion.

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From this judgment the claimant Lang appealed to a Judge in Chambers, and the appeal was argued on February 13th, 1893, before ROBERTSON, J., who subsequently gave the following judgment.

Arnoldi, Q. C., for the Loan Company.
Coatsworth, for Lang.

February 20, 1893. ROBERTSON, J.:—

This is an appeal from an order of the Master in Chambers dated 7th February, 1893, whereby he decided that the loan company were entitled to certain insurance moneys as against the claimant J. W. Lang.

The learned Master's judgment, which I have read, sets out the facts, and it is admitted by Mr. Coatsworth that the loan company, which hold two mortgages, one on one piece of property, and another on the same property as well as on the property on which were the buildings which were insured, and the policy made payable to the loan company as mortgagees. The second mortgage was to secure $3,000, the first to secure $1,000; the second mortgage is payable by instalments of $500 each, on the 1st November in each year. All the instalments up to and inclusive of that one on the 1st November, 1891, have been paid. The last instalment would be payable on the first of November, 1892.

On the 18th of October, 1892, a fire took place, and the buildings insured were destroyed. The loss was settled at $1,203.30, but it was not payable until the expiration of thirty days after the receipt by the insurance company of

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the claim papers. So that, supposing these papers were filed within one week after the fire the loss would not be payable until, say 25th of November, 1892, being twenty-five days after the instalment on the mortgage was due. If Mr. Lang wished to avoid the consolidation of the two mortgages he should have paid that instalment on or before the date it became due. He did not do so and the mortgage is therefore in default. The first mortgage was also in default. The right of the loan company was therefore complete after the 1st of November. The fact of the fire having taken place before the mortgage fell due does not put off the day of payment. The mortgagees could have taken proceedings immediately after default; they were not bound to wait the rule or convenience of the insurance company. Suppose that company had refused to pay the loss or become unable to pay, surely the mortgagees would not be bound to wait the result of litigation with the insurance company with regard to the insurance money.

This being the chief point urged by Mr. Coatsworth, and in every other respect as I think the Master is right, the appeal must be dismissed with costs.

From this judgment the defendant Lang appealed to the Divisional Court, and the appeal was argued on February 28th, 1893, before BOYD, C., and FERGUSON, J.

Moss, Q. C., and *F. E. Hodgins* for the appeal. Up to time of making the claim the loan company always treated the two mortgages as separate securities. This is not a proper case for consolidation of the mortgages. Lang voluntarily insured for the benefit of the loan company, "as their interest might appear," but that did not deprive him of his right to sue for the insurance money if necessary; nor did it give the whole of it to the company, only such amount as they were entitled to. The policy was the policy of Lang, and the party to whom the loss was made payable had no power to deliver it up for cancellation: *Dear*

Argument.

v. *Western Assurance Co.*, 41 U. C. R. 553; *Marrin* v. *Stadacona Insurance Co.*, 43 U. C. R. 556; 4 A. R. 330. This is not the same as a case for redemption. All the modern cases are against extending the doctrine of consolidation. The equity of consolidation only applies when the securities are received from the same source. Here they were different: *Jennings* v. *Jordan*, Brett's L. C., Bl. ed. 280, and cases collected there: *Brower* v. *Canadian Permanent Building Association*, 24 Gr. 509; *Johnston* v. *Reid*, 29 Gr. 293; *Miller* v. *Brown*, 3 O. R. 210; *In re Ragget*, 16 Ch. D. 117. There was no default on the second mortgage: *Cummins* v. *Fletcher*, 14 Ch. D. 699; *Gordon* v. *Ware Savings Bank*, 115 Mass. 588. The mortgagees' interest is limited to the amount of the mortgage debt: Porter on Insurance, 282; *Miller* v. *Aldrich*, 31 Mich. (Post 9), 408. Insurance is only an indemnity: *Castellain* v. *Preston*, 11 Q. B. D. 380 at 386. Here more than an indemnity is asked for, as regards the insured property. We also refer to *Chesworth* v. *Hunt*, 5 C. P. D. 266.

Arnoldi, Q. C., and *Bristol*, contra. When Lang got the conveyance of the equity of redemption there was a covenant to insure for $400 in the first mortgage, and to the full insurable value in the second. He covenanted "to fulfil," that is to assume and pay off the mortgages and the covenants to insure were part. His covenant to indemnify means to assume all the terms of the mortgages. The insurance money takes the place of the property it represents, and must remain until all the liabilities and casualties are beyond a peradventure: *Corham* v. *Kingston*, 17 O. R. 432; *Barber* v. *Clark*, 20 O. R. 522. The loan company have a right to retain the insurance moneys in hand. Lang has made payments on the mortgages to the company, and is personally liable to the company: *The Frontenac Loan and Investment Society* v. *Hysop*, 21 O. R. 577, and *Re Crozier*, commented on at p. 579. The second mortgage makes it a matter of contract that the moneys secured by the first mortgage are charged upon all the

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lands covered by the second mortgage. The mortgagees would be entitled to pay off the first and add it to their claim, and are entitled to consolidate. Lang is estopped from claiming the insurance. Both mortgages were in default: *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

Moss, Q. C., in reply. The loan company must elect whether to claim by consolidation or to retain the insurance moneys. There were no dealings by Lang which made him personally liable to the company.

April 23, 1893. BOYD, C. :—

It was pointed out in *Corham* v. *Kingston*, 17 O. R. at p. 434, that insurance moneys coming to a mortgagee did not resemble a payment made by the mortgagor, and for like reason the reception of these moneys under the "mortgage clause policy" are not to be treated as on a redemption by the mortgagor. If the insurance money is more than sufficient to pay all that is secured by the mortgage, can the mortgagee claim to hold the surplus in respect of another mortgage which is not mentioned in the policy, or in any agreement between the parties? Under the statute R. S. O. ch. 102, sec. 4 (2) the mortgagee may require that all the money from the insurance shall be applied on the particular mortgage in respect of which the insurance was received though it be not presently due and payable. That is, as expressed, repugnant to the idea that it can be held to answer another claim upon another mortgage; unless that other mortgage, being made by the same mortgagor, can be consolidated with the mortgage to which the contract of insurance applies.

In the case in hand the applicant is not the mortgagor in the mortgage sought to be consolidated, but has only the equity of redemption, having covenanted, it is true, with his assignor to pay the mortgage but not directly or personally liable to the mortgagees, who now claim the whole insurance money: *The Frontenac Loan etc. Co.* v. *Hysop*, 21 O. R. 577.

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The insurance money will pay in full the balance due on the particular mortgage, and will leave a surplus of about $650. Though this balance is not due till next November by effluxion of time, the mortgagees have accelerated the date of payment by reason of default in payment of interest due 1st November, 1892, so as to advance and maintain their claim to consolidate both mortgages. This however is only a question of the payment of additional interest as if calculated up to November, 1893; for if the applicant is willing to pay now all that would then be due on this particular mortgage, there is no reason for postponing his right to get the balance (if he has such right) to the later period. So that the sole question is: has the company the right to receive the balance to answer their claim on the other mortgage?

In *Edmonds* v. *The Hamilton Provident & Loan Society*, 18 A. R. at p. 367, Maclennan, J. A., says: "When the instalments and interest are all paid, the deed is to be void, and the securities, land, and insurance and all, are to go back." Can this result be intercepted in the case of surplus insurance moneys by consolidation of securities? The same learned Judge again says at p. 367: "Of course as soon as the debt is reduced to an equality with the insurance money in his hands he must apply the latter *pro tanto* from time to time to subsequently maturing payments."

Now, unless consolidation obtains in this case, the company cannot succeed. The precise point is not reached by authority, and looking at the trend of decision, I accept as sound doctrine the opinion expressed by James, L. J., in *In re Raggett*, 16 Ch. D. at p. 119: "I am not disposed to extend the doctrine (of consolidation) to any case which I do not find already covered by some authority or logically deducible from what has been laid down by some authority."

The nearest case to the present is *Selby* v. *Pomfret*, 1 J. & H. 336, and 3 D. F. & J. 595. That was the case of a mortgagor, coming to the court for a surplus of

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mortgage money, realized after sale of the premises. But he was not allowed that unless he redeemed another property mortgaged, which was an insufficient security. This case is criticised by Cotton, L. J., in *Cummins* v. *Fletcher*, L. R. 14 Ch. D. at p. 714, who justifies it only on the ground that the plaintiff was coming to the Court to do equity in the enforcement of a trust, and not on the footing of a contract enforceable at law under which there was a right to have the surplus paid back. Then applying that principle as deducible from the case which has gone furthest, how does it affect the present applicant? As against the Insurance Company, had he the legal right or a right dependent on contract to recover the amount he now claims?

The contract of insurance is made by and with the owner of the equity of redemption, Lang, with loss, if any, payable to the loan company, as mortgagees, as their interest may appear. That is in substance such a contract as was dealt with in *Anderson* v. *The Saugeen, etc. Co.* 18 O. R. 355, and the legal attitude of the parties is there defined. "If the insurer assents to it, and the event happens, the assignee (the mortgagees) may maintain an action in his own name, because upon notice of assignment, the insurer has agreed to pay the assignee instead of the assignor. But the original contract remains; the assignment and the assent to it form a new and derivative contract, out of the original," per Ferguson, J., at p. 366. And as put in a like case by Patterson, J.A., in *Howes* v. *The Dominion Fire and Marine Ins. Co.*, 8 A. R. at p. 649, "To the extent of the debt the mortgagee has a beneficial interest in himself. The excess above that amount he receives on behalf of the mortgagor; but, as to the whole amount, the insurance is for the benefit and on behalf of the mortgagor, whose debt is paid by it."

That the mortgagor who effects the insurance is the assured and has a right of action to recover from the company at all events when the amount secured by the mortgage is less than the amount insured appears from

Marrin v. *Stadacona Ins. Co.*, 4 A. R. 330. The matter is elaborately discussed in *Mitchell* v. *City of London Ass. Co.*, 15 A. R. 262. Judgment. Boyd, C.

Had the loan company sued the insurance company and received the whole sum representing the amount of loss, they would hold the balance, now in question, as money had and received to the use of the assured—who could maintain an action therefor on the common money counts. That brings the matter within the scope of Mr. Justice Lindley's language in *Chesworth* v. *Hunt*, 5 C. P. D. at p. 271; that though the mortgagor may have allowed the time for payment to pass, yet if he has legal rights to such a surplus as this, then the equitable doctrine of consolidation does not apply.

Apart from this, one can foresee what interminable complexities would arise, if the doctrine of consolidation was introduced in respect to these policies containing the mortgage clause. If, for instance, upon payment the insurance company were to call for the assignment of the mortgage in order to proceed against the mortgagor, as against the "subrogation" clause, could the loan company claim to consolidate as to other securities?

However regarded it seems to be an undesirable innovation to stretch the equities of consolidation over this region of insurance law. I would therefore reverse the judgment of the Master and my brother Robertson and declare the applicant to be entitled to the surplus, after payment of what is due on the footing of the one mortgage covering the premises insured.

The appellant should also have his costs against the company.

FERGUSON, J.:—

I need not make any statement of the leading facts here, for, as said at the bar, these sufficiently appear by the statements in the judgment of the learned Master.

It was not disputed that there was default in respect of the payments secured by the mortgage of the 5th day of October, 1881, for the sum of $1,000.

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Ferguson, J.

There was some discussion as to whether or not there had been default in regard to the payments, secured by the mortgage of the 18th day of April, 1887, for the sum of $3,000. Without following out here the contentions that were made on the subject I think it sufficiently clear that there had been default in respect of the payment secured by this mortgage also, and on the face of the mortgage it is provided that in default of payment of any portion of the moneys secured by the mortgage, the principal money should become due and payable.

The two mortages were made by the same person Gray as mortgagor in each, and to and in favour of the same company, the London and Canadian Loan and Agency Company as mortgagee in each.

Through the assignment from Gray to Gibbon, and the conveyance by Gibbon to Lang, he, Lang, became entitled to the equities of redemption that arose upon the execution of these mortgages. The policy of insurance on which the moneys now in question arose was effected by Lang on the 16th day of December, 1890, after he became the owner of these equities, and he, Lang, is named in the policy as the "Insured," the contract being to "pay or make good all such loss or damage," etc., the document stating on its face that the loss, if any, is payable to the London and Canadian Loan and Agency Company, referring to the "mortgage clause attached," which mortgage clause says amongst many other things of general importance: "At the request of the assured the loss, if any, under this policy, is hereby made payable to the London and Canadian Loan and Agency Company, as their interest may appear, subject to the conditions of the above mortgage clause."

The buildings and property insured were situated upon the lands embraced in the mortgage of the 18th of April, 1887, for the $3,000, which had been paid, excepting an instalment of $500, and some interest. The amount of the insurance money is somewhat over $1,200, so that after satisfying the balance remaining unpaid upon this mortgage, there would be left of the insurance money, some $600 or $700.

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Ferguson, J.

The mortgage of the 5th day of October, 1881, does not embrace the lands on which the property insured was at all. The amount remaining unpaid upon this mortgage, it was assumed, is at least equal to this balance of the insurance money, and the question argued before us was as to whether or not in these circumstances the mortgagees have the right as against Lang to consolidate their two mortgages and thereby take the whole of this insurance money.

The principle on which the right of consolidation rests seems very clearly stated by Cotton, L. J., in *Cummins* v. *Fletcher*, 14 Ch. D. at pp. 711 and 712. Where the learned Judge says: "But the principle is really this, * * that originally it was only, as against the mortgagor, an interference by the Court of Equity with his right of redemption. The right to redeem was the creature of equity, and the Court of Equity held that it was inequitable that the mortgagor should take from his creditor the sufficient estate and leave him with an insufficient estate as security for a different debt, and in granting its own special relief it refused to do so except upon the terms of his doing what the Court of Equity thought equitable.

That was extended to persons taking from him, the mortgagor, on the simple ground that the purchaser of an equity took with all the equities affecting his vendor existing at the time the purchase took place. That being so, no doubt it has been extended not only to a suit for redemption but also to a suit for foreclosure on the ground * * * that such a suit is simply calling upon the mortgagor or owner of the equity of redemption, to exercise his right then or never."

In the same case James, L. J., says, at p. 709: "That where a man has a legal right in property A. and an equity of redemption in property B. which is an insufficient security, and has no occasion, and never will have any occasion, to come to a Court of equity with respect to property A. the fact of the two properties being subject to two mortgages gives the Court no more power to take from him

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property A. than it has to take any other property belonging to him, for the purpose of satisfying the debt for which there is insufficient security."

In the case *Chesworth* v. *Hunt*, 5 C. P. D., at p. 271, Lindley, J., says, plainly, that it is only when the mortgagor has no legal rights that the equitable doctrine of consolidation applies.

In the Bl. ed. of Brett's L. C., at p. 283, under the leading case *Jennings* v. *Jordan*, 6 App. Cas. 698, it is said that this question was considered on principle as well as upon authority, and that the principle on which the Court proceeded with regard to the consolidation of mortgages was that the mortgagor or his assignee, when asking for the assistance or the mercy of the Court on the ground of his equity, must himself do equity, and one finds in very many cases and authorities this doctrine of consolidation of mortgages spoken of in the same way as in the cases I have referred to. The effect of section 17 of the Conveyancing and Law of Property Act of 1881 in England, seems to be to leave this doctrine, in that country a question of contract between the parties, and in the absence of a contract to exclude the Act, there will be no consolidation. Apart from this the current of modern decisions has been against extending the doctrine of consolidation.

From the many cases that I have taken occasion to look at (on the subject) it seems to me that this doctrine is only applied and its effect made available to the mortgagee where the mortgagor or the owner of the equity of redemption, having no legal rights respecting the subject matter, is asking the Court to give effect to his equity, or when the mortgagee drives him by foreclosure proceedings to the assertion of his equity now or never.

The present contention is not, as I understand it, of this character. The parties in contention are not contending as to redemption or foreclosure, or as to these lands or any of them at all. This insurance was an indemnity to both Lang, the insured, and the mortgagees. The moneys are more than sufficient to satisfy the mortgagees, that is, to

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Ferguson, J.

fully indemnify them; and, as it appears to me, Lang has no need to ask the Court for the exercise of any equitable consideration in his favour, so as to place the Court in a position to make use of the equitable doctrine of consolidation as against him. Lang is not, in fact, asking an equity from the Court. He does not come asking for any thing in the shape or form of "mercy" (as it has been called), having no legal right to the subject matter of the contention.

On the contrary of this, as it seems to me, Lang has a good right of action at law against the insurance company to recover the balance of the insurance money after satisfaction to the mortgagees in respect of the mortgage upon the lands on which the insured property was situated.

It may too, be added, that there seem to be some provisions contained in the "mortgagee clause," so much spoken of, such that if circumstances existed authorising the insurance company to avail themselves of the advantages of them, and they sought to do so, a consolidation would appear to be clearly out of the case. This may not be of great consequence here; but it appears to me, to at least, tend to show that the contracting between Lang and the insurance company, should be taken to be confined to the one property and the one mortgage; and as a consequence the words in the last paragraph of the mortgagee clause, "as their interests may appear," should be read as referring to their interests in respect of the particular mortgage.

On the whole, I am of the opinion that the mortgagees are not, in the present condition of affairs, entitled to a consolidation of their mortgages, so as to be paid the whole of these insurance moneys, or any more thereof, than a sum sufficient to satisfy the amount remaining unpaid upon the mortgage upon the lands upon which the insured property was situated.

The appeal should, I think, be allowed.

G. A. B.

[CHANCERY DIVISION.]

THOMPSON v. FOWLER.

Ship—Charter of Tug—Demise or Hiring—Negligence—Liability for Damage to Tug.

The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug * * * * to tow two barges from * * * for which I agree to pay * * * owner to supply engineer and captain * * *." The tug on the voyage was run on a rock through the negligence of the captain:—

Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage.

Decision of FALCONBRIDGE, J., at the trial reversed.

Statement. THIS was an appeal from a judgment of FALCONBRIDGE, J., in an action brought by Robert Thompson against James Fowler.

The action was tried at the Assizes at Ottawa on January 18th, 1893, before FALCONBRIDGE, J., sitting without a jury.

Stuart Henderson and *T. A. Beament*, for plaintiff.
F. R. Latchford and *Colin McIntosh*, for defendant.

It appeared that the plaintiff was the owner of a tug which he had hired to the defendant to tow two barges from Brockville to Dexter, New York, under a contract in writing which is set out in the judgment of the Chancellor. The defendant did not provide a pilot, and the captain, who acted as pilot and who, with the engineer, was by the terms of the contract to be supplied by the owner, intrusted the steering of the tug to an inexperienced lad and went to sleep when the tug was run upon a rock and sunk. The captain had engaged the rest of the crew of whom the lad was one.

The action was brought for the amount due for the towing, and damages for the delay and for the sinking of the tug.

At the close of the case the learned Judge gave the following judgment:

Statement.

FALCONBRIDGE, J., (after referring to the items for towing, delays, etc., proceeded as follows): The remaining question is that of the wreck. In that I would have felt strongly inclined to apply the rule frequently invoked by Admiralty Courts, where both parties are to blame and to find that neither party was responsible to the other for the accident which took place on the 16th of August.

There is a conflict of testimony, but in view of the strong authorities cited on the part of the plaintiff, it seems to me the plaintiff is entitled to succeed on the ground that under the terms of the charter party there was a demise of the tug, and the mere fact that the plaintiff supplied the captain and engineer does not make the captain less under the control of the defendant.

So as to that also there will be a reference, and the defendant's claim for damages in respect to the same accident will of course be disallowed.

In deciding as I do as to the agency of the captain, I refer more particularly to the judgment of the Lord Chief Justice in *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86. I feel myself bound by the law as laid down in the cases which have been referred to.

From this judgment, the defendant appealed to the Divisional Court, and the appeal was argued on February 18th, 1893, before BOYD, C., and MEREDITH, J.

Latchford, for the appeal. The main question is, did the agreement amount to a demise? If it did not, the defendant cannot be liable for the loss resulting from the wreck. The evidence shews that the tug and barges while on the voyage were under the charge and control of the captain. His going to sleep when the vessel was entering a part of the river which he knew to be dangerous, and leaving the wheel in inexperienced hands, was negligence and caused the accident. The captain was provided under the agreement by the plaintiff, and the plaintiff was his paymaster. The agreement did not constitute a demise of

Argument.

the tug, and the plaintiff must bear the loss occasioned by his servant's negligence. *Sandeman* v. *Scurr*, is not in point. I refer to *The Omoa and Cleland Coal and Iron Co.* v. *Huntley*, 2 C. P. D. 464; *Steele* v. *Lester*, 3 C. P. D. 121; *Sack* v. *Ford*, 13 C. B. N. S. 90; *Christie* v. *Lewis*, 5 Moo. at p. 253; *Saville* v. *Campion*, 2 B. & Ald. at p. 510; *Dean* v. *Hogg*, 4 Moo. & S. at p. 195; *Fletcher* v. *Braddick*, 2 B. & P. 182.

Henderson, contra. There was no warranty in the contract that either the captain or the engineer would be competent, but merely an agreement to pay them. The plaintiff gave up entire possession of the tug, and the trial Judge's finding that there was a demise is correct. The captain was the agent of the defendant, particularly in hiring the crew. I refer to *Reeve* v. *Davis*, 1 A. & E. 312, referred to in Abbott on Shipping, 13th ed. 59. *The Lemington*, 2 Asp. M. C. N. S. 475; *Bernard* v. *Aaron*, 31 L. J. C. P. 334; Maclachlan's Merchant Shipping, 4th ed. 355 *et seq.*; *Frazer* v. *Marsh*, 2 Camp. 517; *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Scicluna* v. *Stevenson*, 8 App. Cas. 549; *Hutton* v. *Bragg*, 7 Taunt, 14.

Latchford, in reply.

May 10, 1893. BOYD, C.:—

The question of liability turns upon the frame of the contract which was in these words: "I agree to charter tug "J. K. Ward," (R. Thompson owner) to tow two barges from Brockville to Dexter, New York, for which I agree to pay at rate of eleven dollars per day, owner to supply engineer and captain." Sgd, James Fowler.

"I hereby agree to the above." Sgd, R. Thompson, owner.

Many of the cases cited as to "charter parties" do not much help in the decision. This contract is for the hiring of a steam tug, for that is the meaning of the word "charter." The learned trial Judge treated the engage-

Judgment. Boyd, C.

ment as a demise of the vessel so as to divest the owner of all responsibility. To my mind such an idea is repelled by the terms of the writing. The tug was to supply the motive power, and the control of that power was in the hands of the captain and engineer, and these officers were for all purposes of navigation in the control of the owner. That, I take it is a fair reading of the bargain, and if so, it supplies the salient point which gives shape and character to the whole.

Some of the evidence shews that a crew of four, plus the captain, sufficiently manned the tug as it was ordinarily used in towing. Of these five, the owner supplied two; the captain (who was also steersman and pilot), and the engineer; that is, he selected them and paid them. The captain chose the other members of the crew, and these were paid by the defendant. It is evident that the owner exercised this precaution to ensure the safety of his vessel, for upon the capacity of these two depended the success of the undertaking. The captain assumed (and rightly) I think, the responsibility of managing and directing both the tug and the barges in tow. After they were loaded, the captain was in command, and so continued for all the purposes of the journey until the accident happened. See *The Isca.*, 12 P. D. 39; and *Smith* v. *St. Lawrence Tow-boat Co.*, L. R. 5 P. C. at p. 313.

The captain is called, and says "I had control in managing the vessel; I hired the men, and they were under my control." It is proved that the duty of the captain was to stay in port if the vessel was short of hands, but in this case, the evidence conflicts as to whether she was manned in the usual way for such service. The captain knew the channel well from Brockville to Clayton, and undertook to pilot the vessel across, but at a critical place he chose to go to sleep, leaving the wheel in the hands of an inexperienced lad who ran the tug on a rock.

It appears that the defendant was not consulted in any way, shape or manner as to who should be on the boat or the number of hands; the captain, who was the brother

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Boyd, C.

of the owner, did everything in connection with the equipment and navigation of the tug for the service to be rendered. The defendant had suggested to the plaintiff about having marine insurance on the tug, but he replied that he would run the chance, he thought nothing would happen to her.

These circumstances shewing the conduct of the parties, throw light upon their understanding of the contract, which accords with their relative positions.

In the *Mary* and *Dorothy* Case, 1 Stu. V. A. Ca. 187, a contest arose as between the charterers of a ship and the master as to the possession of the vessel; and the Judge said (Hon. Henry Black): "The shippers of the cargo have no control over the ship, or its navigation, unless when expressly given them by the owner. The owner, who is answerable to the shippers for the proper navigation of the ship, exercises his own judgment in selecting or removing the master. The shippers are strangers to the contract between the owner and the master, and cannot, in any way by their acts, alter or affect the rights and obligations of these parties, without an express authority to that effect from the owner," p. 188.

As between the parties to this case, the fact that the plaintiff employed and paid and could alone dismiss the captain and engineer, proves that they were his agents, and an act of negligence in the navigation committed by the captain would render the owner liable. That being so, I do not see how it is possible to support the judgment against the defendant for an accident to which the captain materially contributed by his negligence: *Hibbs* v. *Ross*, L. R. 1 Q. B. at p. 542; *Fenton* v. *Dublin Steam Packet Co.*, 8 A. & E. 835; *The Omoa, etc., Co.* v. *Huntley*, 2 C. P. D. at p. 467; *The Beeswing*, 5 Asp. M. L. C. N. S. 484. On this branch, the action should therefore be dismissed with costs.

I do not give effect to the defendants counter-claim growing out of the accident, for the loss was occasioned in part by his servants. The captain hired the crew as agent of the barge owner. He turned over the wheel to one of

these hands with directions how to steer before he fell asleep on the night of the accident. This man either disregarded the captain's directions or may have been incompetent for what he had to do in the steering of the boat; but he was there as servant of the defendant. Both plaintiff and defendant thus contributed to the common loss; and neither party should charge it against the other. Costs of counterclaim on this branch to be set off against costs to be paid by plaintiff.

Judgment. Boyd, C.

The other damages directed by the trial Judge may be referred, and the costs disposed of by the Master or reserved as the parties may agree. This can be spoken to afterwards.

MEREDITH, J.:—

I cannot think that under the agreement between the parties the owner was to part with the possession of the tug: to the contrary, upon the whole evidence, and having regard to all the circumstances of the case, it seems reasonably plain that there was no demise of the tug, rather a hiring of its services by the day, upon certain terms; the owner retaining possession and control of it, subject to such orders from the employer as were proper in such service: see *The Omoa, etc., Co.* v. *Huntley*, 2 C. P. D. 464; and *Christie* v. *Lewis*, 2 B. & B. 410.

It also seems reasonably plain to me that the accident would not have happened but for the fact that the tug was undermanned for the services she was engaged in at the time. Both parties to the action were blamable for that; the plaintiff, through the captain (his brother), who had the command and control of the vessel for the owner, (his brother) and the employer in person. The defendant was willing to, and did, take the risk in order to save the delay, expense, and trouble of procuring a pilot; and the plaintiff, through his brother (to whom he seems to have left the whole business of the transaction during his long absence from home, as well as the command and control

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Meredith, J.

of the tug), was willing to, and did go undermanned to save delay and assist the plaintiff.

In such circumstances neither party is entitled against the other, to damages flowing from the injury arising out of the risk which both agreed to take, and voluntarily took; see *The Julia*, Lush. 224; *Smith* v. *The St. Lawrence Towboat Co.*, L. R. 5 P. C. 308; *The Energy*, L. R. 3 Adm. 48; and *The Quickstep*, 15 P. D. 196.

I therefore think that the first impressions of the learned trial Judge were right, and am unable to find anything in the judgment in *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86, in conflict with them; certainly nothing requiring a departure from them—as he felt constrained to—in giving judgment upon this question. I would accordingly set aside that judgment and dismiss the action and the counter claim upon this branch of the case.

Nor do I think the claims for damages for delay, on any of the other occasions in question, are sufficiently sustained in evidence; they seem to be an after-thought, and should, in my opinion, be also dismissed.

If the parties cannot agree upon the state of accounts between them in other respects, there should be a reference to the proper local officer to take them, reserving further directions and the question of costs of the reference.

The defendant should have his costs of this motion.

G. A. B.

[QUEEN'S BENCH DIVISION.]

WILLIAMS V. RICHARDS ET AL.

Waters and Watercourses—Defined Channel—Surface Water—Right to Drain into Neighbouring Lands.

That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbour's land the surface water from his own land not flowing in a defined channel.

The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage has not been adopted in this Province.

McGillivray v. *Millin*, 27 U. C. R. 62; *Crewson* v. *Grand Trunk R. W. Co.*, *ib.* 68; *Darby* v. *Crowland*, 38 U. C. R. 338; and *Beer* v. *Stroud*, 19 O. R. 10, considered.

Statement.

THE plaintiff by his statement of claim alleged (2) that he was and had been for two years the lessee and the tenant in occupancy of the southerly 147 acres of lot 12 in the 4th concession of the township of Raleigh, under a lease unexpired; (3) that the defendants were and had been for two years occupants and in possession of the adjoining land to the west, being lot 11 in the same concession; (4) that a drain and natural watercourse ran across the lands of the plaintiff and defendants from east to west, carrying the surplus water from the lands of the plaintiff and those to the east, across the defendants' land, to the outlet and drains to the west; (5) that this drain and watercourse was the natural course for the water from the plaintiff's land, and for water coming from the east and south upon the plaintiff's land to flow and find an outlet across the land of the defendants; (6) that the defendants during the years 1890, 1891, and 1892, had continually and on various occasions constructed a dam upon their own land, and at the line between their land and the plaintiff's, across the drain and watercourse, immediately to the west of the plaintiff's land, thereby preventing the water flowing in and along the drain and watercourse to its proper outlet, and dammed the water

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back on the plaintiff's land, and thereby the plaintiff's land and crops became overflowed, he lost the use of his land, his crops were injured, he was prevented from cultivating his land, and lost the crops he had put into it; (7) that the defendants threatened to continue to dam and close up the drain and watercourse and to maintain their dam by force and prevent the water flowing naturally down the watercourse from the plaintiff's land across the defendants' land, as it naturally should flow and did flow until stopped by the defendants' dam. The plaintiff claimed an injunction to prohibit the defendants from so closing up and damming or obstructing the drain, and $1,500 damages, and costs.

The defendants by their statement of defence denied that the plaintiff was the lessee of the land as alleged, or that he had been for the past two years the tenant in occupation thereof, or that he had any *bonâ fide* interest therein. They also denied the allegations in the 4th and 5th paragraphs of the statement of claim, and said that the so-called drain and natural watercourse was not a natural watercourse, and averred that, some time subsequent to 1877, and prior to the plaintiff's occupancy, the person or persons then in occupation of the lands excavated and constructed the drain and extended it westward across the land claimed by the plaintiff to a point adjacent to the east of the line dividing that land from their lands. They further alleged that the excavation of the drain in the manner stated had the effect of diverting the flow of waters coming from the south and east of the land claimed by the plaintiff, in a course different from that in which they would naturally have flowed if such drain had not been constructed, and in a course different from that which would lead to their proper outlet if such drain had not been constructed. Further, that in 1890 and at divers times since, the plaintiff, unlawfully, maliciously, and without any warrant or authority from the defendants, caused such drain to be excavated and extended into and upon the defendants' land, and, for the purpose of effecting his

Statement.

object, broke down the line fence and entered and trespassed upon the defendants' land, and thereby caused the waters from the drain to flow into and upon the defendants' land, in consequence whereof such land became flooded and damaged, and the crops growing thereon were injured and destroyed. Further, that, in consequence of such acts, and in order to prevent further damage to their land and crops, the defendants in the autumn of 1890, acting in pursuance of their legal rights, constructed a dam on their own land near its easterly limit, and extending from the north to the south across their land, thereby preventing the further inflow upon their land of the waters from the drain, which was the damage complained of by the plaintiff.

Issue.

The action was tried before ROBERTSON, J., at the Chatham Spring Sittings, 1893, for the trial of actions in the Chancery Division.

The following facts appeared.

The plaintiff was the lessee of lot 12, and the defendants were the owners of lot 11, in the 4th concession of the township of Raleigh, in which the concessions run and the lots are numbered from west to east.

In the original survey of the township, no lots were laid out in the 3rd concession between the side road between lots 6 and 7 and the side road between lots 12 and 13; and no lots were laid out in the 4th concession between the side road between lots 6 and 7 and the side line between lots 17 and 18; and no lots were laid out in the 5th and 6th concessions between the side lines between lots 8 and 9 and the side lines between lots 19 and 20; and on the plan of such survey a creek was shewn on the western boundary of the 3rd concession, and from this creek across the land not laid out into lots was this writing: "This large creek, as well as the hills and drains whose water it carries off, loses itself in this large open marsh, is the outlet of all the waters of Raleigh, excepting a few

Statement.

small springs along the bank of lake Erie." It did not appear when this marsh was laid out into lots, but the plaintiff's and defendants' lots were in this marsh, and it was shewn that they were not capable of cultivation in a state of nature, but had only become so by artificial drainage. It was shewn that the waters of two creeks, Bulles and Indian, flowed into this marsh from the eastward, and before they reached the marsh flowed in well defined banks, but these defined banks ceased when they reached the marsh; that the natural trend of the waters of the marsh was in a westerly direction, with a fall of about thirty inches in a mile; and that there were depressions in the land running from east to west, through which the waters which were wont to cover the whole marsh, as they subsided, were finally drained off towards the west; and there were depressions on the plaintiff's lot through which the waters were drained from the east to the west, carrying the waters from the plaintiff's to the defendants' lot; that, following the course of the most northerly depression, the defendants had cut a drain for the purpose of draining their lot, and the defendants had made an embankment on the easterly limit of their lot, which prevented the waters running across the plaintiff's lot in this depression going into this drain. A surveyor stated that he took the levels on the plaintiff's lot from the north-east angle of it to the south-west angle of it; that there was very little depression, very gradual, about the centre of the lot, a little more south if anything; that the depression was, taking the levels between those points, not more than a couple of inches, and it was the water running through this depression that the embankment made by the defendants obstructed. By the public system of drainage which had been adopted in that locality, all the water which flowed on to the plaintiff's land from the east and south had been cut off, and no water flowed on to it from the north or west, so that the only water that came upon the plaintiff's land was what fell from the clouds.

Statement.

The learned Judge held that the depression referred to was not a watercourse; that it did not flow in any defined channel; and that the embankment made by the defendants was lawful; and he dismissed the action with costs.

At the Easter Sittings of the Divisional Court, 1893, the plaintiff moved to set aside this judgment and to enter judgment for him, on the ground that the judgment was against law and evidence and the weight of evidence; and that the plaintiff had proved that a natural watercourse existed across his property, and crossed into and over the defendants' property, which the defendants admitted they obstructed; and that the plaintiff was entitled to the use of the said watercourse and damages for such obstruction; and the finding of the Judge that the plaintiff had not proved that the said watercourse had any apparent banks was no reason for dismissing the action; and that whether the plaintiff did not or could not prove the existence of banks to the said watercourse was immaterial, so long as the water was proved to flow across said land in a defined channel or depression in the land.

The motion was argued before ARMOUR, C. J., and STREET, J., on the 18th May, 1893.

Douglas, Q. C., for the plaintiff. I contend that it is not necessary to shew banks. So long as there is a defined and certain channel, though the water is surface water, an action will lie for stopping the flow of it and damming it back. I rely on *Beer* v. *Stroud*, 19 O. R. 10. *McGillivray* v. *Millin*, 27 U. C. R. 62, and *Crewson* v. *Grand Trunk R. W. Co.*, *ib.* 68, were relied on by the trial Judge; but *Murray* v. *Dawson*, 19 C. P. 314, was subsequent to these cases. I refer to the judgment in that case at p. 319; *Boyd* v. *Conklin*, 54 Mich. 583.

M. Wilson, Q. C., for the defendants, contra, relied on *Darby* v. *Crowland*, 38 U. C. R. 338; Gould on Waters, sections 275, 41, 263, 264; Coulson and Forbes on Waters,

Argument. (ed. of 1880), pp. 53, 105; and also contended that the plaintiff's remedy was under the Ditches and Watercourses Act.

Douglas, in reply. The plaintiff is not an owner and cannot apply under the Ditches and Watercourses Act. On the main question I refer, in addition, to *Kelly* v. *Dunning*, 39 N. J. Eq. 482; *Palmer* v. *Persse*, 11 Ir. R. Eq. 616; *Claxton* v. *Claxton*, 7 Ir. R. C. L. 23.

June 10, 1893. The judgment of the Court was delivered by

ARMOUR, C. J.:—

I am of the opinion that the judgment was right and must be affirmed.

Neither the lands of the plaintiff nor those of the defendants were capable of being cultivated in their natural state, owing to their being situated in a large marsh, and it was only owing to the system of artificial drainage which had been adopted in the locality in which they were, that they had become capable of being cultivated.

By this system the water was prevented from coming upon the plaintiff's land from the adjoining lands on the east and south by means of drains and embankments formed for that purpose, and no water flowed upon the plaintiff's land from the adjoining lands upon the north and west; so that what we have to deal with is simply the case of surface water upon the plaintiff's land caused only by what falls from the clouds, and not flowing in any defined channel, for that cannot be called a defined channel which has no visible banks or margins within which the water can be confined.

The Courts of some of the states of the United States have adopted the rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage, and the lower owner cannot reject, nor can the upper withhold, the supply, although

either, for the sake of improving his land according to the ordinary modes of good husbandry, may somewhat interfere with the natural flow. Judgment. Armour, C.J.

But other of such Courts have refused to adopt the rule of the civil law, and have followed English authority which does not recognize any such right with respect to surface water as such.

The decisions in our own Courts are based upon English authority, and we are bound by them. They are *McGillivray* v. *Millin*, 27 U. C. R. 62: *Crewson* v. *Grand Trunk R. W. Co.*, *ib.* 68; and *Darby* v. *Crowland*, 38 U. C. R. 338; and we do not see anything in *Beer* v. *Stroud*, 19 O. R. 10, which conflicts with them.

The motion will, therefore, be dismissed with costs.

[CHANCERY DIVISION.]

BRETHOUR v. BROOKE ET AL.

Mortgage—Short Forms Act—Covenant (No. 7)—Proviso (No. 14)—Possession—Right of Mortgagee to Lease without Notice—Scanty Security—Right to cut Timber.

There is nothing in the covenant (No. 7) in the Act respecting Short Forms of Mortgages, R. S. O. ch. 107, that on default the mortgagee shall have quiet possession of the lands repugnant to the proviso in the same Act (No. 14), that the mortgagee, on default of payment may, on giving notice, enter on and lease or sell the lands; and a mortgagee, when his mortgage is in default may, under the covenant, without giving notice, make any lease which will not interfere with the mortgagor's right to redeem.

The action intended by the proviso is not the mere taking possession for the purpose of keeping down the interest, but the entering on the lands to lease or sell in such wise that the right of redemption shall be postponed or destroyed,

When the security in arrear is scanty, it is competent for the mortgagee to make the best provision he can for his own safety even to the cutting down of trees, which power he can confer upon others under him, subject to an account to the owner of the equity of redemption at the proper time.

Millett v. *Davey*, 31 Beav. 476, applied.

Statement. THIS action was brought by Henry W. Brethour as assignee of Paul Huffman against Daniel Brooke, mortgagee of certain property in a mortgage executed by Paul Huffman, and against George Huffman and Albert Huffman, to set aside a lease made by Brooke to George Huffman and Albert Huffman, two sons of the mortgagor, and was tried at the Chancery sittings held in Brantford, on May 18th, 1893, before BOYD, C.

The facts are sufficiently set out in the judgment.

Lynch-Staunton and *Livingston* for the plaintiff. The defendant Brooke had no right as mortgagee to lease the property without giving notice to the mortgagor or his representative. He had no right to lease and give power to cut the timber, and even if he had the power to lease, as the term in this case was for three years, which was longer than the mortgage had to run, it was invalid.

They referred to *Chisholm* v. *Shedden*, 1 Gr. 318, at p. 321; *Stewart* v. *Rowsom*, 22 O. R. 533; *Christie* v. *Long*, 3 Gr. 630, R. S. O. ch. 107, forms 7 and 14. Argument.

Hoyles, Q. C., and *V. Mackenzie*, Q. C., for the defendant Brooke, the mortgagee. The pleadings are not drawn for redemption, and all matters in dispute between the parties will arise and be settled when the accounts as between the mortgagor and mortgagee are taken. The security is scanty, and the mortgagee had the right to enter and cut the timber; and the plaintiff has no right to interfere. The evidence shews that the plaintiff had virtually abandoned the properties to the mortgagee to do the best he could with them. They cited Fisher on Mortgages, 4th ed., par. 499, 501.

Oles, for the defendants, the tenants.

Lynch-Staunton, in reply. If notice of intention to lease had been given, the plaintiff would have had the right to redeem.

May 20th, 1893. BOYD, C.:—

This is a case of very unusual character, in which the law is somewhat obscure, but upon the facts the defendant has a more meritorious position than the plaintiff.

Brooke, the defendant, took a mortgage from Paul Huffman in November, 1889, to secure $5,000 on four parcels of land, payable on the 1st of January, 1895.

Huffman assigned under R. S. O. ch. 124, for the benefit of his creditors to the plaintiff in October, 1890. The assignee arranged with Huffman's sons to occupy the land for two years and pay rent at the rate of $150 per year. This not sufficing to pay the interest on the mortgage, Brooke desired some change to be made which would secure him. The evidence greatly preponderates in favour of the conclusion that the security was a scanty one—not worth at the outside, I should say, $5,500. As much as this was admitted by the letters, and the action, of the assignee. On July 7th and 17th, 1892, he wrote letters in

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Boyd, C.

which he stated that he did not think the land would sell for more than the mortgage.

It is admitted that the estate has no assets to keep down the interest, and when Brooke pressed for settlement and offered to assign the mortgage on being paid what was due, the assignee declined to expend his own funds in making redemption. This was done by letter on the 4th of January, 1893. There was then $5,500 due on the mortgage.

Thereupon Mr. Brooke made an arrangement with Huffman's sons, whereby they took a lease of the mortgaged premises for three years, at the rate of $300 a year, in consideration of being allowed to chop 100 cords of wood yearly. This they used for the manufacture of cheese-boxes in a mill on the place. I am abundantly satisfied that this was the best possible means that could be devised to utilize the property and keep the mortgage current. This rent (which was double what could have been obtained in any other way) is sufficient to keep down accruing interest and one-third of the wooded land will be rather improved than injured by the cutting of the trees. After the removal of the 300 cords of wood, there will be still equivalent to 1,500 left on the land.

This transaction is now attacked by the assignee on the ground that no notice was given pursuant to the proviso contained in the mortgage, that "the mortgagee in default of payment for one month, may, on giving one month's notice in writing, enter on and lease or sell the said lands." (See R. S. O. ch. 107, sec. 14, p. 971), and that the provision in the lease is equivalent to the sale of so much of the timber, which, under *Stewart* v. *Rowsom*, 22 O. R. 533, cannot be lawfully done.

The plaintiff made a tender of all that was due (without costs) before action, and demanded a transfer of the mortgage and a cancellation of the lease. This was refused by the mortgagee as he could not cancel the lease. The statement of claim does not in terms offer to redeem, though this is perhaps to be implied; and it does not ask for possession

Judgment.

Boyd, C.

of the land. Nor is possession desired by the assignee, because he now admits that his object in bringing the action is to get rid of the mortgage and lease, and then by breaking up the land into parcels, and so selling, he hopes to be able to realize some hundreds of dollars over the outlay. This, I think, extremely unlikely, but it is not material in considering the legal aspects of the case arising from the foregoing facts and conclusions of fact.

The mortgagee was willing to be redeemed as to the whole security before he made the lease; but thereafter he changed his position—made provision for the payment of the interest—and is now unwilling and unable to accelerate the time for the payment of the principal money.

Unless the mortgagor is entitled to redeem, he cannot usually file a bill to impeach the conduct of the mortgagee lawfully in possession. The acts of a mortgagee who impairs the integrity of the security or otherwise deals so as to prejudice the mortgagor, will be overhauled in the taking of the mortgage account; *Hood* v. *Easton*, 2 Giff. 692, (in some aspects doubted in appeal, 2 Jur. N. S. 917); but the present action, if to redeem the mortgage, is premature as the time-limit of the security is in the future, and the court cannot force the mortgagee to take the principal money before the day.

When the mortgagee took possession the interest was in arrear, and the estate of the mortgagor was, in law, at an end. His right to possession then ceased, as the contract between the parties provided. For the mortgage under the Short Forms Act, also contained the covenant (No. 7, p. 968), that in default the mortgagee shall have quiet possession. That is not repugnant to the later clause, No. 14, as to notice required before the mortgagee can enter on and lease or sell. The action intended in the later clause is not the mere taking possession under the security for the purpose of keeping down the interest, but the entering on the land to lease or sell in such wise, that the right of redemption shall be postponed or destroyed. The effect of the earlier provision as to default in giving the right to

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enter without notice, or to take possession if it can be peaceably obtained, is seen in such cases as *Doe d. Garrod* v. *Olley*, 12 A. & E. 481, and *Lowe* v. *Telford*, 1 App. Cas. 414.

Being then, upon and after the default, entitled to possession, it was, in my opinion, competent for the mortgagee to rent the land so as not to interfere with the right of the mortgagor or the plaintiff to redeem. If the security was scanty as I find, and the interest was in arrear, then it was competent for the mortgagee to make the best provision he could for his own safety; even to the cutting down of trees; and if so, he could confer that power upon others under him, subject always to the right of the owner of the equity of redemption, to call both to account at the proper time.

"When the mortgage security is insufficient, the mortgagee is entitled to make the most of the property for the purpose of realizing what is due to him. He may cut timber, he may open a mine, and the Court will not, by injunction, interfere to prevent his doing so, provided he is not committing wanton destruction, * * where a mortgagee so circumstanced, is acting *bonâ fide*, * * the court will never interfere to prevent his felling timber or opening a mine; * * but he does it at his own risk and peril; so that, if he incurs a great loss * * he cannot charge a penny of that loss against the mortgagor, and if he obtains a great profit, the whole of that profit must go in discharge of his mortgage debt. That is the condition upon which he speculates, but, subject to that condition and speculation, he is entitled to make the most of the property for the purpose of discharging what is due to him." Such is a statement of the law pertinent to this case given by the Master of the Rolls in *Millett* v. *Davey*, 31 Beav. 476, (See also *Franklinski* v. *Ball*, 33 Beav. 560.)

The power of leasing also exists when the mortgagee takes possession, though his lease may not bind the owner of the equity of redemption. A lease so made in case of sufficient security, if not made pursuant to the 14th pro-

viso, would be subject to the right of the mortgagor to pay up arrears of interest and resume possession. But that manner of relief is not asked, nor would it serve the purpose of the plaintiff in this case; but were it the precise point of contention, I should question the right of the mortgagor to obtain it in the case of a scanty security when the mortgagee has been compelled to protect himself by making the most provident lease possible.

Judgment.

Boyd, C.

A decision of Lord Macclesfield in 1722, holds that a mortgagee before foreclosure cannot make a lease for years of a house to bind the mortgagor, unless to avoid an apparent loss and merely in necessity; *Hungerford* v. *Clay*, 9 Mod. 1, and no later decision has disturbed this. That was the case of a lease for longer than the period of redemption fixed in the mortgage. I do not say that this kind of lease could now prevail against the mortgagor, having regard to the provision as to notice before leasing in our statute. But it is not needful further to consider this right of possession pending the mortgage, because that is not now the subject of controversy.

The present lease runs beyond the time at which the mortgage money is to be paid, but all the defendants agree to curtail the term to a concurrent period. The law would give that, I think, to the person redeeming without concession, and no further notice need now be taken of it, for the present action cannot be maintained. It must be dismissed with costs.

G. A. B.

[CHANCERY DIVISION.]

BRITISH CANADIAN LOAN COMPANY v. TEAR ET AL.

Mortgage—Sale subject to Mortgage—Implied obligation to Indemnify against Mortgage—Evidence of Agreement to the Contrary—Assignment of Claim—Right of Action.

Although when a mortgagor conveys his equity of redemption, subject to the mortgage, there is an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, evidence is admissible of an express agreement between the parties to the contrary.

A claim against a purchaser of an equity of redemption for indemnification against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter.

THIS was an appeal from the judgment at the trial of ROBERTSON, J., in which the facts are fully set out.

The action was tried on December 10th, 1892.

J. K. Kerr, Q. C., for the plaintiffs.

Elgin Schoff and *Horace Harvey*, for the defendant Lamb.

G. W. Holmes, for the defendant Tear.

Judgment. January 10, 1893. ROBERTSON, J.:—

Robertson, J. This is a mortgage action by mortgagees (the plaintiffs) against Tear, the mortgagor, and Lamb, the assignee of the equity of redemption, who is charged with having purchased the mortgaged lands, subject to the plaintiffs, mortgage, for $3,200 and interest, etc., which it is charged he assumed, and agreed to indemnify defendant Tear, the mortgagor, against payment of. And Tear claims that he be indemnified by Lamb; and by an indenture bearing date 1st of April, 1891, Tear assigned to the plaintiffs all rights and remedies he might have against the defendant Lamb, and the benefit of all covenants express or implied; that the defendant Lamb should indemnify defendant Tear from the payment of such mortgage money, or any interest or costs in respect thereof.

Judgment. Robertson, J.

The mortgage in question bears date 10th October, 1887, and is granted on certain lands in Toronto, particularly described therein, and set forth in the statement of claim. This mortgage contained the usual covenants for payment of the mortgage money, etc.

Afterwards, on 20th February, 1888, by the ordinary statutory short form conveyance, Tear, the mortgagor, and Rose Tear, his wife, joining therein to bar her dower, granted and conveyed the said lands unto defendant Lamb in consideration of $5,600, the said mortgage money $3,200, being included in and forming part of the said purchase money. And it is charged Lamb thereby became liable for and assumed payment of said mortgage money, and agreed to indemnify Tear against payment thereof.

The plaintiffs also allege that defendant Lamb, by an agreement in writing dated March 2nd, 1888, made with the plaintiffs, assumed payment of the said mortgage.

The plaintiffs claim: That they be paid the mortgage money and interest, and the costs of this suit, and in default that the mortgaged premises be sold and proceeds applied in or towards the said debt and costs: That defendants Tear and Lamb be ordered forthwith to pay the said debt and costs: That defendants do forthwith deliver to plaintiffs possession of the said lands: That all proper directions may be made and accounts taken, etc.

The defendant Lamb denies all the allegations in plaintiff's statement of claim affecting him, and alleges that it was distinctly understood and agreed between him and Tear, that he, Lamb, was not to be personally liable for payment of the mortgage debt and interest; and if there is any statement or provision to that effect in the conveyance from Tear to him, it was so made by mistake or ignorance, and is incorrect, and fails to express the true bargain between him and defendant Tear.

Defendant Lamb also alleges that he exchanged a parcel of land on Queen street, Toronto, for the mortgaged lands of Tear, and it was understood and agreed that the interest of the one was to be exchanged for the other in their respec-

Judgment. Robertson, J.

tive properties without defendant Lamb becoming personally liable for any incumbrance by mortgage or otherwise thereon. He also denies the agreement with the plaintiffs to assume payment of the mortgage, and alleges that the paper writing of 2nd March, 1888, was signed by him merely for the purpose of consenting to payment of the balance due Tear of the mortgage money by the plaintiffs, as it was then represented to him, but which it appears contains a false statement, whereby Lamb is made to say that he had assumed the plaintiffs mortgage; and he charges that the said writing was obtained by misrepresentation, and without any consideration, and that the said writing in that respect is untrue.

Defendant Lamb also raises the question of privity of contract existing between him and plaintiffs, etc.; and by way of counter-claim against Tear, he says the latter is indebted to him in large sums of money, on an open account, on promissory notes, for interest, etc., and that Tear is indebted thereon in the sum of $3,548.80, principal and interest. And he claims to be entitled to have such sum set off against any claim which Tear establishes against him; and to have the conveyances (*sic*) mentioned in fifth paragraph of statement of claim (which is the agreement of 2nd March, 1888), amended, etc., to carry out the true intent of the defendants, etc.

The defendant Tear admits all the plaintiffs' allegations, and alleges on his own behalf that defendant Lamb expressly stipulated with him to assume and pay off the said mortgage, and claims indemnity from Lamb against plaintiffs' claim, etc.

Then Lamb, in answer to defendant Tear, denies all his allegations against him (Lamb), and sets forth the same grounds of defence as urged against the plaintiffs by him, and by way of counter-claim Lamb claims payment of the said sum of $3,548.80, etc., and to have the same set off against any claim Tear may establish against him, and to have the conveyance made by Tear to him amended, so as to carry out the true intent of the agreement and exchange of properties, etc.

Judgment. Robertson, J.

Lamb also demurs to Tear's statement of defence. 1st. Tear admits he has assigned all his rights, etc., against him, Lamb, as set forth by plaintiffs, and he is therefore not entitled to the relief he asks against Lamb. 2nd. That Tear's statement of defence shews no right of action, etc.

At the trial I declined to go into the counter-claim of defendant Lamb against the defendant Tear, subject to his right to bring an action to recover any sum which may be due from Tear to him, as he may be advised.

Then as to the main question, as to the liability of defendant Lamb.

Apart from the writing of 2nd March, 1888, signed by defendant Lamb, in which he stated he had lately purchased the mortgaged property from Tear, and had assumed payment of the loan thereon, I think it clear on the authorities that defendant Lamb having purchased the mortgaged premises from the mortgagor, subject to the mortgage, is bound to indemnify the mortgagor against payment of the mortgage money.

In *Waring* v. *Ward*, 7 Ves., at pp. 336, 337, Lord Eldon, speaking of the purchaser of an equity of redemption, states the principle in these words:—"If he enters into no obligation with the party from whom he purchases, neither by bond or covenant of indemnity to save him harmless from the mortgage, yet the Court, if he received possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being the owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

In *Thompson* v. *Wilkes*, 5 Gr., at p. 595, the late Chancellor Blake states the principle in these words:—"The plaintiff's right to that relief, *primâ facie*, cannot be doubted, for it is clear that the purchaser of an equity of redemption is bound, as between himself and his assignor, to pay off the incumbrances, and that quite irrespective of the form of the contract between the parties."

Judgment.
Robertson, J.

In *Jones* v. *Kearney*, 1 Dr. & War., at p. 155, Sir Edward Sugden lays down the doctrine of the Court in these words: "Now, what was the situation, in which *Kearney*, the defendant, stood? He became the assignee of the premises under the deed of the 24th of September, 1834. He was in the ordinary position of a purchaser buying an estate *cum onere*. The premises were subject to a burden: the purchaser did not enter into any particular obligation to discharge that burden, or to indemnify the seller; it was not necessary that he should do so. This Court fastens on every such purchaser a liability to indemnify the seller against the incumbrances affecting the property sold. If I create an incumbrance on my estate, and sell, and no engagement be entered into with respect to that incumbrance, but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such incumbrance. It was my object, in so selling, to charge him and indemnify myself. This is a proposition which is perfectly clear, requiring no authority to support it."

So far then as defendants Tear and Lamb are concerned there can be no question as to the liability of Lamb to indemnify Tear; but it is contended on behalf of Lamb that there is no privity of contract, between him (Lamb) and these plaintiffs, and they at all events have no right of action against him; and *Davidson* v. *Gurd*, 15 P. R. 31; *Prosser* v. *Edmonds*, 1 Y. & C. (Ex.) 481; *The Frontenac Loan and Investment Society* v. *Hysop*, 21 O. R. 577; *Aldous* v. *Hicks*, *ib.* 95, are relied on.

The first of these cases was on a motion for summary judgment under Rule 739. The plaintiffs sued defendants for moneys alleged to have been paid by them for interest upon certain mortgages, etc. The writ was specially endorsed and contained a statement that the defendant was liable to pay the mortgages by virtue of a certain covenant made by him with one T. on a certain date, and assigned by T. to the plaintiffs. But it appeared that the deed alleged to contain the covenant

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Robertson, J.

made by defendant did not in fact contain any express covenant to pay the mortgages, but by it T. conveyed the lands in question to defendant "subject to all mortgages registered against the lands," and was not executed by defendant. The plaintiffs, however, sought to support the indorsement by reference to the preliminary contract between the defendant and T. which contained an offer to assume and covenant to pay off the mortgages:—*Held*, that although the deed expressed an *equitable obligation* by the defendant to indemnify T., there was no covenant in any sense; and the plaintiffs could not invoke the benefit of the preliminary contract, for the indorsement must be complete in itself, containing everything which entitles plaintiffs to recover; and the Court will not encourage an amendment for the purpose of upholding a summary right. *Held*, also, that Rule 245, specifying the different kinds of action in which writs may be specially endorsed, does not extend to an action upon an implied covenant. This case, therefore, is not in point. It merely settles a point of practice, in regard to applications for summary judgment, etc.

Then as to *Prosser* v. *Edmonds*. The point there is: "A chose in action, not coupled with any partial interest in possession, which cannot be reduced into possession without a suit, is not assignable in equity." That is not the case before me either; here, there is a chose in action coupled with an interest, etc., and that chose in action has been assigned to the party who has the interest.

The Frontenac Society v. *Hysop*, 21 O. R. 577, was an action by the mortgagees against the purchaser, who bought subject to the mortgage, and covenanted with the grantor to pay a part of a mortgage held by plaintiffs on the premises, and which was expressed to be the consideration for the conveyance. No money having been paid, the mortgagees brought an action against the purchaser. There was no assignment of this covenant from the mortgagor to the plaintiffs. *Held* that there was no privity of contract, or any implied obligation created thereby, which will enable the mortgagee to sue the purchaser.

Judgment.

Robertson, J.

Then *Aldous* v. *Hicks*, 21 O. R. 95, was an action against the mortgagor and his assignee, who was entitled to the equity of redemption. Hicks, in his defence, alleged that he had sold his lands to one Rolston, who thereupon became the party liable to pay the mortgage moneys, and who afterwards sold the lands to the defendant Riches, who then became and had since remained primarily liable for the payment, etc.; that the plaintiff had since the conveyances always dealt with Rolston and defendant Riches as the parties liable to pay, and had from time to time by agreement with them, but without the knowledge of defendant Hicks, extended the time for payment. And he contended that if in any way liable after the conveyances to Rolston and Riches, he was so as surety only; and that by reason of plaintiff's laches and dealings he had been discharged, etc. The Chancellor, who tried the case, held that there was no privity between the mortgagee and Riches, although she had covenanted to pay the mortgage debt as between her and the mortgagor, and no right of action arose to the plaintiff, whereby he could recover the mortgage debt directly from Riches. The defence of Hicks therefore failed on this as well as on other grounds, and there was judgment against Hicks, with an order upon Riches to indemnify Hicks against the judgment.

Now that would be the judgment in this case, if the assignment from Tear to the plaintiffs of 1st April, 1891, alleged in the plaintiff's statement of claim, and which was produced and proved at the trial, does not entitle the plaintiffs to maintain this action direct against Lamb. That assignment contains, 1st, a recital of the mortgage in question; 2nd, of the conveyance from Tear and wife to Lamb, the consideration therein being stated at $5,600; 3rd, that the $3,200 secured by the mortgage, was included in and formed a part of the purchase money, "and the said Lamb became liable to the party of the first part (Tear) for the payment of such mortgage"; 4th, that the mortgage money had become in arrear, and the party of the first part had agreed to assign to the said company (the plain-

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Robertson, J.

tiffs), all rights and remedies he might have against the said Lamb, and the benefit of all covenants, express or implied; that the said Lamb should indemnify the party of the first part from payment of such mortgage, or any interest or costs in respect thereof. Then in consideration of the premises and of the sum of $1, Tear grants, assigns, transfers and sets over unto the plaintiffs, their successors, etc., all claims, rights or remedies, that he has now, or may or could hereafter have against the said Lamb in respect of such mortgage and conveyance, and also the full benefit of all covenants, express or implied, whereby Lamb agreed to indemnify Tear from payment of the said mortgage, etc. So that the plaintiffs shall possess the entire beneficial interest in the said covenants, and have the right to receive and give full and effectual discharges for the money due or to become due, etc.

In my judgment this assignment removes the objection of want of privity between the plaintiffs and Lamb. The plaintiffs are doubtless entitled to the mortgage money, and Tear is personally liable on his covenant in the mortgage to them; and Lamb, by implied covenant or obligation, is in equity bound to protect Tear against his covenant. Now, if that obligation had been reduced to writing and in express terms, there can be no doubt it would be a chose in action assignable to the party holding the mortgage—they thereby having a present interest in possession.

Under the Mercantile Amendment Act R. S. O. ch. 122, sec. 7, and according to the *dictum* of the late Chancellor, Spragge, expressed in *Irving* v. *Boyd*, 15 Gr. at p. 162, there is no doubt this assignment gives the plaintiffs a right of action direct against Lamb on the equitable right thus assigned. That was a bill by the representative of a mortgagee against the mortgagor and his assignee, seeking to compel the assignee to pay the deficiency which remained after a sale of the mortgaged premises in a former suit, and for which a sequestration had issued against the mortgagor. The assignee set up that the mort-

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gagor had executed to him a release of any claim in respect of the mortgage. In this case the assignee was to pay off the mortgage debt; and it was sought by sequestration to make him pay the mortgage deficiency. The plaintiff was, as mortgagee, his creditor, and he sought to have the benefit of the equity which the mortgagor had as surety, against the assignee. He conceded that there was no privity between him and the assignee, and that he could not by action, either at law or in equity, compel the assignee to pay him that which the mortgagor was bound to pay, and which as between mortgagor and assignee, the assignee was bound to pay. The assignee was the party to pay the money and the plaintiff (mortgagee) was the party to receive it. The difficulty was the want of privity between them. The plaintiff's contention was that by means of the process of sequestration he could avail himself of the right which the surety has to compel payment, and the bill was filed for that purpose.

After an able review of the cases the conclusion of the learned Chancellor was, that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached. But, in reviewing the cases, and referring to the difficulties in the case before him in regard to "*the nature of the thing* which was sought to be affected by the sequestration," he said, at p. 161: "The cases that I have met in the books are cases where the chose in action was a debt due by a third person to the sequestration debtor. In the case before me there is no debt—it is an equitable right. It is, therefore, so far as I know, a case of first impression; and is to be decided on principle. In the first place is it personal estate, and if so *primâ facie* a thing to be reached under that name by the sequestration? I think it is personal estate. It is of the quality of personal estate, and would pass, I apprehend, to assignees in bankruptcy, to personal representatives, and by assignment. It could not, perhaps, pass or be assigned by itself; but it would pass with what is ordinarily called personal property; and

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Robertson, J.

where the whole of the personal property of a person passed, by death, by act of law, or by assignment, it would pass, I apprehend, as incident to the rest; and in the case of an assignment by a mortgagor of his equity of redemption, subject to mortgages, the mortgages to be paid off by the purchaser—as is the case here—I have no doubt that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee. It certainly would not fall within the mischief of *Prosser* v. *Edmonds*, and cases of that class. It would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the party to pay; it would create the privity which alone was wanting to make such a suit maintainable."

This case was decided in 1868, long before the Act to make choses in action assignable at law, which was first passed 20th March, 1872. So that, independent of the Act, according to the opinion of the late Chancellor, the assignment in question would have enabled the mortgagee to sue the assignee of the equity of redemption for the mortgage debt. I can see no reason, therefore, why the plaintiffs should not have judgment direct against the defendant Lamb for the amount due on the mortgage; and as by the assignments referred to it was "made on the distinct understanding that the company (the plaintiffs) expressly reserved all rights and claims in respect of said mortgage, and the land therein, and all claims against any other parties in any way liable in respect thereof, and the said company shall have the right to include the party of the first part (Tear), in any proceedings to be taken to realize on such security, for conformity, to avoid circuity of action or otherwise," the plaintiffs are also entitled to judgment as prayed against defendant Tear.

Let therefore the usual order for payment go against both defendants, Tear and Lamb, with full costs of suit, and for immediate possession of the premises; Lamb to indemnify Tear, in case the latter is made to pay.

The counter-claim of Lamb against Tear, as well as

Judgment. Robertson, J.

against the plaintiffs, is dismissed, with costs; all rights of Lamb reserved, however, against Tear, to seek recovery of any claim which he may have on the subject for which he has counter-claimed in this action.

From this judgment the defendant Lamb appealed to the Divisional Court, and the appeal was argued on February 1st, 1893, before BOYD, C., and MEREDITH, J.

Aylesworth, Q. C., and *Elgin Schoff*, for the defendant Lamb, who appealed. The plaintiffs have no covenant or contract with Lamb. They merely rely for their remedy against him upon the fact that he purchased from Tear subject to their mortgage. Lamb sought to prove at the trial that he had contracted himself out of any implied liability to pay the mortgage, but the trial Judge refused to allow him to give the evidence. There should be a new trial, if only to give that evidence: *Corby* v. *Gray*, 15 O. R. 1; *Beatty* v. *Fitzsimmons*, 23 O. R. 245; *Walker* v. *Dickson*, 20 A. R. 96.

Kerr, Q. C., for the plaintiffs. The evidence spoken of was not properly tendered at the trial. The deed to Lamb was expressed as subject to the mortgage, and no evidence could be given in derogation of it: *Copeland* v. *The Corporation of the Village of Blenheim*, 9 O. R. 19. The conveyance being subject to the mortgage raises an implied covenant to pay it off: *Campbell* v. *Robinson*, 27 Gr. 634; *Boyd* v. *Johnston*, 19 O. R. 598; *McMichael* v. *Wilkie*, 19 O. R. 739. The assignment to the plaintiffs of Tear's rights against Lamb was perfectly valid: *Irving* v. *Boyd*, 15 Gr. 157.

G. W. Holmes, for the defendant Tear. Tear's right against Lamb was more than a mere indemnity, it was a right to compel him to pay off the mortgage: *Canavan* v. *Meek*, 2 O. R. 636, *per* HAGARTY, C. J., at p. 645. There was no evidence of any other contract than what the deed shews on its face.

Aylesworth, Q. C., in reply. Every debt arising out of contract is assignable under R. S. O. ch. 122, sec. 7, but here the right—Tear's right against Lamb—was not assignable, as it was a mere equity to be indemnified. A naked right to sue is not assignable. I refer to *Prosser* v. *Edmonds*, 1 Y. & C. (Ex.) 481; *De Hoghton* v. *Money*, L. R. 2 Ch. 164; *Hill* v. *Boyle*, L. R. 4 Eq. 260; *In re Paris Skating Rink Co.*, 5 Ch. D. 959; *Williams* v. *Balfour*, 18 S. C. R. 472; *Davidson* v. *Gurd*, 15 P. R. 31; *Barry* v. *Harding*, 1 J. & L. 475; *Re Cozier, Parker* v. *Glover*, 24 Gr. 537; *Aldous* v. *Hicks*, 21 O. R. 95. Lamb is entitled to a new trial at the expense of the plaintiffs, as the necessity for it was caused by their objecting to the reception of proper evidence. Argument.

May 10, 1893. BOYD, C.:—

Tear, the mortgagor, having sold the land subject to the mortgage to Lamb, there arose (if no other arrangement was made) an equitable liability on the part of Lamb, by which he became liable to pay the mortgage not directly as between him and the mortgagee but by way of indemnification to Tear who had covenanted to pay it.

But Lamb claims that it was otherwise agreed upon by particular contract as between him and Tear, whereby he, Lamb, was not to be personally liable to pay the mortgage, or to indemnify Tear. This line of defence he has pleaded, and it is open to him to make proof of this in order to escape the liability which would otherwise attach by operation of law. But the Judge declined to receive this evidence, and for this reason I think the issues must be remitted for further trial. It is open also for Lamb to prove any error or mistake in the documents relied upon to prove that he assumed payment of the mortgage debt, just as in any other case where the rectification of documents is sought, though a heavy *onus* rests upon any one who seeks to get rid of the effect of his own signature.

It is further argued that there is no privity between

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Boyd, C.

Lamb and the plaintiffs by which they can claim a personal order against him. This privity is claimed because of an assignment from Tear to the plaintiff of all his claim for indemnification against Lamb in respect of the mortgage debt. But to this it is answered that such a claim cannot be assigned. The contrary was said to be the course of equity in the careful judgment of Spragge, V. C., in *Irving* v. *Boyd*, 15 Gr. 157, a case referred to with approval by Mowat, V. C., in *Roberts* v. *The Corporation of the City of Toronto*, 16 Gr. 238. The opinion was not necessary for the decision in *Irving* v. *Boyd*, but it is intrinsically weighty, and in my opinion correctly sets forth the law on this head.

Both points are dealt with, one directly, the other indirectly, by North, J., in a late case *Bridgman* v. *Daw*, 40 W. R. 253, (1892). He gave effect to the contention that independently of contract the purchaser of an equity of redemption would be compelled (unless there is a special agreement to the contrary, which of course may be and ought to be proved) to indemnify the vendor against the mortgage debt; and (adopting the opinion of eminent conveyancers) that the purchaser may be required to enter into a covenant so to indemnify the vendor. If the matter were in the shape of a covenant, unquestionably it would be the subject of equitable if not legal assignment, and being a claim of potentially this liquidated and contractual character it is open to none of the objections urged against the transfer of litigious and tortious possibilities. *Prosser* v. *Edmonds*, 1 Y. & C. (Ex.) 481, is the classical case, and there Lord Lyndhurst, L. C. B., says: "Where an equitable interest is assigned * * in order to give the assignee a *locus standi* in a Court of Equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument" p. 496.

As between Tear and Lamb, the latter (in the absence of proof to the contrary) assumed the debt not only as a charge upon the land but as a personal obligation, which

was in effect an implied contract to recoup Tear in case he was called upon to pay. This right is a substantial legal entity which may well be the subject of assignment: *Canavan* v. *Meek*, 2 O. R. 636.

The result of this appeal being for and against the defendant Lamb as to his several contentions, there should be no costs of this motion, and the other costs will be dealt with by the trial Judge.

The judgment will be vacated for the purpose of a new trial. The question of set-off will depend very much on the result of the further trial, but at present I think it may be a matter of reference.

MEREDITH, J. :—

There is no covenant to pay off, or to indemnify against, the mortgage debt; but the purchase was of the equity of redemption only, and the deed is expressed to be made subject to the mortgage. There, therefore, *primâ facie*, rests upon the purchaser the implied equitable obligation to indemnify the vendor against the mortgage debt. *Primâ facie*, that is the position of the parties; but I cannot doubt that it is open to such a purchaser in the facts and circumstances of this case to negative any such obligation; to rebut the presumption, if such it may be, and as in *Beatty* v. *Fitzsimmons*, 23 O. R. 245, it was, called. The case is not the same as that of a vendor seeking, upon parol testimony, without a rectification of the document, to derogate from his grant.

The defendant having been denied his right of defence in that respect, there must be a new trial, unless the contention made in his behalf that the equitable obligation was not assignable, and cannot be enforced in this action, must be given effect to; for in that case it is needless to go further; he would obviously be entitled to have the claims made against him for payment of the mortgage debt dismissed. It does not, however, seem to me needful to consider whether such an obligation is assignable or

Judgment. Meredith, J.

not, for here both assignor and assignee are seeking to enforce it in the same way, by compelling the purchaser to pay the debt to the mortgagees; though I may add that in my opinion no good reason for the contention that such an obligation is not assignable was advanced, and that, as at present advised, I can perceive none.

Had the obligation been in the form of a bond of indemnity, or covenant to indemnify, might it not have been assigned? Why the less so because an implied obligation?

What was there unlawful in this transaction? The mortgage debt was payable, and payment was sought; it was time for the purchaser to fulfil his obligation; the mortgage was not merely being foreclosed; the mortgagor was being forced to pay; the assignment was to the mortgagees, so that the person ultimately liable might be compelled to pay directly to them instead of indirectly to the mortgagor and by him to them; they being in any case entitled to the money whensoever and by whomsoever paid.

The true ground of the judgment in such cases as *Prosser* v. *Edmonds*, *supra*, was the unlawful character of the transaction; in that case the real object of the parties was to give the purchaser a *locus standi* to set aside a deed for fraud.

The other matter discussed is one which may be referred to the Master in Ordinary if the purchaser fail to relieve himself from the implied obligation. An account would then be taken of the amount (if any) which he is entitled to set off against the amount of his obligation; both assignor and assignee seem to be in this case on a like footing as to any such right of set-off.

G. A. B.

[COMMON PLEAS DIVISION.]

McCLELLAN V. McCAUGHAN.

Power of Attorney—Sale of Land—Authority of Attorney.

Acting under a power of attorney from the defendant empowering him to attend to and transact all defendant's business in connection with her properties both real and personal, and generally to do anything he might think necessary, etc., in the premises as fully and effectually as if she were personally present, the attorney entered into a contract for the sale of defendant's farm to the plaintiff, and a deed was executed by defendant and delivered over to the attorney for the purpose of carrying out the sale. The terms of purchase were that the plaintiff was to pay off certain incumbrances, make a cash payment and execute a mortgage to secure the balance of the purchase money, which he did, making the cash payment and mortgage to the attorney as trustee for defendant, which the attorney was willing to hand over to the latter on her delivering up possession; this she refused to do:—

Held, that the power was a sufficient authority to the attorney to receive the purchase money and bind the defendant in the arrangement made; and that the plaintiff was entitled to possession of the land.

THIS was an action tried before STREET, J., without a jury, at Chatham, in April 1892, to recover possession of certain lands, when the learned judge reserved his decision and subsequently delivered judgment as follows:— Statement.

December 13th, 1892. STREET, J.:—

The action was brought by John McClellan against Eliza McCaughan, James McCaughan, and Charles McCaughan, to recover possession of certain lands in the township of Chatham conveyed by Eliza McCaughan to the plaintiff on 3rd of November, 1891. The defendants, James and Charles McCaughan, are grandsons of Eliza McCaughan, and claimed possession as tenants under her, alleging notice to the plaintiff of their rights as tenants before his purchase, and alleging that the plaintiff at the time he purchased had agreed as part of his purchase to pay for their crop in the ground and to adopt them as tenants.

Judgment.

Street, J.

The defendant Eliza McCaughan, in her defence sets up that she is a widow over eighty years of age, and that if she leased the property to her co-defendants, the plaintiff was aware, or might have become aware, of the fact by enquiry, and that if she executed any conveyance of the land advantage was taken of her ignorance and imbecility, and she signed it without understanding its contents, and upon representations made by the plaintiff or his agent which were untrue; and that she had received none of the purchase money for the said lands, and the sale was improvident.

It appeared from the evidence at the trial that one McNaughton had acted as agent for the defendant Eliza McCaughan in making the sale to the plaintiff in November, 1891. A crop of wheat was in the ground at the time, and he explained to her that the purchaser would have the benefit of it; she thought that she should get something for the wheat, but was quite satisfied with the sale and executed the conveyance. The purchaser paid off some mortgages which absorbed all the purchase money but some $700; he delivered to McNaughton a mortgage to McNaughton "as trustee for Eliza McCaughan" for $450 and gave him the $250 in cash; thereupon McNaughton delivered to him the conveyance, which was duly registered.

There were two houses on the place at the time of the sale in one of which lived Eliza McCaughan and her son Charles, in the other lived her son Jordan with his family, of whom the defendants Charles and James McCaughan were two. They had put a crop in upon a part of the place in the fall of 1891, for Eliza McCaughan upon shares. After the sale and conveyance they refused to give up possession unless paid for their crop, and the defendant Eliza McCaughan refused to permit any deduction from her purchase money to pay for their crop; McNaughton, her agent refused to pay her the purchase money in his hands until the purchaser obtained possession, whereupon

Judgment.
Street, J.

this action was brought claiming possession and damages for the delay in giving possession.

It appears from the evidence of James McCaughan that, owing no doubt to the age of Eliza McCaughan and her inability to work the farm in question herself, it had been for many years worked by other members of her family, they living in one of the houses and she in the other. That in the year 1890, the two defendants, her grandsons, had worked it paying her one-third of the crop, and that the arrangement was renewed by them in the year 1891, and a crop sowed in the fall of that year. There is nothing to contradict the statement of James McCaughan that he and his brother had six horses and a number of farm utensils on the place, and that his father and mother lived there with these two sons who had put in and reaped the crop of 1890-91, and had put in the one in 1891. There seems to have been no interference at all with their possession of the house and of the fields in which the crop had been sown. The widow Eliza McCaughan lived in a separate house and did not interfere. They all, it is true, speak of the place as having been worked for her, but they all seem at the same time to recognize the crop as being the property of the grandsons subject to their liability to give one-third of it to her. Under these circumstances I think I must treat the contract between the parties as one of tenancy for the season with an exclusive possession in the tenants of the land in which the crop was planted.

Under the 35th section of "The Registry Act," R. S. O. ch. 114, the plaintiff is not protected against this tenancy, for it is for a term not exceeding seven years, and the actual possession went with it. At the time of the commencement of this action therefore the plaintiff was not entitled to possession as against the two defendants, James and Charles McCaughan, but their title has expired since the trial and judgment should go for delivery of possession by them.

Judgment.
Street, J.

I cannot find that the defence set up by Eliza McCaughan has been made out, or that she has any defence to this action.

I must find, upon the evidence, that she authorized and approved of the sale of the place with the crop in the ground. Then when her grandsons asserted their rights with regard to it she refused to allow any part of the funds coming to her to be applied in settling with them.

The whole difficulty which has led to this most unfortunate litigation has been her refusal to pay for the crop, and her grandsons' refusal to leave until paid for it. The fact that the mortgage was made to Mr. McNaughton as trustee for her, instead of direct to herself, was not complained of apparently from first to last. Had she repudiated his authority to receive payment for her, and relied on that as her defence, other considerations would have arisen.

I think judgment must be entered for the plaintiff for possession of the land as against all the defendants, and for $100 damages as against Eliza McCaughan only, that sum representing about the interest on the purchase money which he has paid. He should pay the costs of the two tenants, James and Charles McCaughan, but must recover these costs as well as his own costs against Eliza McCaughan.

The defendant moved on notice to set aside the judgment entered for the plaintiff, and to enter the judgment for the defendant, dismissing the plaintiff's action with costs; or that it should be pronounced for the plaintiff only upon his paying to the defendant and securing to her the purchase money due and payable for the said lands, with interest thereon, on the grounds, among others, that the plaintiff had not paid or secured the purchase money to the defendant, and that the alleged payment to one McNaughton, and the making of a mortgage to him, did not constitute a payment and securing of the purchase money to the defendant, as McNaughton had no authority to receive the same.

Argument.

In Hilary Sittings, February 22nd, 1893, before a Divisional Court composed of GALT, C. J. and MACMAHON, J., *E. D. Armour*, Q. C., supported the motion. The plaintiff never paid or secured the purchase money to the defendant. To make the payment a valid one it must be made either to the defendant personally or to an agent specifically authorized for such purpose. The power of attorney did not give such power and the mere possession of the deed does not confer authority to receive the purchase money: *Viney* v. *Chaplin*, 2 DeG. & J. 468, 481-2; *Ex. p. Swinbanks*, 11 Ch. D. 525. Under the English Conveyancing Act, where a solicitor produces the deed with a receipt endorsed thereon this entitles him to receive the purchase money, and although the Act has in many respects been copied here, this particular clause has been left out, and the law here is therefore the same as it was in England, before the passing of that Act. The plaintiff must make a mortgage and tender same to the defendant. The defendant under the circumstances is entitled to specific performance of the contract and to interest: Webster's Conditions of Sale, p. 279; Dart. on V. & P., 6th ed., p. 711; *Leggott* v. *Metropolitan R. Co.*, L. R. 5 Ch. 716.

H. J. Scott, Q. C., contra. The whole question is one of fact. The evidence clearly shows that McNaughton was the defendant's agent. The power of attorney is of the widest character; it empowers McNaughton to attend to and transact all Mrs. McCaughan's business in connection with her property, both real and personal, and generally to do anything he may think necessary and requisite in the premises as fully and freely as she could do herself if personally present. Then McNaughton, as defendant's agent, sells the property to the plaintiff. The deed is taken by McNaughton. And the defendant knew that McNaughton was to receive the purchase money. The defendant also ratified the agent's acts by directing a portion of the purchase money to be paid out by him. Under these circumstances the Court would never allow the defence set up by the defendant to prevail.

Judgment. March 4th, 1893. GALT, C. J.:—

Galt, C.J.

The facts bearing on this motion may be briefly stated as follows: The defendant, who is an old woman, did, on the 16th September, 1891, execute a power of attorney to the said McNaughton appointing him "to be my true and lawful attorney, to attend to and transact all my business in connection of all my property, both real and personal, and generally to do any thing he may think necessary and requisite in the premises as fully and freely as I could do myself if personally present. And I, the grantor, hereby ratify and agree to ratify all that the said attorney shall lawfully do or cause to be done in the said premises by virtue hereof."

After this power of attorney had been given, the plaintiff made application to the agent respecting the purchase of the land now in question, the result being that the plaintiff purchased the land from the defendant on 3rd November, 1891, and obtained a deed from her, the consideration being $2,000.

At the time of purchase, there were two mortgages amounting to $1,200, which, with over-due interest, would represent $1,300; these were paid off by the plaintiff, who also paid to McNaughton the sum of $250, and executed a mortgage to McNaughton "as trustee" for the plaintiff in the sum of $450, making in all the sum of $2,000.

When this action was brought, the $250 had not been paid by McNaughton to the defendant nor had he made any assignment of the mortgage to her; and it is on these grounds the motion herein is made.

It was not disputed that the plaintiff had paid (so far as he was concerned), the purchase money; but the contention on the part of the defendant is, that the person to whom it was paid had not paid it over to her.

The case principally relied on by Mr. Armour, is *Viney* v. *Chaplin*, 2 DeG. & J. 468. That, however, was very different from the present. The law bearing on the point now before us, is as stated by the Lord Chancellor at p.

Judgment.
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477: "It is quite clear, that if the purchaser pay his money to a person not authorized to receive it, he is liable to pay it over again."

There is nothing whatever in the case to shew that if the purchaser pay his money to a person not authorized to receive it, the conveyance is void; all that is laid down as law is, that under these circumstances the purchaser may be required to pay it again.

The case of *Ex p. Swinbanks*, 11 Ch. D. 525, was also referred to, which, at p. 535, recognizes the decision in *Viney* v. *Chaplin*, 2 DeG. & J. 468, viz., "that the mere fact that a solicitor has in his possession a deed executed by his client does not give him authority to receive" the purchase money.

In the case now in question, McNaughton was not a solicitor, he was an agent acting under a power of attorney, which expressly authorized him "to attend to and transact all my business in connection of all my property both real and personal, and generally to do any thing he may think necessary and requisite in the premises as fully and fairly as I could do myself if personally present." Under this express authority McNaughton was authorized to receive the money, but even if he was not, the result would be *not* that the deed was void, but that McClellan might be liable to pay it again.

The motion must be dismissed with costs.

MacMahon, J.:—

Mr. Armour argued that *Viney* v. *Chaplin*, 2 DeG. & J. 468 (which was followed in *Ex p. Swinbanks*, 11 Ch. D. 525), is an authority in the defendant's favour, and should govern our decision in this case.

The distinction between *Viney* v. *Chaplin*, and this case is, that in *Viney* v. *Chaplin*, the vendor had given no written authority to his solicitor to receive the purchase money on the sale of an estate, the deed of which had been executed by the vendor.

Judgment.

MacMahon, J.

In the present case the defendant, Eliza McCaughan, had prior to executing the conveyance of the land in the plaintiff's favour, given to Duncan McNaughton a power of attorney in very wide terms, authorizing him to "attend to and transact all my business in connection with all my property, both real and personal, and generally to do every thing he may think necessary and requisite in the premises as fully and fairly as I could do myself if personally present. And I, the grantor, hereby ratify and agree to ratify all that my said attorney shall lawfully do or cause to be done in the said premises by virtue hereof."

"This power of attorney to remain irrevocable in force for one year from this date."

The agreement for the sale of the land was entered into by McNaughton, acting as agent under the power of attorney, with the plaintiff; and Mrs. McCaughan confirmed the agreement so entered into by executing the conveyance to McClellan.

In *Viney* v. *Chaplin*, Turner, L. J., at p. 481, in reply to the argument that the vendor's solicitor being in possession of the title deeds and of the conveyance to the purchaser, was therefore entitled to receive the purchase-money, said: "I take it to be settled, that a solicitor is not by virtue of his office, entitled to receive purchase moneys, even though he may have possession of the deed of conveyance, and it would be strange if he was, for it is no part of the ordinary duty of a solicitor to receive money belonging to his client, and the deed of conveyance comes into his hands for a wholly different purpose. * * No written authority is produced, or, as it would appear has ever been given by the vendor; it is said that no such authority was asked for, but I think it was incumbent on the vendor asserting the authority of his solicitor to produce that authority."

Here there was the authority to do all the grantor might have done in connection with her property, "both real and personal." He had the deed from her to McClellan, and under the authority of the power of attorney, was enti-

tled to receive the whole purchase money as her agent and trustee. He did see to paying off the two mortgages then forming incumbrances on the land, and he was prepared to pay over the balance of the purchase money in his hands and assign the mortgage taken in his name as trustee for Mrs. McCaughan, if she would deliver possession of the land to the plaintiff who then held the title. This she refused to do unless McClellan paid her sons and grandsons for the crop, for which they claimed $100; and this after Mrs. McCaughan well knew that whatever crop was on the place was to pass to McLellan when he got the deed; and that she was expected to settle with her grandsons for any interest they might have in the crop.

Judgment.

MacMahon, J.

As to the authority conferred under this very general power of attorney, I refer to the judgment of Lord Chancellor Campbell, in *Perry* v. *Holl*, 2 DeG. F. & J. 38, at p. 49.

It is much to be regretted that this very expensive litigation should have been caused over so trivial a matter, the sum involved being only $100; but I must say the plaintiff is free from all blame—the disastrous consequences to the defendant, Mrs. McCaughan, resulting wholly from her own acts.

I agree that the motion must be dismissed with costs.

[COMMON PLEAS DIVISION.]

REGINA EX REL. PERCY v. WORTH.

Municipal Corporations—Election of Deputy Reeve—Disclaimer—Lowest Candidate taking Seat—Motion to set aside the Election—Omission of Interest of Relator—Amendment—Con. Rule 444.

At an election under the Municipal Act, 55 Vic., ch. 42 (O.), for a Deputy Reeve of a town, there were three candidates, and after the election and before the first meeting of the council, the two who had received the highest number of votes successively disclaimed, whereupon the remaining candidate, who had received the lowest number of votes, made the declaration of office and took his seat. On a motion in the nature of a *quo warranto* made by the candidate who had received the highest number of votes to have it declared that there was no election and that the seat was vacant:—

Held, that what took place constituted an election of the respondent and entitled him to the seat.

The notice of motion did not shew any interest in the relator, as required by sec. 187 of the Act; but it having been shewn by affidavit filed in support of it that the relator was a candidate, an amendment of the motion would, if necessary, have been allowed under Con. Rule 444.

Statement. THIS was a motion in the nature of a *quo warranto* to have it declared that the defendant was not entitled to take his seat as Deputy-Reeve of the town of Bowmanville.

The motion was heard before the Master in Chambers, who on the 14th February, 1893, delivered the following judgment, in which the facts are stated:—

An application for an order declaring that Richard Worth has not been properly elected and has unjustly usurped and still usurps the office of deputy-reeve for Bowmanville, and asking that the office be declared vacant in order that a new election may be had.

The circumstances leading up to the application are as follows:—

Three candidates, namely, the relator, Dr. Boyle, and the respondent, were nominated for the office of deputy-reeve on the 26th December, 1892. A poll being demanded, one was held on the 2nd January, 1893, with the following result: The relator received 268 votes, Dr. Boyle received 201 votes, the respondent received 173 votes. Previous to

the meeting of the council for organization the relator, who had been declared elected, sent in a disclaimer to the seat, and Dr. Boyle also sent in one. Statement.

At the meeting of the council for organization Mr. Worth, the respondent, claimed the seat, and subsequently made the official declaration and took his seat and acted as a member of the council.

On behalf of the respondent it was objected that the notice of motion served herein did not shew an interest in the relator, as required by section 187 of the Consolidated Municipal Act, 55 Vic. ch. 42 (O.), and that the affidavit in support of the application could not be looked at to cure the defect: *Regina ex rel. Chauncey* v. *Billings*, 12 P. R. 404; *Regina ex rel. Bugg* v. *Bell*, 4 P. R. 226, Rule 1040.

In these cases and in those which they followed the affidavit in support of the application did not shew the facts omitted from the notice of motion, and it was for that reason the objection was considered fatal; but in this case the relator abundantly shews in his affidavit that he was a candidate at the election, and thus supplies the omission in his notice of motion. An amendment of the notice of motion may be made: *Regina ex rel. O'Reilly* v. *Charlton*, 6 P. R. 254; although I do not consider one necessary: *Regina ex rel. Ross* v. *Rastal*, 2 U. C. L. J. N. S. 160. I therefore consider that this objection must be overruled.

For the relator sections 203 and 204 of the Act were relied on as shewing that a disclaimer can only be taken advantage of by the person elected by the votes of the people, and not by a person becoming a member by reason of the candidate elected resigning or disclaiming, and that therefore as the respondent was not the candidate having the next highest number of votes he was not entitled to the office.

For the respondent *Smith* v. *Petersville*, 28 Gr. 599, was relied on as holding that the candidate entitled to the seat upon a disclaimer being given by the one elected, was not necessarily the candidate next to the one elected in num-

Statement.

ber of votes, but could be the candidate next to the last candidate.

In my opinion I do not think *Smith* v. *Petersville* bears out the construction sought to be placed upon it. A consideration of the two sections cited will, I think, shew this. They are as follows :—

"203. Where there has been a contested election, the person elected may at any time after the election, and before his election is complained of, deliver to the clerk of the municipality a disclaimer signed by him as follows," etc.

"204. Such disclaimer shall relieve the party making it from all liability to costs, and where a disclaimer has been made in accordance with the preceding sections, it shall operate as a resignation, and the candidate having the next highest number of votes shall then become the councillor or other officer, as the case may be."

It appears to me from the reading of these sections that they only apply to the person elected by the popular vote and to the candidate receiving the next highest number of votes to the person so elected, and not to a candidate receiving a less number of votes than these two; and that a disclaimer can only be given by a person elected by the votes of the electors, so that in the present case the only person who was in a position to take advantage of the special provisions of the statute as to disclaimer was the relator as being the person elected. The privilege of disclaiming is apparently only given to the person elected; and as the candidate receiving the next highest number of votes is not the person elected, although under the statute he may become entitled to the seat, he cannot, in my opinion, disclaim.

Under the circumstances, I hold that the relator was the only person who could disclaim, and that Dr. Boyle was the only candidate who could take the seat upon the relator disclaiming, and that the respondent is not entitled to the seat, and it must be declared vacant.

The relator will be entitled to his costs.

From this judgment the respondent appealed, and the appeal was heard on February 17th, 1893, before STREET, J. Judgment. Street, J.

Aylesworth, Q. C., for the appeal.

Osler, Q. C., contra.

March 3rd, 1893. STREET, J.:—

This was an appeal from a judgment of the Master in Chambers upon a motion in the nature of a *quo warranto* holding that the respondent was not entitled to take his seat as deputy-reeve of the town of Bowmanville.

An election to fill the offices of mayor, reeve, and deputy-reeve was held on 2nd of January, 1893. The relator Percy, Dr. Boyle, and the respondent, Worth, were candidates for the office of deputy-reeve, and Percy received 268 votes, Boyle 201, and Worth 173. Before the first meeting of the council Percy and Boyle successively filed disclaimers under section 203 of the Municipal Act, 55 Vic. ch. 42 (O.), and the seat was therefore claimed by the respondent, who declared his intention of assuming and claiming it under the 204th section of the Act.

The relator thereupon on 25th January, 1893, after giving due warning to the respondent of his intention to do so, filed his own affidavits, setting forth the facts above stated, and obtained leave from the Master in Chambers to serve notice of motion for an order declaring that the respondent was not duly elected. The affidavits disclosed the fact that the relator had been a candidate at the election, but the notice of motion only described him as "a person properly qualified to vote, and a voter at the election for the office of deputy-reeve," etc.

The facts were not disputed, and the learned Master held that the notice of motion and the affidavit filed with it sufficiently shewed that the relator was a candidate at the election complained of, and that the affidavit might be read together with the notice of motion and in aid of it for this purpose. He further held that the 204th section of the Act did not operate to seat the third candidate upon

Judgment. Street, J.

the successive disclaimers of the two who had received the highest number of votes, and that no person could disclaim under the Act but the person elected by the popular vote.

Against this judgment the respondent appealed.

I concur in the opinion of the learned Master in Chambers, that under the circumstances of the present case the notice of motion should, if necessary, be amended under the authority of Con. Rule 444.

I guard myself from being understood as holding that a relator is to be allowed to treat Con. Rule 1040 as being a dead letter; but in the present case as the fact of the relator having been a candidate is set forth in the affidavit required to be filed before the notice of motion is served, and as that fact must have been well known to the respondent from his having also been a candidate, I think that the amendment should be allowed.

The other question is of much more difficulty and importance.

The sections of the Act requiring special consideration are the first sub-section of the 187th, the 200th, the 203rd, and the 204th.

The 201st section seems to have been allowed to remain in the Act by mistake.

The four sections to which I have referred are as follows:

Section 187.—(1) In case the right of a municipality to a reeve or deputy-reeve or reeves, or in case the validity of the election or appointment of mayor, warden or reeve, or deputy-reeve, alderman, or councillor is contested, the same may be tried by a Judge of the High Court, or the senior or officiating Judge of the County Court of the county in which the election or appointment took place; and when the right of a municipality to a reeve or deputy-reeve, or reeves, is the matter contested, any municipal elector in the county may be the relator, and when the contest is respecting the validity of any such election as aforesaid, any candidate at the election, or any elector who gave or tendered his vote thereat, or if respecting the vali-

Judgment. Street, J.

dity of any such appointment, any member of the council or any elector of the ward, or if there is no ward, of the municipality for which the appointment was made, may be the relator for the purpose.

Section 200. Any person whose election is complained of may, unless such election is complained of on the ground of corrupt practices on the part of such person, within one one week after service on him of the notice of motion, transmit, post-paid, through the post office, directed to "The Clerk in Chambers, at Osgoode Hall, Toronto," or to "The Judge of the County Court of the county of " (as the case may be), or may cause to be delivered to such clerk or Judge a disclaimer signed by him, to the effect following: (setting same out).

Section 203. Where there has been a contested election, the person elected may at any time after the election, and before his election is complained of, deliver to the clerk of the municipality a disclaimer signed by him as follows: (setting same out).

Section 204. Such disclaimer shall relieve the party making it from all liability to costs, and where a disclaimer has been made in accordance with the preceding sections, it shall operate as a resignation, and the candidate having the next highest number of votes shall then become the councillor, or other officer, as the case may be.

It is to be observed that the 187th section evidently contemplates only two modes by which a seat at the council of a municipality may be filled, viz., by appointment and by election, and presupposes that every means of filling a seat which is not described as "appointment" must be described as "election."

Members of a council appear to be "appointed" and not "elected" when the electors neglect or decline to elect the requisite number of members upon the day named; in that case a sufficient number of qualified persons are appointed by those who have been elected or in certain cases by the council of the previous year. See section 186.

Judgment.

Street, J.

It is in accordance with this view that if half a dozen persons are duly nominated on the nomination day, and upon the following day all but one resign, that one is declared "duly elected" under section 117 of the Act, although not a hand may have been raised in his favour but that of his proposer.

So far as the intention of the Act can be gathered from its provisions and its language, it appears to be that every case in which the right to a seat obtained or claimed under the provisions of the Act is disputed, the dispute shall be tried under section 187 and the following sections, and that the relator shall not in any case be remitted to the cumbersome and expensive remedy of a common law information.

I think the question here turns upon the meaning to be placed upon the words "person elected" in the 203rd section and "election" in the 200th section. In my opinion every person becoming entitled to the office of reeve, deputy-reeve, etc., under the provisions of the Act, otherwise than under the 186th section, is to be regarded as "elected" to the office; he is chosen in the manner provided by the Act to fill it; and is therefore, in the strict propriety of language, described as elected to it, and the process by which he becomes entitled to it may then with equal propriety be spoken of as an election.

I might hesitate to apply this meaning to these words as used in the Municipal Act because of their more usual and popular signification which restricts an "election" to a choosing by the popular vote, were it not for the consequences of giving to them the more popular and restricted meaning. There would in that case be no summary manner provided for trying the right to a seat of the candidate becoming entitled to it by the disclaimer of the candidate who received the highest number of votes, and there would be no means by which the person so becoming entitled to the seat and finding his right questioned could disclaim. As soon as it is conceded that the person becoming entitled to a seat by the resignation of the candidate who received

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Street, J.

the highest number of votes may be attacked under section 187, and may disclaim under section 200, then it follows, from the words of section 204, that upon his disclaimer the candidate next to him becomes entitled to the seat, because section 204 applies not only to disclaimer under section 203, but also to those under section 200.

The relator therefore in the present case appears to be in this dilemma: if the respondent holds or claims the seat by virtue of an election, and is a person elected to it, then the construction of sections 203 and 204 necessarily entitles him to the seat; if he does not hold his seat by election, then the Act does not authorize an attack upon him by notice of motion at all, and the present motion should fail.

In holding that the person receiving the third highest vote at an election is not prevented from taking the seat, under section 204, which the other two have disclaimed, I am not violating any principle which is not open to violation under section 117, as I have already pointed out.

For these reasons, and with the greatest respect for the opinion of the learned Master in Chambers, I am compelled to differ from him and to dismiss the motion with costs.

[COMMON PLEAS DIVISION.]

LAIDLAW v. O'CONNOR.

Chose in Action—Solicitors—Negligence—Evidence of—Assignment of.

A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another person, and by the latter to the plaintiff:—

Per ARMOUR, C. J., at the trial. The claim did not by virtue of R. S. O. ch. 122, sec. 7 (O.), pass to the plaintiff so as to enable him to maintain in an action therefor in his own name, but in any event no negligence was proved.

On appeal to the Divisional Court the judgment was affirmed on the ground of the absence of any proof of negligence, but

Per MACMAHON, J., if negligence had been proved, the plaintiff could properly have maintained the action in his own name.

Statement. THIS was an action against the defendants, a firm of solicitors, to recover damages for alleged negligence in instructing the sheriff to distribute a sum of $441 in his hands amongst persons not entitled thereto, which moneys, as alleged by the plaintiff, were part of the sum of $641, found in certain interpleader proceedings in which E. G. Eveleigh was the plaintiff and the said Hackett the defendant, to be the moneys of the said Eveleigh.

The claim was assigned by Eveleigh to Josepha E. Bible, and by her assigned to the plaintiff Laidlaw.

The defendants contended that the only amount in question in the interpleader was a sum of $200 claimed by the then plaintiff for rent and the expenses in connection therewith, and which had been duly paid over to Eveleigh.

The action was tried without a jury at Walkerton at the Spring Assizes of 1892, before ARMOUR, C. J., who delivered the following judgment:—

November 11, 1892. ARMOUR, C. J.:—

The claim of Eveleigh against the defendants, as set forth in the statement of claim, was for negligence in instructing the sheriff to distribute the sum of $441 of money in his hands among persons not entitled thereto; and in

answer to a question put by me to the plaintiff's counsel upon the argument he said that the negligence was for directing the distribution of this money by the sheriff. Judgment. Armour, C.J.

This claim was, as was alleged, assigned by the said Eveleigh to one Josepha E. Bible, and by her assigned to the plaintiff.

It may be doubtful whether, under the terms of these assignments, which were in evidence, and of each of them, this claim passed to the plaintiff in form; but it is claimed that at all events it did not so pass as to enable the present plaintiff to maintain a suit for it in his own name; and I am of this opinion.

The statute R. S. O. ch. 122, sec. 7, provides that "every debt and *chose in action* arising out of contract shall be assignable by any form of writing"; and the question is whether the claim sued for in this action was a chose in action arising out of contract.

There is no doubt that Eveleigh might have declared under the law as it formerly stood either in contract or tort against the defendants, and no doubt a contractual relation existed between the defendants and Eveleigh; but neither of these considerations appear to me to determine that this claim was one arising out of contract within the meaning of the statute.

The legislature did not make all choses in action assignable, but only those arising out of contract; and by these words I am of the opinion that they intended such choses in action as arise directly out of a contract, and not those arising indirectly or remotely out of contract.

It is difficult to believe that they intended that actions against solicitors, physicians and surgeons, and against carriers of goods and passengers, for negligence, should be assignable merely because a contractual relationship existed between them and the persons injured by their negligence or because the person so injured might declare against them either in contract or tort.

I think that although this claim arose while the contractual relationship existed between Eveleigh and the defen-

Judgment.
Armour, C.J.

dants, it could not be said to arise out of such contractual relationship, and was not a chose in action arising out of contract, but was a chose in action arising out of tort, the tort being the negligence of the defendants in ordering the distribution of the money.

In note *a* to *Hill* v. *Finney*, 4 F. & F. 616, at p. 635, it is said: "But in an action against an attorney, not for direct breach of a positive contract to do a specific act, but for breach of a general duty arising out of the retainer to bring sufficient care and skill to the performance of the contract, the action is not in contract, but in tort, and its essence is negligence."

I have been able to find no case, nor was any cited to me, which was any guide to the construction of this provision of the statute; but the following cases may be referred to: *Pontifex* v. *Midland R. W. Co.*, 3 Q. B. D. 23; *Fleming* v. *Manchester, Sheffield and Lincolnshire R. W. Co.*, 4 Q. B. D. 81, 84; and Stroud's Judicial Dictionary, p. 304, may also be referred to, under title "Founded on Contract."

Apart from the statute, this claim was not such an one as could be assigned so as to enable the assignee to maintain an action for it in his own name.

Aside from these difficulties in the plaintiff's way, I do not think that Eveleigh could have succeeded in this action against the defendants, for I find that the defendants were not guilty of negligence in ordering the distribution of the money, and, even if guilty technically of negligence, that no damage resulted to Eveleigh therefrom.

[The learned Judge then discussed the facts in connection therewith, and dismissed the action with costs.]

The plaintiff moved on notice to set aside the judgment and to have the judgment entered for the plaintiff for $441.

G. Lynch-Staunton and *Livingstone* supported the motion.

Aylesworth, Q. C., contra.

March 4, 1893. MACMAHON, J.:— Judgment. MacMahon, J.

[The learned Judge after setting out the material parts of the pleadings and the facts on which the alleged negligence arose, proceeded]:

In any aspect in which the case has presented itself to my mind I cannot see that the litigation the parties intended to embark in, or in fact did embark in, under the interpleader order, involved anything more than the question as to the validity of Eveleigh's claim to the sum of $200 for rent and expenses mentioned in the order.

In this view there was no negligence on the part of the defendants when they saw that Eveleigh received the $200 claimed by him, and then directing the sheriff to distribute the balance of the fund.

The other question raised as to whether, even supposing Eveleigh had a claim against these defendants, it is assignable so as to give the plaintiff a right to sue in his own name is one of importance, besides involving a nice point under the statute.

By the Mercantile Amendment Act, R. S. O. ch. 122, sec. 7, "Every debt and chose in action arising out of contract, shall be assignable by any form of writing, but subject to such conditions or restrictions, with respect to the right of transfer, as are contained in the original contract; and the assignee thereof shall sue thereon in his own name in the action, and for such relief as the original holder or assignees of such chose in action would be entitled to sue for in any court in this province."

The definition of what is a "chose in action," is given at length by Fry, L. J., in *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, at pp. 285-7, and was approved and adopted by the House of Lords in the same case, 11 App. Cas. 426.

The Act, however, permitting assignments of choses in action, which the assignee may sue in his own name, confines it to those arising out of contract.

The extract from the note in *Hill* v. *Finney*, 4 F. & F. 616, at p. 635, shews the cause of action against the

Judgment. MacMahon, J.

defendants in that case is one for the tortious act or negligence of the defendant in advising the plaintiff to consent to a decree of separation and not to defend the suit.

In *Pontifex* v. *Midland R.W. Co.*, 3 Q. B. D. 23, where the vendor of goods delivered them to the railway company as carriers, such goods being consigned to the purchasers, but before the goods were delivered to the consignees, it was discovered by the vendor that they were insolvent, and, as unpaid vendor, gave notice to the railway company not to deliver them to the consignees, and required the goods to be re-delivered to the consignees as unpaid vendors: the defendants refused to do so, and delivered them to the consignees, who absconded without paying for the goods: It was held that the action was "founded on tort" and not "on contract."

The Court of Appeal in *Fleming* v. *Manchester, Sheffield and Lincolnshire R. W. Co.*, 4 Q. B. D. 81, at p. 84, explained with great clearness the distinction between the case the Court was then deciding, and the case in 3 Q. B. D. They said: "He (Pontifex) had put an end to the original contract to carry and deliver, and the delivery by the defendants to the consignees was a wrongful conversion, and therefore a tort: the goods came into the hands of the defendants under a contract; but after that contract had been determined, the defendants dealt wrongfully with them. * * Here, the real ground of complaint was the breach of the contract to deliver."

The cause of action in the case of *Pontifex* v. *Midland R. W. Co.* would have undoubtedly passed to his assignee under the bankruptcy laws, as being an injury to the bankrupt's estates. See the very suggestive judgment in *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; *Beckham* v. *Drake*, 2 H. L. 579, and the numerous authorities there referred to; and Robson on Bankruptcy, 6th ed., pp. 407-8.

So in the case in hand, the injury of which Eveleigh complained, was a pecuniary loss to him and his estate, caused by the act of the defendants, and the cause of action would have passed under an adjudication in

bankruptcy to the trustee of his estate. But the question is, whether under the restricted language used in our statute, it would have passed by an assignment under the Act so as to enable the assignee to sue in his own name. Judgment. MacMahon, J.

I conclude that *Hill* v. *Finney*, 4 F. & F. 616, does not, on the point now being considered, govern the case. In *Hill* v. *Finney*, the plaintiff's right of action, in the event of his bankruptcy, would not have passed to his assignee, as the ground of action against the defendant was negligence in advising the plaintiff to consent to a decree for separation, and not to defend the suit, and not to attend the hearing with any evidence in support of an action brought by the plaintiff's wife in the Divorce Court, and that he consented to such decree provided no evidence upon the charges contained in the petition should be taken, but that evidence was taken, whereby, it being unanswered, "his character had been greatly injured." The cause of action there, being one for injury to the reputation, would not have passed to the plaintiff's assignee or trustee in bankruptcy any more than would a cause of action for slander or any other cause of action *moritur cum personâ*.

In view of the opinion expressed by the learned Chief Justice of the Queen's Bench Division that the cause of action in the present case is not assignable, it is not without some misgiving that I have reached a contrary conclusion.

It appears to me if a solicitor undertakes, for instance, to enter judgment and issue execution in an action for a client by whom he has been retained, and through negligence or in fraud of the client, the undertaking is not carried out, by reason whereof other execution creditors obtain priority, or the debtor mortgages his property, and the clients claim, or a portion of it, is in consequence lost, the solicitor would be liable in an action of tort for negligence; but still the action would arise out of the contract which the solicitor had entered into with his client, and would, I consider, be assignable under our Act so as to enable the assignee to sue in his own name.

Judgment.

MacMahon, J.

The right of the plaintiff to seek any further redress by a taxation of the defendant's bills of costs we do not interfere with.

The motion must be dismissed with costs.

ROSE, J.:—

I quite agree to the conclusion arrived at by my learned brother on the facts, and for the reasons given him.

I do not, however, say anything upon the question whether the claim is one assignable under the statute so as to give the assignee a right of action in his own name. I have not considered the question sufficiently to enable me to express an opinion.

[END OF VOL. XXIII.]

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ACTION.

1. *New Trial — Surprise — Corroborative Evidence.*]—*See* NEGLIGENCE, 2.

2. *Jury—Dispersal Before Verdict — Waiver of Irregularities — Verdict on Single Issue.*]—*See* VERDICT, 1.

3. *Redemption Action for Land in Foreign Country.*]—*See* JURISDICTION, 1.

4. *Ejectment—Action for Possession by One Tenant in Common—Judgment.*]—*See* TENANTS IN COMMON, 1.

5. *Alienation of Husband's Affections.*]—*See* HUSBAND AND WIFE, 262.

6. *Locus Standi—Covenant with Mother to Educate Child—Action by Child for Breach.*]—*See* CONTRACT, 1.

ASSESSMENT AND TAXES.

1. *Court of Revision—Right of Counsel to appear before—Mandamus.*]—Courts of Revision created under the Consolidated Assessment Act, 1892, are not obliged to hear counsel in support of an appeal against an assessment of property under that Act.

A mandamus for such purpose was refused. *Re Rosbach and Carlyle*, 37.

2. *Person Complaining of his own Assessment — Court of Revision—Notice of Sitting—R. S. O. ch. 193, sec. 54, sub-secs. 4, 7, 9.*]—A person appealing against his own assessment to a Court of Revision is not entitled to a personal notice of the time and place of the sitting of the Court under sub-section 9 of section 64 of the Consolidated Assessment Act.

He is sufficiently notified by the publication of the advertisement re-

quired by sub-section 7, and by the posting of the list under sub-section 4.

Where there is jurisdiction to assess, any appeal from a Court of Revision must be to the County Judge or stipendiary magistrate, as the case may be. *Vivian & Co.* v. *The Corporation of the Township of McKim*, 561.

ASSIGNMENTS AND PREFERENCES.

1. *R. S. O. ch. 124—Assignment for the Benefit of Creditors—Benevolent Society—Interest of Debtor in Fund—R. S. O. ch. 172, sec. 11.*]—An assignment by a debtor of all his estate for the benefit of his creditors under R. S. O. ch. 124, is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not; but the form in which it is made and the effect of such form not being optional with him, in this sense it is not voluntary; and having regard to the provision of section 11 of the Benevolent Societies Act, R. S. O. ch. 172, such an assignment does not pass to the assignee the benefit to which the debtor is entitled in the fund of a society properly incorporated under that Act. *Re Unitt & Prott*, 78.

2. *Sale of Debts—Action by Purchaser—Set-off of Barred Claim—R. S. O. ch. 124, sec. 20, sub-sec. 5—Sec. 23.*]—R. S. O. ch. 124, sec. 20, sub-sec. 5, which provides that where a claim against the estate is contested by the assignee the same shall be for ever barred of any right to rank thereon if an action is not brought against the assignee to establish the claim within a limited time, only applies to the right to rank on the estate, and does not affect the right to set-off the claim so barred in an action against the claimant by the assignee of the estate, or any one claiming through him. *Johnston* v. *Burns*, 179, 582.

3. *Assignment for Benefit of Creditors under R. S. O. ch. 124—Purchase of Insolvent Estate from Assignee—Arrangement between Purchaser and certain Creditors—Payment of Claims in Full—Liability to Account—Parties.*]—An insolvent trader having made an assignment of all his estate for the benefit of his creditors, under R. S. O. ch. 124, his stock-in-trade was purchased by his wife from the assignee; the defendants, who were creditors of his, and one of them the sole inspector of the estate, becoming responsible to the assignee for payment of the purchase money, and, by a secret arrangement made beforehand, receiving security from the wife upon the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband.

In an action by another creditor for an account:—

Held, that the estate was entitled to the benefit of whatever advantage the defendants derived from the transaction, and that they should account to the assignee for the difference between the amount of their claims and the amount they would have received by way of dividend from the estate:—

Held, also, that the assignee was a necessary party to the action. *Segsworth et al.* v. *Anderson et al.*, 573.

BAILMENT.

1. *Storage of Wheat—"At Owner's Risk"—Loss by Fire.*]—A quantity of wheat was delivered by the plain-

tiff to the defendant, a miller, under a receipt stating that the same was received in store "at owner's risk" and that the plaintiff was entitled to receive the current market price therefor when he called for his money. The wheat to the plaintiff's knowledge was mixed with wheat of the same grade and ground into flour. The mill with all its contents was subsequently destroyed by fire, but there had always been in store a sufficient quantity of wheat to answer plaintiff's receipt:—

Held, that the receipt and the facts in connection therewith constituted a bailment of the wheat and not a sale.

South Australian Ins. Co. v. *Randall*, L. R. 3 P. C. 101, distinguished. *Clark* v. *McClellan*, 465.

Warehouseman — Railways as — Carriers.]—*See* RAILWAYS, 2.

BANKRUPTCY AND INSOLVENCY.

Assignment for Benefit of Creditors—Purchase of Insolvent Estate from Assignee — Liability to Account.]—*See* ASSIGNMENTS AND PREFERENCES, 2.

BUILDING CONTRACT.

1. *Action by Contractor for Price —Action brought before Drawback Due—Counter Claim for Liquidated Damages for Delay—Reply of Matters arising since Action—Construction of Contract—Extension of Time —Necessity of Application for—Enforcement of Provision for Liquidated Damages.*]—Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, etc., should form part of the contract if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike.

The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract.

Although some extras were done, and there was evidence as to delay by strikes, the architect was not asked for, and he did not grant, any extension of time:—

Held, that the contract must govern, and that the defendants were entitled to recover, by way of counter-claim, the sum provided by the contract as liquidated damages.

If a claim to liquidated damages by a defendant is pleaded by way of counter-claim, the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought.

Aliter, if pleaded by way of set-off. *Toke* v. *Andrews*, 8 Q. B. D. 428, followed. *McNamara* v. *Skain et al.*, 103.

BY-LAWS.

See MUNICIPAL CORPORATIONS, 1.

CASES.

Armour v. *Boswell*, 6 O. S. 153, 352, 450, followed.]—*See* CONTEMPT OF COURT, 1.

Baddeley v. *Earl Granville*, 19 Q. B. D. 423, followed.] — *See* MASTER AND SERVANT, 2.

Beer v. *Stroud*, 19 O. R. 10, considered.]—*See* WATERS AND WATERCOURSES, 1.

Carver v. *Richards*, 27 Beav. 488, followed.]—*See* MORTGAGE, 2.

Re Cornish, 6 O. R. 259, not followed.]—*See* MECHANICS' LIEN, 3.

Crewson v. *Grand Trunk R. W. Co.*, 27 U. C. R. 68, considered.]—*See* WATERS AND WATERCOURSES, 1.

Darby v. *Crowland*, 38 U. C. R. 338, considered.]—*See* WATERS AND WATERCOURSES, 1.

Re Eberts v. *Brooke*, 10 P. R. 257, 11 P. R. 296, referred to and followed.]—*See* DIVISION COURT, 1.

Evans v. *Watt*, 2 O. R. 166, considered.]—*See* SEDUCTION, 1.

Gilchrist v. *Herbert*, 20 W. R. 348, followed.]—*See* HUSBAND AND WIFE, 2.

Goddard v. *Coulson*, 10 A. R. 1, followed.]—*See* MECHANICS' LIEN, 3.

Hamilton v. *Walker* (1892) 2 Q. B. 25, referred to.]—*See* JUSTICE OF THE PEACE, 1.

Hill v. *Gray*, 1 Stark. 434, explained and distinguished.] *See* LIFE INSURANCE, 1.

Jones v. *Keene*, 2 Moo. & R. 348, distinguished.]–*See* LIFE INSURANCE, 1.

Kelly v. *Imperial Loan Co.*, 11 A. R. 526; 11 S. C. R. 516, followed.]—*See* MORTGAGE, 2.

Millet v. *Davey*, 31 Beav. 476, applied.]—*See* MORTGAGE, 4.

McCloherty v. *Gale Manufacturing Co.*, 19 A. R. 117, commented on.]—*See* MASTER AND SERVANT, 2.

McGill v. *License Commissioners of Brantford*, 21 O. R. 665, followed.]—*See* INTOXICATING LIQUORS, 1.

McGillivray v. *Millin*, 27 U. C. R. 62, considered.]—*See* WATERS AND WATERCOURSES, 1.

Regina v. *Brown*, 24 Q. B. D. 357, followed.]—*See* INTOXICATING LIQUORS, 1.

Rodgers v. *Richards* (1892), 1 Q. B. 555, not followed.]—*See* JUSTICE OF THE PEACE, 1.

Shelley's Case.—Will—Construction—Estate Tail—Expression of Intention Contrary to Operation of Rule.]—*See* WILL, 2.

Smith v. *Hughes*, L. R. 6 Q. B. 597, followed.]—*See* LIFE INSURANCE, 1.

South Australian Ins. Co. v. *Randall*, L. R. 3 P. C. 101, distinguished.]—*See* BAILMENT, 1.

Stokoe v. *Cowan*, 29 Beav. 637, doubted.]—*See* RECEIVER, 1.

Toke v. *Andrews*, 8 Q. B. D., 428, followed.]—*See* BUILDING CONTRACT, 1.

Waring v. *Ward*, 7 Ves. 332, explained.]—*See* MORTGAGE, 3.

West v. *Houghton*, 4 C. P. D. 197, distinguished.]—*See* CONTRACT, 1.

CERTIORARI.

See GENERAL SESSIONS, 1.

CHEESE FACTORIES.

Act to Prevent Frauds against.]—*See* CONSTITUTIONAL LAW, 1.

CHOSE IN ACTION.

1. *Solicitor — Negligence — Evidence of—Assignment.*]—A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff:—

Per ARMOUR, C. J., at the trial. The claim did not by virtue of R. S. O. ch. 122, sec. 7 (O.), pass to the plaintiff so as to enable him to maintain an action therefor in his his own name, but in any event no negligence was proved.

On appeal to the Divisional Court the judgment was affirmed on the ground of the absence of any proof of negligence, but

Per MACMAHON, J., if negligence had been proved, the plaintiff could properly have maintained the action in his own name. *Laidlaw* v. *O'Connor*, 696.

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

See MEDICAL PRACTITIONER, 1.

COMPANY.

1. *Purchase by Promoter—Sale to Company by—Paid-up Stock—Contributory—R. S. C. ch. 129.*]—The appellant, intending to promote a joint stock company for manufacturing furniture, procured the conveyance to himself of certain lands, free of charge, in consideration of the factory being erected upon them, which was done, he contributing $7,300 for that purpose. $7,000 of this he repaid himself by mortgaging the land.

The company was incorporated under R. S. O. (1887), ch. 157, the appellant being one of the directors and appearing as a subscriber for 150 shares. At a shareholders' meeting, after he had ceased to be a director, but at which he was present by agent, it was agreed that the company should purchase the land and factory from him for $25,000, payable by the assumption of the $7,000 mortgage, and the issue to him of $18,000 of paid-up shares, which was accordingly allotted to him. Subsequently he transferred 234 of the 360 shares so allotted. A winding-up order having been made under R. S. C. ch. 129:—

Held, affirming the decision of the Master in Ordinary, that the appellant, as a promoter of the company, held a fiduciary position towards the company which precluded him from making a profit on his dealings with the company, and that he was liable as a contributory in respect to the 126 shares still held by him, but not in respect of the shares transferred, the same having been taken by him as trustee for those to whom he afterwards transferred them. *In re Hess Manufacturing Co.—Sloan's Case*, 182.

2. *Winding-up — Transfer of Shares for a Particular Purpose— Neglect to Re-transfer—Unpaid Calls —Liability as Contributory.*]—The defendant, at the request of the president of the plaintiff association, accepted from him a transfer of shares, partly paid up, in the association, for the purpose of attending a meeting of shareholders and forming a quorum, and gave the president a power of attorney to re-transfer the shares after the meeting. No re-transfer was made, and the defendant remained in ignorance that the shares stood in his name until the association became financially embarrassed :—

Held, that he was liable as a contributory.

Decision of MacMahon, J., at the trial reversed. *The Ontario Investment Association* v. *Leys*, 496.

CONSTITUTIONAL LAW.

1. *Act to Prevent Frauds against Cheese Factories — Intra Vires— Dominion Parliament.*]—The Act 52 Vict. ch. 43 (D.) an Act to provide against frauds in the supplying of milk to cheese factories, etc., is *intra vires* of the Dominion Parliament.]—*Regina* v. *Stone*, 46.

CONTEMPT OF COURT.

1. *Justice of the Peace—Summary Convictions Act—Power to Commit for Contempt—Power to Exclude from Court Room — Privileges of Counsel—Review by Court of Justice's Proceedings.*]—A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace, holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court room, and imprisoned for an alleged contempt and for disorderly conduct in court.

In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment :—

Held, that the justice had no power summarily to punish for contempt *in facie curiæ*, at any rate without a formal adjudication and a warrant setting out the contempt.

Armour v. *Boswell*, 6 O. S. 153, 153, 352, 450, followed.

2. That he had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the Court; but, upon the evidence, that the plaintiff was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion.

If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the Court could not have reviewed the facts alleged therein; but, there being no warrant, the justice was bound to establish such facts upon the trial, as would justify his course,

Judgment of Rose, J., at the trial, reversed. *Young* v. *Saylor, et al.*, 513.

CONTRACT.

1. *Covenant with Mother to Educate Child — Action by Child for Breach of—Trust—Action by Exe-*

cutors of Mother—Measure of Damages.]—The defeadants' mother having conveyed her farm to them, they mortgaged it to her in consideration of the conveyance and of $2,500, and covenanted in the mortgage, *inter alia*, to educate their younger brother. The latter was not a party to the covenant, nor was there anything in the mortgage giving him a right to maintain an action upon it, but there was a stipulation that if the defendants failed to educate him, the mother or her executors might distrain upon them for such sums as might be required from time to time to secure the due performance of the agreement. After the death of the mother, this action was brought by her executors and the younger brother for damages for breach of the covenant :—

Held, that there was no trust in favour of the younger brother, and that the action was not maintainable by him :—

Held, however, that it was maintainable by the executors to the extent that they might recover such sum as would enable them to perform the covenant to educate their co-plaintiff.

West v. *Houghton*, 4 C. P. D. 197 distinguished. *Faulkner et al* v *Faulkner et al.*, 252.

Impossible Date for Completion —Construction.]—*See* MECHANICS' LIEN, 1.

Ante-nuptial Contract by Letters —Post-nuptial Conveyance of Lands —Destruction of Letters—Sufficiency of Description.]—*See* HUSBAND AND WIFE, 2.

Charter of Tug—Demise or Hiring —Negligence–Liability for Damage.] —*See* SHIP, 1.

CONVICTION.

1. *Information taken and Summons Issued by Interested Magistrate—Hearing before another Magistrate—Defendant Appearing and Answering Charge — Validity of Conviction.*]—The justice of the peace before whom the information was laid, and who issued the summons was claimed to be interested. The hearing, however, took place before, and the adjudication and conviction were made by another justice whose qualification was not attacked, while the defendant pleaded to the charge and raised no objection to the validity of the proceedings until the application for a certiorari :—

Held, that the conviction could not be impugned. *Regina* v. *Stone*, 46.

See CONSTITUTIONAL LAW, 1.

2. *Defect in Substance—Objection not taken before a Magistrate—Quashing Conviction—Costs.*]—*See* JUSTICE OF THE PEACE, 1.

COURT OF REVISION.

1. *Notice of Sitting—Appeal from.* —*See* ASSESSMENT AND TAXES, 2.

2. *Right of Counsel to be Heard.*] —*See* ASSESSMENT AND TAXES, 1.

COVENANT.

Sale Subject to Mortgage—Implied Obligation to Indemnify Against Mortgage—Evidence of Agreement to Contrary.] MORTGAGE, 5.

CRIMINAL LAW.

Public Officer—Misbehaviour in Office—Audit Department—Pecuniary Damage.]—An officer in the public service of Canada having charge of the public dredging and whose duty it was to audit the expenditure therefor, used property of his own in connection with the dredging, having first placed it in the name of a third party, in whose name also he made out the accounts. No undue gains were made by him, but as such public officer he certified to the correctness of the accounts respecting the use of his said property as though for services rendered by contractors with the Government, and thereby received for himself a payment for these services;—

Held, that he had been guilty of misbehaviour in office, which is an indictable offence at common law, and that to constitute the offence it was not essential that pecuniary damage should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives. *The Queen* v. *John R. Arnoldi*, 201.

CRIMINAL PROCEDURE.

1. *Recognizance of Bail, Form of—Notice to Sureties—Estreat—Order of Judge—Estreat Roll, Form of—Signature of Clerk of Court—Forfeiture of Recognizance—Writ of Fieri Facias and Capias, form of—R. S. O. ch. 88—R. S. C. chs. 174, 179—Release of Bail.*]—A recognizance of bail is taken in open Court by the clerk of the Court addressing the parties, being then before him in open Court, by name, and stating the substance of the recognizance; and the verbal acknowledgment of the parties so taken is quite sufficient without more.

2. In this case a recognizance was drawn up which stated that the principal and sureties personally came before the clerk of Assize, in open Court, and acknowledged, etc.; and also stated that it was taken and acknowledged in open Court before the clerk of Assize. As a matter of fact the parties actually came before the Court, and properly acknowledged the debt to the Crown in open Court:—

Held, that the recognizance should have stated that the parties personally came before the Court, and that the recognizance was taken and acknowledged in open Court; and the name of the clerk should merely have been subscribed to it; but the errors made in drawing it up were not sufficient to avoid it.

3. Notice to the sureties of the recognizance is not necessary where it is taken as and where this one was.

4. The provision of R. S. C. ch. 179, secs. 10 and 11, and R. S. O. ch. 88, secs. 7 and 8, requiring the written order of the Judge for the estreating or putting in process of a recognizance, applies only to recognizances, to appear to prosecute, or to give evidence, or to answer for any common assault, or to articles of the peace, and does not apply to a recognizance such as the one here in question, whereby the bail became bound for the appearance of their principal to stand his trial upon an indictment for conspiracy.

5. The estreat roll was sufficiently signed by the clerk when he signed the affidavit at the foot of the roll.

6. It is no part of the duty of the clerk in making up the roll to instruct the sheriff as to what dispo-

sition he is to make of the money therein mentioned when collected.

And where the clerk in making it up stated it to be made in accordance with a Provincial statute and also with two Dominion statutes, thus leaving it uncertain whether the moneys were to be paid over to the Provincial Treasurer or to the Dominion Minister of Finance :—

Held, that the words so used were surplusage, and did not affect the validity of the roll, and should be stricken out.

7. The estreat roll as drawn up stated that it was a roll of fines, issues, amerciaments, and forfeited recognizances, set, imposed, lost, or forfeited, by or before the Court, etc., commenced, etc., and contained the names of parties, residences, etc., with the amounts for which the bail were bound, filled in under the heading "amount of fine imposed:"—

Held, that the roll sufficiently shewed the recognizance to have been forfeited, and that it was fairly entered and extracted on the roll as a forfeited recognizance.

8. *Held*, that the proceedings to collect the debt due to the Crown under the recognizance were civil, and not criminal, proceedings, and were to be regulated by R. S. O. ch. 88 ; and the writ of *fieri facias* and *capias* issued in this case, following the form given in the schedule to that Act, was not open to any objection.

9. *Held*, that, under the circumstances set forth in the affidavits, the Court would not be justified in releasing the bail from their liability. *Re Talbot's Bail*, 65.

Search Warrant—Legality—Time for Determining.]—*See* INTOXICATING LIQUORS, 3.

CROWN LANDS.

1. *Ordnance Lands—Chain Reserve along Niagara River—Slope—Military Communication — Government Reserve—Waste Lands—Public Purposes—Military Purposes—User for—Ordnance Act (1843), 7 Vict. ch. 11.*]—In an action by the plaintiffs, claiming under a patent from the Ontario Government, and the defendant, claiming under a lease from the Dominion Government, to try the right to a part of the chain reserved along the bank of the Niagara River and the slope between the top of the bank and the water's edge, which had been reserved out of the original survey of the township of Stamford, and was claimed by the defendants to have been reserved or set apart for "Military" or "Ordnance" purposes :—

Held, that the "Chain Reserve" was part of the waste lands of the Crown held for public purposes.

It was a "Government Reserve" originally made for public purposes :—

Held, also, that as there was no evidence that this "Chain Reserve" was set apart for military purposes, or of any user, charge or control of it by the military authorities, that it was not affected by the Ordnance Vesting Act of 1843, 7 Vict. ch. 11, but remained a government reserve, held for public purposes generally, and that the portion in question vested in the province of Ontario, as successor of the old province of Canada, until vested in the plaintiffs who were entitled to succeed :—

Held, also, that assuming the "Chain Reserve" had been so set apart for military purposes, the "slope" formed no part of such reserve, but always remained part of the waste lands of the Province.

History of the "Chain Reserve" along the west bank of the Niagara River from Niagara to Fort Erie traced. *The Commissioners for the Queen Victoria Niagara Falls Park* v. *Howard*, 1.

2. *Indian Lands—Mortgage before Patent—Notice — Registration in County Registry Office — Salvage — Priorities.*] — A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee duly registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage, having been registered in the department, though the mortgage was registered in the county registry office, and the plaintiff now sought to foreclose his mortgage :—

Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him. *Reed* v. *Wilson, Re*, 552.

DAMAGES.

1. *Appeal Bond—Security for Damages—Vendor and Purchaser.*] —In winding-up proceedings a property was sold by tender under the power of sale in a mortgage with the consent of the liquidator, and an appeal by an unsuccessful tenderer to a Judge from the report confirming the sale was dismissed, whereupon a further appeal to the Court of Appeal was allowed upon the appellant giving security by bond to the successful tenderer to answer the damages which the latter as purchaser might sustain by being prejudicially affected in his purchase, by the appeal allowed, in case such appeal should fail. Possession was not taken by the purchaser until after the failure of the appeal. The conditions of sale provided that possession would be given upon payment of the balance of the purchase money within a time fixed, but the money was not paid, nor did it appear that it had been set aside for that purpose, nor was any provision made in the conditions as to the payment of interest or taxes :—

Held, that under the bond the purchaser was not entitled to payments made by him for care of the property or taxes, nor was he entitled to interest on the purchase money, or to damages for deterioration of the property. *Re Alger and The Sarnia Oil Company*, 583.

DEED.

1. *Construction of — Municipal Corporation—Conveyance of Land to, for Waterworks Purposes—Power of Corporation to sell Land—R. S. O. ch. 192, sec. 29—Conditions in Deed —Right of Way—Construction of Grant.*]—A deed of conveyance of land under the Short Forms Act from the plaintiff to the defendants recited that the latter had determined to construct waterworks in their municipality, and for that required the land for buildings and other purposes connected with the waterworks, and the plaintiff had agreed to sell them such land for such purposes for the consideration and subject to the conditions set

forth. The consideration was a valuable one. The grant was to the defendants and their assigns for ever, for the purposes mentioned in the recital, of the land described, with full right of ingress and egress to and from the said lands for the defendants, their employees and others doing business on and about the said waterworks with teams and otherwise, from a certain street, etc., along a certain road, etc.; *habendum* to the defendants, their successors and assigns, for the purposes aforesaid to and for their sole and only use for ever, subject nevertheless to the following conditions. The first condition was that the defendants should fence and keep fenced at their own expense the land conveyed to them, and place an entrance and gate on the right of way at the north and south limits of the land conveyed, for the use of the plaintiff, his heirs and assigns, and all persons claiming under him or them, whenever he or they might require the same. The second condition was, that the defendants should put and maintain the right of way in a reasonable state of repair until the happening of a certain event, and thereafter that the plaintiff and defendants should each bear a proportionate part of the repairs necessary according to their respective requirements. Certain other conditions were also made. There was a covenant for quiet possession for the purposes aforesaid, and subject to the conditions aforesaid. The plaintiff released to the defendants all his claim upon the land save as aforesaid, and for the purposes aforesaid. The conveyance contained no provision that the lands should not be put to any other use, and no condition making the grant void upon the happening of any event subsequent to the grant:—

Held, that under the terms of the conveyance, the defendants acquired an absolute estate in fee simple, free from any condition of defeasance, and unincumbered by any trust restricting the use to which they should put it; and that under section 29 of the Municipal Water-Works Act, R. S. O. ch. 192, they had the right to dispose of the land when no longer required for waterworks purposes.

2. That the grant of the right of way gave to the defendants and their employees foot-way, carriage-way, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease the land. *McLean* v. *City of St. Thomas*, 114.

DEFAMATION.

1. *Libel — "Fair Comment" — Evidence of Truth of Facts—Justification—Pleading.*]—In an action for libel in which the defence is that of "fair comment," and in which the facts, the subject matter of the comment, are pleaded generally, evidence may be given in detail of the truth of the facts commented on, even though justification be not pleaded.

Per BOYD, C. — "Justification" technically is not pertinent in such a case unless the statements of facts as published are themselves libellous; but if the commentary on certain facts is complained of, then under "fair comment" may be proved actuality of the occurrences alleged in order that the jury may pass upon the comment.

Under the present rules of plead-

ing the details of the conduct animadverted upon should properly be spread upon the record either by pleading or by particulars. *Brown* v. *Moyer*, 222.

Reversed in Appeal, 20 A. R. 509.

DIVISION COURT.

1. *Jurisdiction—Action on Judgment of High Court—"Final Judgment"—Abandoning Excess—R.S.O. ch. 51, sec. 70 (b).*]—Division Courts have jurisdiction to entertain an action brought upon a judgment of the High Court, where the judgment of that Court is a final judgment.

Re Eberts v. *Brooke*, 10 P. R. 257, 11 P. R. 296, referred to and followed.

In an action for alimony, the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and in the usual form for alimony, at the rate of $226 per year, payable in equal quarterly instalments at specified times:—

Held, that the judgment, so far as it related to the costs, was a final judgment, whatever might be the case with regard to the payments of alimony, and that a Division Court had jurisdiction under R. S. O. ch. 51, sec. 70 (*b*), to entertain a suit by the plaintiff for $100 in respect to the costs, as being a claim for a debt owing to the plaintiff by the defendant, she expressly abandoning the balance of the taxed costs awarded. *Aldrich* v. *Aldrich*, 374.

After-Judgment Summons—Garnishee—Defendant—R. S. O. ch. 51, sec. 235.]—*See* PROHIBITION, 1.

DOWER.

1. *Assignment of—Assessment of a Yearly Sum in Lieu of—"Peculiar Circumstances" — Dwelling-house Partly on Dowable Land—R. S. O. ch. 56, sec. 12.*]—Where dower was claimed in land upon a portion of which stood two-thirds of a dwelling-house, the remaining third being upon the adjoining land which was not dowable:—

Held, that this was not a case within sub-sec. 3 of sec. 12 of the Dower Procedure Act, R. S. O. ch. 56, in which the commissioners had power to assess a yearly sum in lieu of assigning dower by metes and bounds.

The commissioners were not bound necessarily to assign a portion of the building upon the property, but might give an equivalent. They were bound, however, to assign one-third of the whole property, having regard to value as well as to quantity. *McIntyre* v. *Crocker*, 369.

DRAINAGE.

1. *Drain Bringing Down Noxious Matter—Use of Drain by Others—Excavations on Plaintiff's Land.*]—*See* MUNICIPAL CORPORATIONS, 1.

2. *Surface Water—Defined Channel—Right to Drain into Neighbouring Lands.*]—*See* WATERS AND WATERCOURSES, 1.

EMPLOYER'S LIABILITY.

1. *Workman going out of his Way—Contributory Negligence.*] — *See* MASTER AND SERVANT, 1.

2. *Accident—Negligence — Defect in Machine—Volenti Non Fit Injuria.*]—*See* MASTER AND SERVANT, 2.

ESTATE.

1. *Conveyance by Deed—Habendum—Fee Tail—Separate Estate——Tenant by the Curtesy—Power of Appointment—Invalid Exercise of.*]—A father conveyed lands to his daughter by deed with *habendum* "To have and to hold the same unto * * and the heirs of her body lawfully begotten to and for their sole and only use for ever * * to and for the sole and separate use and benefit of (grantor) for and during the term of her natural life, and after her death then to the heirs of her body lawfully begotten for ever. Provided always, however, that it shall and may be lawful for (grantor) to direct and appoint either by deed or her last will and testament which or in what manner her said heirs shall have the lands and premises hereby granted should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge." She died leaving her husband and several children surviving her, and by her will devised and appointed the lands to her eldest son with instructions to dispose of the same between her husband and children in the proportions mentioned in her will:—

Held, that the daughter took an estate in fee tail general, and that her husband was tenant by the curtesy:—

Held, also, that the provisions of the will were not a valid exercise of the power. *Archer v. Urquhart et al.*, 214.

Will—Construction—Estate Tail—Shelley's Case—Expression of Intention Contrary to Operation of Rule.]—*See* WILL, 2.

EVIDENCE.

Evidence of Married Woman to Prove her Seduction.]—*See* SEDUCTION, 1.

FACTORIES ACT.

Absence of Guard to Machinery.]—*See* MASTER AND SERVANT, 2.

FIRE INSURANCE.

1. *Mortgage — Loss Payable to Mortgagees — Consolidation.*]—The owner of a parcel of land mortgaged the same, and subsequently mortgaged it to the same person again, the second mortgage containing other lands on which were buildings, and also a covenant to insure. The mortgagor subsequently made an assignment for the benefit of his creditors, and the equity of redemption was sold by his assignee, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings included in the second mortgage in his own name "loss if any payable to the mortgagees as their interest might appear," subject to the conditions of the mortgage clause. A fire took place by which the buildings in the second mortgage were destroyed, the insurance moneys payable being more than sufficient to pay the balance due on the second mortgage which was in default, and the mortgagees claimed the right to apply the surplus in payment of the

first mortgage which was also in default :—

Held, that the mortgagees were not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys, but were restricted to the right to recover the amount remaining unpaid on the second mortgage. *Re The Union Assurance Co.*, 627.

GENERAL SESSIONS.

1. *Order by to Sheriff to Abate Nuisance—Validity of—Certiorari—Right to Issue—Costs.*]—The defendant was convicted at the General Sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance, which not having been done, the Sessions made an order directing the sheriff to abate the same at defendant's costs and charges, and to pay the County Crown Attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order :—

Held, that the Sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ *de nocumento amovendo*: that the order being a judicial act was properly removed by *certiorari*, and must be quashed, but without costs.

Remarks as to the jurisdiction of the Sessions as to the costs. *Regina v. Grover*, 92.

HABEAS CORPUS.

1. *Judge in Chambers—Appeal from to Court of Appeal.*]—Under R. S. O. ch. 70, sec. 1, the writ of *habeas corpus* may be made returnable before "the Judge awarding the same, or, before a Judge in Chambers for the time being, or before a Divisional Court;" and by sec. 6 an appeal is given from the decision of the said Court or Judge to the Court of Appeal :—

Held, that the right of appeal must be exercised in the manner provided by the statute, and therefore an appeal from a Judge in Chambers must be to the Court of Appeal. *Re Harper*, 63.

HUSBAND AND WIFE.

1. *Taking away Wife from Husband — Parents — Harbouring — Damages.*]—An action will lie by a husband against his father-in-law when the latter has, without sufficient cause, by a display of force taken the wife away from the house of her husband against his will, she continuing absent, whereby he has lost the comfort and help of her society ; and substantial damages may be awarded in such a case.

The mere harbouring, by her parents, of a wife who has left her husband, without any evidence of influence or persuasion on their part, is not sufficient to sustain an action against the parents.

Review of English and American decisions. *Metcalf* v. *Roberts et al.*, 130.

2. *Adultery of Husband—Alienation of Husband's Affections—Support of Wife—Married Women's Property Act—Damages.*]—When a husband leaves his wife to live in adultery with another woman by her procurement, and lives and continues by such procurement to live

in adultery with her, whereby his affections are alienated from his wife and she is deprived of her means of support, an action lies at common law by the wife against such woman.

The Married Women's Property Act, R. S. O. ch. 132, by allowing a wife to sue without her husband and by making the damages recovered the separate property of the wife, removes the former difficulty in enforcing such a cause of action.

Review of English and American decisions. *Quick* v. *Church*, 262.

3. *Ante-nuptial Contract by Letters — Post-nuptial Conveyance of Lands — Destruction of Letters — Description of Lands—Duty of Husband—Intent to Defeat Creditors.*]—A young man under twenty-one made an offer of marriage by letter to a young woman, and in the letter promised that if she would marry him he would, after the marriage, give her all the property he had (meaning real property), describing it as "my farm in Osprey," and "my property in Elmvale." She accepted the offer unconditionally, also by letter; the marriage took place; and he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily and without any evil intent, destroyed the letters, believing that they had no longer any use for them:—

Held, that the letters formed a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given.

Gilchrist v. *Herbert*, 20 W. R. 348, followed:—

Held, also, that the description of the properties in the man's letter was sufficient, he having no other properties in the places mentioned:—

Held, lastly, that there was a duty on the part of the husband to convey to his wife, which negatived the existence of an intent to defeat creditors. *Stuart et al.* v. *Thomson et ux.*, 503.

Insurance for Benefit of Wife—Predecease of Wife—Second Marriage—R. S. O. ch. 136, sec. 5.]—*See* LIFE INSURANCE, 2.

INDIAN LANDS.

Mortgage before Patent—Notice—Registration in County Registry Office — Salvage — Priorities.]—*See* CROWN LANDS, 2.

INTOXICATING LIQUORS.

1. *Liquor License Act—Admission of Guilt—Right to Object to Legality of Rules and Regulations—Right to Impose Costs and Imprisonment.*]—On an information charging that the defendant, in his premises, being a place where liquor might be sold, unlawfully did have his bar room open after 10 o'clock in the evening, contrary to the rules and regulations for license holders passed by the License Commissioners, etc., the defendant signed an admission stating that, the information having been read over to him, he desired to plead guilty to the charge, which was the only evidence before the Court, and on which the defendant was convicted. It did not appear that the municipality had passed any by-law on the subject:—

Held, that this did not prevent the defendant from objecting to the power of the License Commissioners

to pass such rules and regulations, but on the authority of *McGill* v. *License Commissioners of Brantford*, 21 O. R. 665, the objection must be overruled.

Regina v. *Brown*, 24 Q. B. D. 357, followed.

By the conviction herein a fine and costs were imposed, and, in default of payment, distress, and, in default of sufficient distress, imprisonment:—

Held, under sec. 98 of the Liquor License Act, R. S. O., ch. 194, incorporating sec. 427 of the Municipal Act, costs and imprisonment could properly be imposed. *Regina* v. *Farrell*, 422.

2. *Liquor License Act—Druggist—Conviction for Allowing Liquor to be Consumed on the Premises—Validity of.*]—It is an offence under the Liquor License Act, R.S.O. ch. 194, and amendments thereto, for a chemist or druggist to allow liquor "sold by him or in his possession to be consumed within his shop by the purchaser thereof," and it is not essential that he should be registered. A conviction in the above form does not charge an alternative offence.

The adjudication and conviction, besides imposing the money penalty under sec. 70, further imposed imprisonment for three months, as provided by that section.

The Court differed as to the validity of the term of imprisonment impcsed, but held that in any event the conviction could be amended under 53 Vict. ch. 37, sec. 27 (D.), so as to comply with sec. 67 of the Summary Convictions Act. *Regina* v. *McCay*, 442.

3. *Liquor License Act—R. S. O. ch. 194, sec. 131—Search Warrant for Liquors—Obstructing Officer Executing—Punishment for Offence—R. S. C. ch. 162, sec. 34—Indictment—Legality of Warrant.*]—The defendants were committed for trial for obstructing a peace officer acting under a search warrant issued on an information charging that there was reasonable ground for the belief that spirituous, etc., liquors were being unlawfully kept for sale contrary to the Liquor License Act in an unlicensed house:—

Held, that the search warrant must be deemed to have been issued under section 131 of the Act, and that section containing no provision for punishment in such case, the proceedings against the defendant must be by indictment for a misdemeanour under R. S. C. ch. 162, sec. 134.

The Court refused to determine the validity of the warrant on a motion to set aside the commitment, as it could be raised on the trial of the indictment if a true bill were found. *Regina* v. *Hodge et al.*, 450.

Liquor License Act — Summary Conviction—Information—Two Offences.]—*See* JUSTICE OF THE PEACE, 1.

JURISDICTION.

1. *Ontario Courts—Title to Land Outside of Ontario.*]—The Courts in this province have no jurisdiction to entertain an action for determining the title to lands in the North West Territories, even though the parties be resident here.

Re Robertson, 22 Gr. 449, distinguished. *Ross* v. *Ross*, 43.

2. *Redemption Action — Foreign Lands—Locus Standi of Plaintiff—Application of Statute Law of Foreign Country.*] — The defendants, domiciled in this province, took from

a customer a mortgage upon lands in the province of Manitoba as security for an indebtedness which arose in Ontario. The plaintiff, who also resided in Ontario, subsequently recovered a judgment for the payment of money against the mortgagor in a Manitoba Court, and registered a certificate of it against the mortgaged lands, the effect of which was by the C. S. Man. 1880, ch. 37, sec. 83, to make the judgment a lien and charge upon the lands. The plaintiff brought this action to redeem the mortgaged lands:—

Held, that the Court had jurisdiction to entertain the action, and was bound to apply the law of Manitoba to determine whether the plaintiff had the right to redeem; and, in determining that the registration of the judgment gave the plaintiff that right under the Manitoba statute, was not giving an extra-territorial effect to the judgment. *Henderson* v. *The Bank of Hamilton*, 327.

JURY.

Dispersal before Verdict—Waiver of Irregularities—Verdict on Single Issue.]—*See* VERDICT, 1.

JUSTICE OF THE PEACE.

1. *Summary Conviction—Information—Two Offences—Liquor License Act—R.S.O. ch. 194, sec. 105—R. S. C. ch. 178, secs. 26, 28, 80, 87, 88—Defect in Substance—Objection not taken before Magistrate—Quashing Conviction—Costs.*]—An information laid before a police magistrate, charged that the defendant did on the 30th and 31st days of July, 1892, sell intoxicating liquor without the license therefor by law required. Upon the hearing, evidence was adduced to shew that the defendant had sold intoxicating liquor on those days; the magistrate adjudged the defendant guilty, and made a minute thereof and of the punishment imposed; a few days afterwards he returned a conviction of the defendant for having sold liquor without a license on the two days named; and a month later returned a second conviction as for an offence committed on the 31st only:—

Held, that the information charged two offences, and it and the proceedings thereon were in direct contravention of sec. 26 of the Summary Convictions Act, R. S. C. ch. 178; and that the misjoinder of the two offences was not a defect in substance within the meaning of sec. 28.

Rodgers v. *Richards*, [1892] 1 Q. B. 555, not followed.

Hamilton v. *Walker*, [1892] 2 Q. B. 25, referred to:—

Held, also, that the objection to the information and subsequent proceedings was open to the defendant upon motion to quash the convictions, although it was not taken before the magistrate:—

Held, lastly, that, under the circumstances, neither section 105 of R. S. O. ch. 194, nor secs. 80, 87, and 88 of R. S. C. ch. 178, as amended by 53 Vict. ch. 37, applied to the convictions.

And the convictions were quashed with costs to be paid by the prosecutor. *Regina* v. *Hazen*, 387.

Power to Commit for Contempt—Power to Exclude from Court Room.]—*See* CONTEMPT OF COURT, 1.

LACHES.

Delay in Prosecuting Decree for Redemption — Analogy of Statute of Limitations.]—*See* MORTGAGE, 1.

LANDLORD AND TENANT.

1. *Distress for Rent—Goods of Third Person—Resort first to Goods of Tenant.*]—Where a landlord has distrained for arrears of rent goods upon the demised premises liable to such distress, belonging in part to the tenant and in part to a third person, such third person has no right to compel, or to ask the Court to compel the landlord to sell the part belonging to the tenant before selling the part belonging to such third person. *Pegg* v. *Starr*, 83.

Agreement to Repair—Damages for Injury Resulting from Want of Repair.]—*See* NEGLIGENCE, 4.

Nuisance—Right of Action—Liability.]—*See* NUISANCE, 1.

LIEN.

1. *Mechanics' Lien—Appropriation by Lien-holder—Notice to Owner not to Pay Contractor—Contract—Impossible Date for Completion—Construction—"Allow"—R. S. O. ch. 126, secs. 9, 11.*]—After proceedings commenced to enforce a mechanic's lien, a sub-contractor and material man, who finds that he is not able to support his claim to a lien as to certain items in his account cannot to the prejudice of the owner agree with the contractor to appropriate moneys received from the latter and for which he had given credit, to those items.

A material man giving notice to the owner under R. S. O. ch. 126, secs. 11, of an unpaid account against the contractor is not thereby entitled to dispute the validity of payments afterwards made by the owner to persons having claims for wages, or to persons furnishing materials to be used on the building, who would have refused to furnish the same if he had not, as he did, assumed a personal liability to them for the value thereof.

And this also was held to apply to a payment made by the owner by cheque payable to the order of the contractor, but for the specific purpose of the latter endorsing the same over as he did to certain persons who refused to supply material unless paid for, and also to a payment made for insurance which the contractor ought to have paid.

These sums were not payable to the contractor by virtue of any lien held by him as required by the section 11, but were virtually payments to sub-contractors with him who thereupon furnished the particular material for which the payments were made.

But *aliter* as to a payment made to an assignee of the contractor who had no lien or claim on the money coming from the owner except as such assignee, and this although the assignment from the contractor was prior in date to the giving of the notice under section 11.

Where under a building contract work was to be completed by "November 31st" under penalty of damages:—

Held, that this must be construed to mean November 30th.

Where a contract provided that upon noncompletion by a fixed date a contractor was to pay or "allow" ten dollars a day until completion:—

Held, that this authorized a deduction as liquidated damages of the amount so "allowed" from the contract price, even as against lien-holders claiming adversely to the contractor, other than those having liens for wages where such wages liens were less in the aggregate than ten per cent. of the contract price.

The amount required to satisfy the wages lien should be deducted from the contract price remaining unpaid after allowing for the reduction by reason of the noncompletion, and cannot be marshalled in favour of a material man by being thrown upon the part of the contract price representing such reduction.

Payments made by an owner to a contractor after notice under R. S. O. ch. 126, sec. 9, are only invalid when if not made they would have been liable for the satisfaction of the sub-contractor's lien or claim. *McBean* v. *Kinnear*, 313.

2. *Mechanics' Lien — Owner of Lands under Verbal Contract—Unpaid Vendor—Consent of Owner—R.S.O. ch. 126, sec. 2, sub-sec. 3.*]—A verbal agreement without any condition as to forfeiture on nonpayment of the purchase money was entered into for the purchase of certain lands it being understood that the purchaser would proceed to erect buildings thereon, which he accordingly did, procuring materials and work from the plaintiff and others, and then became insolvent without having paid anything to the vendor:—*Held*, that there having been sufficient acts of part performance, the purchaser had become the owner in equity of the lands and the plaintiff's lien attaching to his interest the vendor could only after that hold the lands subject to the burden of the lien.

Before the parties claiming liens furnished work and material, they were aware that the purchaser was in difficulties, but the vendor assured them that they would be paid, and urged them to go on with the work, although it was not contended that he actually guaranteed payment himself:—*Held*, that the work was done and the material furnished with the "privity or consent" of the vendor within the meaning of sub-section 3 of section 2 of the Mechanics' Lien Act, R. S. O. ch. 126. *Blight* v. *Ray*, 415.

3. *Mechanics' Lien—"The Price to be Paid to the Contractor"—R. S. O. ch. 126, secs. 7, 9, 10—53 Vict. ch. 38—Contract Abandoned—No Money Payable by Owner to Contractor—Existence of Liens—Wages-earners—Priority—Enforcing Liens—Taking Benefit of Proceedings by other Persons.*]—The words used in secs. 7 and 9 of the Mechanics' Lien Act, R. S. O. ch. 126, as amended by 53 Vict. ch. 38, "the price to be paid to the contractor," and other like expressions in the same sections, all mean the original contract price, and not that part of the contract price to the extent of which the contractor has done work or supplied materials.

And where the owner has, in good faith and without notice of any lien, paid the contractor the full value of the work done and materials furnished, and such value does not exceed the statutory percentage of the contract price, and the contractor has abandoned his contract, and no money is payable to him in respect thereof, no lien can exist or be enforced against the owner in favour of any one.

Wages-earners are not, by virtue of sec. 9, sub-sec. 3, and sec. 10, as amended, entitled to the percentage of the contract price necessary to be retained, if it never becomes payable by the owner to the contractor.

Persons who have registered liens, but have taken no proceedings to realize them, cannot have the benefit of proceedings taken by other persons to enforce liens against the same

lands, where the liens of such other persons are not enforceable.

Goddard v. *Coulson*, 10 A. R. 1, followed.

Re Cornish, 6 O. R. 259, not followed. *In re Sear and Woods*, 474.

4. *Mechanics' Lien—"Prior Mortgage"—Mortgage Advances on Progress Certificates — Completion of Buildings and Advances Before Lien Registered—Registry Act—R. S. O. ch. 126, sec. 5, sub-sec. 3.*]—"Prior mortgage" in sec. 5, sub-sec. 3 of the Mechanics' Lien Act means one existing in fact before the lien arises, though not necessarily prior in point of registration.

Under a mortgage advances were to be made from time to time as buildings progressed. Part of the work was done, and the mortgage was registered, the buildings completed and the further advances made before a lien was registered, and without actual notice of it:—

Held, that the mortgage had priority over the lien both as to prior and subsequent work, and as to the latter each further advance under the mortgage attracted to itself the advantage of the Registry Act so as to gain priority over the concurrent unregistered lien.

The increased value in such a case is not a benefit added to the pre-existing mortgage, but the periodical increase of value calls forth the periodical payments. *Cook* v. *Belshaw*, 545.

Mechanics' Lien — Appropriation by Lien-holder—Notice to Owner not to Pay Contractor—R.S.O. ch. 126, secs. 9, 11.]—*See* MECHANICS' LIEN, 1.

LIFE INSURANCE.

1. *Surrender of Policy — Contract—Absence of Deceit—Evidence of Fraud.*]—The rules which govern the purchase and sale of policies of life insurance are the same as those which govern the purchase and sale of any other species of personal property.

A contract for the surrender of a life policy, unlike a contract for life insurance, is not *uberrimæ fidei*.

The insured in a life policy, having no surrender value, applied to the insurers to purchase it, which they did for a small sum, he being at the time, to their knowledge as well as his own, seriously ill with heart disease. The insurers in no way misled the insured, who died shortly after the sale.

In an action by his executors to set aside the transaction:—

Held, that there was no evidence of fraud to submit to a jury. *Hill* v. *Gray*, 1 Stark 434, explained and distinguished; *Smith* v. *Hughes*, L. R. 6 Q. B. 597, followed. *Jones* v. *Keene*, 2 Moo. & R. 348, distinguished. *Potts* v. *Temperance, etc., Life Assurance Co. of North America*, 73.

2. *Insurance for Benefit of Wife, "Her Executors, Administrators or Assigns"—Predecease of Wife—R. S. O. ch. 136, sec. 5.*]—A married man insured his life, the policy being made payable "to his wife, Sarah, her executors, administrators, or assigns." The wife died before her husband, who married again, and died leaving a widow and children without having assigned the policy or altered the direction as to payment in it:—

Held, that the policy fell under the provisions of the Act to secure

to wives and children for the benefit life insurance, and was for the benefit of the wife absolutely, the words of limitation having no effect; that the provision for payment lapsed by the death of the wife, and that the policy moneys belonged to the personal estate of the husband. *In re Eaton*, 593.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS, 1, 2, 3.

MASTER AND SERVANT.

1. *Employer's Liability — Workman Going out of his Way — Contributory Negligence.*]—The plaintiff, in going to that part of the defendants' building where his work was, had to pass through a long room, the passage being nearly straight until within ten or twelve feet of a hoist, where it turned to the left. He was quite familiar with this passage, which was well lighted, but on the occasion in question, while looking at a man at work repairing the hoist, instead of turning toward his workroom he walked straight into the hole and fell to the cellar below, thus causing injury. As a rule there was a bar protecting the entrance to the hoist, but on the occasion in question this bar had been removed on account of the repairs:—

Held, that the action must be dismissed upon the ground of contributory negligence on the part of the plaintiff. *Headford* v. *The McClary Manufacturing Co.*, 335.

2. *Accident to Servant—Liability Under the Workmen's, etc., Act—Factories Act, Construction of—Volenti Non Fit Injuria—Applicability of—53 Vict., ch. 23, sec. 7 (O.).*]—In the defendants' dye house over the tanks containing the dye was certain machinery consisting of a series of rollers for wringing the dye out of the warp as it came from the tanks, having cogwheels at the ends thereof where they connected with the frame of the machine. There were spaces between the tanks where planks were placed for the workmen to pass along, and which were always in a slippery condition. The plaintiff, a workman employed by the defendants, who was aware of the absence of a guard, but did not consider it a defect, while returning along one of these planks from the discharge of his duty in disentangling the warp, slipped, and by reason, as was found by the jury, of the defendant's negligence in not guarding the wheels, in trying to save himself caught his hand therein and was injured:—

Held, that the cogwheels constituted part of the machinery, and being dangerous, should have been guarded under sec. 15, sub-sec. 1 of the Factories Act, R. S. O. ch. 208; and that the non-guarding constituted a "defect in the condition of the machinery" under the Workmen's Compensation for Injuries Act, R. S. O. ch. 141.

McCloherty v. *Gale Manufacturing Co.*, 19 A. R. 117, commented on:—

Held, also, following *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423, that the maxim *volenti non fit injuria* does not apply where an accident is caused by the breach of a statutory duty. *Rodgers* v. *The Hamilton Cotton Co.*, 425.

3. *Accident—Negligence — Defect in Machine—Volenti Non Fit Injuria.*]—In an action by a servant

against a master to recover damages for injuries sustained by the plaintiff, owing to an accident which occurred by reason of a defect in the machine which he was working, the defect being the giving way of a string which worked a brake automatically, thus saving the necessity of an attendant to work the brake by hand, it appeared that the plaintiff knew of the defect and of the likelihood of an accident, he having frequently replaced the string when worn, and that he worked and continued to work the machine without help from any other person, and without any complaint:—

Held, that the plaintiff was *volens* and could not recover at the common law. *Poll* v. *Hewitt*, 619.

MAXIM.

"*Volenti Non Fit Injuria.*"]—*See* MASTER AND SERVANT, 2, 3.

MECHANICS' LIEN.

See LIEN, 1, 2, 3, 4.

MEDICAL PRACTITIONER.

1. *College of Physicians and Surgeons of Ontario—Erasure of Name from Register—R. S. O. ch. 148—Disgraceful Conduct in a Professional Respect—Advertising—False Representations to Patient—Publishing Symptoms of Disease—Committee of Council — Evidence — Report — Procedure.*]—Upon an appeal by a registered medical practitioner, under R. S. O. ch. 148, sec. 37, the Ontario Medical Act, as amended by 54 Vict. ch. 26, sec. 5, from an order of the council of the College of Physicians and Surgeons of Ontario, directing that his name should be erased from the register, it appeared that he had advertised extensively in newspapers and by handbills, setting forth and lauding in extravagant language his qualifications for treating catarrh, shewing that that disease led to consumption, stating the symptoms of it, and giving testimonials from persons said to have been cured by him:

Held, that mere advertising was not in itself disgraceful conduct in a professional respect; but that the advertisements published by the appellant were studied efforts to impose upon the credulity of the public for gain, and were disgraceful in a professional respect within the meaning of section 34 of the Act.

It appeared also that the appellant had represented to two persons, who were in fact in the last stages of consumption, that they were suffering from catarrhal bronchitis, and that he had the power to cure them, and that he had taken money from them upon the strength of such representations:—

Held, that this was conduct disgraceful in the common judgment of mankind, and much more so in a professional respect:—

Held, however, that publishing broadcast the symptoms of the disease known as catarrh, was not in itself disgraceful conduct in a professional respect.

The council referred the complaint against the appellant for inquiry and report to their discipline committee, who took evidence, and reported it with their conclusions thereon to the council:—

Held, that the report of the committee could not be set aside or treated as a nullity because they took unnecessary evidence or because

they drew conclusions from the facts ascertained by them.

Proper procedure under the Act pointed out. *Re Washington*, 299.

MISBEHAVIOUR IN OFFICE.

See CRIMINAL LAW, 1.

MORTGAGE.

1. *Redemption of Mortgage—Decree for—Laches—Analogy of Statute of Limitations—Quieting Titles.*—That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the Court to exercise its discretion by holding its hand when the laches occur in the prosecution of an action whether before or after judgment.

After the usual decree for redemption had been pronounced in favour of a mortgagor, who was at the time and continued afterwards to be a lunatic residing in Scotland; no proceedings were taken under it for over twenty years. Although several communications with reference to the suit passed between the mortgagor's solicitor and his *curator* the latter never intervened. For some years before, and during all the time after, the making of the decree, the mortgagee, or those claiming under him, had been in possession of the mortgaged premises; and the petitioner in this matter, claiming under the mortgagee, sought after notifying the *curator* of the facts and proceedings to quiet his title under the Quieting Titles Act, R. S. O. ch. 113:—

Held, that after the great and unexplained delay in the redemption suit, the decree made therein was no obstacle to the petitioner's obtaining a certificate of title. *Re Leslie*, 143.

2. *Foreclosure — Action on Covenant— Opening Foreclosure — Sale after Foreclosure—Covenant—Validity of, as an Exercise of the Power of Sale—Private Sale—Inadequacy of Price—Previous Efforts to Sell—Diligence — Judgment Creditor — Status of, to Attack Sale—Judgment Recovered after Sale.*]—Mortgagees of a property, with a power of sale exercisable on default without notice, took foreclosure proceedings on their mortgage, and pending these obtained judgment in a separate action on the covenant against the executors of the mortgagor, and, after foreclosure of the mortgage, issued execution on the judgment, and sold thereunder other lands of the mortgagor, crediting the proceeds on the mortgage debt.

Previous to the foreclosure proceedings the mortgaged lands had been offered for sale by public auction under the power of sale and also privately, but without result.

About a year after the foreclosure the mortgagees sold the premises by private contract, conveying to the purchaser by ordinary short form deed without recitals, and the purchaser shortly afterwards sold again at a large advance, both purchaser and sub-purchasers being aware of the sale of the other lands under execution on the judgment on the covenant.

The plaintiff, a creditor of the mortgagor at the time of his death, did not recover a judgment for his debt until a year after the sale of the property by private contract, and subsequently purchased it at sheriff's sale under his own execution, and now claimed to be let in to

redeem, or, in the alternative, that the mortgagees should account to him for the value of the property :—

Held, that the foreclosure was opened by the proceedings on the covenant, and any person entitled to redeem had a right to bring the action without first setting aside the final order; the right to redeem under such circumstances not being merely a personal equity in the mortgagor.

Held, however, that the sale by private contract and conveyance must be deemed an exercise of the power of sale, the equity of redemption then being at large.

Carver v. *Richards*, 27 Beav. 488, and *Kelly* v. *Imperial Loan Co.*, 11 A. R. 526; 11 S. C. R. 516, followed :—

Held, also, that the mortgagees had not acted negligently or carelessly in the sale, but had taken all reasonable care, and that they were not bound to offer the property a second time by public auction without some reasonable prospect of a sale :—

Held, lastly, that under any circumstances, the plaintiff not being an incumbrancer at the time of the sale, and the legal and equitable title having been vested in the purchaser before the sheriff's sale to the plaintiff, the latter was not entitled to an account from the mortgagees. *Chatfield* v. *Cunningham et al.*, 153.

3. *Sale of Equity of Redemption — Indemnity against Mortgage—Implied Contract—Rebuttable Presumption.*]—When a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance, the right to indemnification against it does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract. *Waring* v. *Ward*, 7 Ves. 332, explained. *Beatty* v. *Fitzsimmons, et al.*, 245.

4. *Payments by Stranger—Subsequent Assignment to Him—Second Mortgage — Priority.*] — Payments made on a mortgage by a person who at the time of making them was not interested in the mortgaged premises, and who had then no intention of becoming so, but who subsequently paid the balance due on and became assignee of such mortgage, are not entitled to priority over a subsequent mortgage. *McMillan* v. *McMillan*, 351.

5. *Short Forms Act—Covenant (No. 7)—Proviso (No. 14)—Possession—Right of Mortgagee to Lease without Notice—Scanty Security——Right to cut Timber.*]—There is nothing in the covenant (No. 7) in the Act respecting Short Forms of Mortgages, R. S. O. ch. 107, that on default the mortgagee shall have quiet possession of the lands, repugnant to the proviso in the same Act (No. 14), that the mortgagee, on default of payment may, on giving notice, enter on and lease or sell the lands; and a mortgagee, when his mortgage is in default may, under the covenant, without giving notice, make any lease which will not interfere with the mortgagor's right to redeem.

The action intended by the proviso is not the mere taking possession for the purpose of keeping down the interest, but the entering on the lands to lease or sell in such wise that the

right of redemption shall be postponed or destroyed.

When the security in arrear is scanty, it is competent for the mortgagee to make the best provision he can for his own safety even to the cutting down of trees, which power he can confer upon others under him, subject to an account to the owner of the equity of redemption at the proper time.

Millett v. *Davey*, 31 Beav. 476, applied. *Brethour* v. *Brooke et al.*, 658.

6. *Sale subject to Mortgage—Implied Obligation to Indemnify against Mortgage—Evidence of Agreement to the Contrary—Assignment of Claim—Right of Action.*]—Although when a mortgagor conveys his equity of redemption, subject to the mortgage, there is an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, evidence is admissible of an express agreement between the parties to the contrary.

A claim against a purchaser of an equity of redemption for indemnification against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter. *British Canadian Loan Co.* v. *Tear et al.*, 664.

Redemption Action for Lands in Foreign Country.]—*See* JURISDICTION, 1.

Fire Insurance—Loss Payable to Mortgagees—Consolidation.]—*See* FIRE INSURANCE, 1.

MUNICIPAL CORPORATIONS.

1. *By-laws—Payable by Instalments Based on Aggregate Debenture Debt—Variation in Different Years—Registration—Effect of.*]—A by-law passed under formalities required by law for contracting a debt for a purpose within the jurisdiction of the council under the Municipal Act, R. S. O. ch. 184, sec. 340 *et seq.*, was made payable by instalments, but in settling the amount payable in each year the total existing debenture debt of the municipality was estimated, and although the aggregate annual amount payable under all the by-laws was approximately equal to that payable in other years, there was a very large variance in the amounts payable in the different years under the present by-law. The by-law was duly registered under section 351, and notice published under section 354, and no application to quash was made within three months after the said registry:—

Held, that the by-laws and debentures issued thereunder were valid and binding on the municipality. *The Corporation of the Village of Georgetown* v. *Stimson*, 33.

2. *Drain bringing down Noxious Matter—Use of Drain by Others—Excavations on Plaintiff's Land.*]—A municipal corporation having constructed a drain without a by-law for the particular portion passing through private property whereby noxious matter was brought down and deposited thereon, was held liable for damages sustained thereby, notwithstanding that there were excavations on the land but for which the noxious matter might have passed off; the owner not being bound to leave his land in a state of nature; nor was it any answer that the drain was used for similar purposes by others as well as the corporation. In such a case the remedy is by action and not by submission to arbitration. *Close* v. *The Corporation of the Town of Woodstock*, 99.

2. *Negligence — Defective Sidewalk—Ice—Accident.*] — At a certain point in a frequented street in the defendants' town, the sidewalk having settled through age and decay formed a depression where water lodged and ice gathered, and the plaintiff slipped upon it and was injured. The place had been in as bad condition as at the time of the mishap for a fortnight :—

Held, MEREDITH, J., *dissentiente*, that the plaintiff was entitled to damages.

Per BOYD, C.—The walk was out of repair, because not safe at this point, having regard to the travel upon it and the resources of the municipality. Defect in a way or in the condition of a way may arise from superinduced causes which make it dangerous or unfit for travel.

Per ROBERTSON, J.—This was a case of disrepair and decay of a sidewalk which it was within the power of the municipality to prevent by ordinary care and watchfulness.—*Durochie* v. *The Corporation of the Town of Cornwall*, 355.

3. *Way—Noxious Weeds—Removal of—Non-appointment of Inspector and Overseer—R. S. O. ch. 202.*] —Municipal corporations are not "owners" or "occupants" of highways in their municipalities within R. S. O. ch. 202, "An Act to Prevent the Spread of Noxious Weeds," etc., nor does the word "land" therein include street or highway.

The appointment of an inspector under the Act being discretionary with the council unless petitioned for by the necessary number of ratepayers, and that of an overseer being altogether discretionary; in the absence of such appointments no duty is cast on the council to cut down noxious weeds growing in the streets. *Osborne* v. *The Corporation of the City of Kingston*, 382.

4. *By-law — Exclusive Privilege Granted to Telephone Company—Monopoly—Municipal Act, 55 Vict. ch. 42, sec. 286, (O.).*]—A by-law passed by the city council ratified an agreement between the city and a telephone company, providing that no other person, firm or company should, for five years, have any license or permission to use any of the public streets, etc., of the city for the purpose of carrying on any telephone business :—

Held, that this by-law was in contravention of section 286 of the Municipal Act, 55 Vict. ch. 42, and was *ultra vires* of the council. *Re Robinson and City of St. Thomas*, 489.

5. *Election of Deputy Reeve—Disclaimer—Lowest Candidate Taking Seat—Motion to Set Aside the Election—Omission of Interest of Relator—Amendment—Con. Rule 444.*]—At an election under the Municipal Act, 55 Vict., ch. 42 (O.), for a Deputy Reeve of a town, there were three candidates, and after the election and before the first meeting of the council, the two who had received the highest number of votes successively disclaimed, whereupon the remaining candidate, who had received the lowest number of votes, made the declaration of office and took his seat. On a motion in the nature of a *quo warranto* made by the candidate who had received the highest number of votes to have it declared that there was no election and that the seat was vacant :—

Held, that what took place constituted an election of the respondent and entitled him to the seat.

The notice of motion did not shew

any interest in the relator, as required by sec. 187 of the Act; but it having been shewn by affidavit filed in support of it that the relator was a candidate, an amendment of the motion would, if necessary, have been allowed under Con. Rule 444. *Regina ex rel., Percy* v. *Worth*, 688.

Obstacle Left on Highway by Contractor with Municipal Corporation —Accident—Want of Repair by Corporation — Improper User — Corporate Assent—Liability of Contractor.] —*See* NEGLIGENCE, 2.

NEGLIGENCE.

1. *Permitting Child to Drive Mowing Machine — Volunteer — Judge's Charge.*]—The plaintiff, a boy of eight, came upon the defendant's land, where the latter was mowing hay, and the defendant permitted him to get upon the mowing machine alone, and to drive the horses. By reason of one of the wheels striking into a furrow, the plaintiff was thrown out of his seat, and, falling on the knives of the machine, was injured. The trial Judge told the jury that if the defendant was not using reasonable care in allowing the plaintiff to be upon the machine, he was guilty of negligence:—

Held, a proper direction; and a verdict for the plaintiff was allowed to stand.

The question whether the plaintiff was a trespasser or volunteer or licensee was not material. *Carroll* v. *Freeman*, 283.

2. *Obstacle Left on Highway by Contractor with Municipal Corporation—Accident — Want of Repair by Corporation — Improper User—Corporate Assent— Liability of Contractor—New Trial — Surprise— Corroborative Evidence.*]—A contractor with a municipal corporation for the repair of a highway of theirs, who negligently leaves an obstacle thereon in such a position as to frighten a horse being driven on the highway, thereby causing injury to the driver, is liable in an action for the improper use of the highway, and is not relieved from liability by the fact that the corporation may have otherwise negligently allowed the highway to get out of repair.

In such a case the corporation are not liable for the accident caused by the improper use, unless their assent thereto can be shewn.

Per ROSE, J.—A corporation is under such circumstances liable for non-repair of the highway.

New trial, on the ground of surprise and discovery of new evidence, refused, where the evidence was merely in corroboration. *Howarth* v. *McGugan et al.*, 396.

3. *Railways—Evidence — Sufficiency of—Non-suit— New Trial.*]—The plaintiff was an assistant yardsman in the defendants' employment, whose duty it was to marshal and couple cars subject to the orders of the conductor of a shunting engine, to whose orders the engine-driver was also subject. According to the plaintiff's evidence, while attempting to carry out specific instructions received from the conductor, which the latter denied, as to coupling certain cars, the conductor negligently allowed the cars to be backed up, thus driving the cars together and injuring the plaintiff. The plaintiff had for a long time been in the defendants' employment, was thoroughly experienced in his duties, had never received specific instruc-

tions before, and knew before he went in between the cars that the engine was in motion backing up, and only eight feet distant. On a motion to set aside a verdict found by the jury for the plaintiff, the Court, though not satisfied with the verdict, was of opinion that there was evidence for the plaintiff to be submitted to the jury, and therefore refused to interfere either by granting a non-suit or a new trial. *Weegar* v. *The Grand Trunk R.W. Co.*, 436. [Affirmed by the Court of Appeal.]

4. *Landlord and Tenant—Agreement to Repair—Notice—Damages.*] —An express contract between a landlord and his tenant that the former is to repair the demised premises does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the disrepair.

In such a case the tenant should himself repair, at the expense of the landlord. *Brown* v. *The Trustees of the Toronto General Hospital*, 599.

Defective Sidewalk — Ice — Accident.]—*See* MUNICIPAL CORPORATION, 2.

Employer's Liability—Workman going out of his Way—Contributory Negligence.]—*See* MASTER AND SERVANT, 1.

NUISANCE.

1. *Permanent or Temporary — Right of Action—Occupancy by Tenants—Injury to Reversion—Liability of Owner of Premises.*]—The owner of houses occupied by tenants can maintain an action in his own name for damages and to restrain the continuance of a nuisance arising from privy pits on the land of an adjoining owner, if the nuisance is of such a nature as to be practically continuous and permanent.

The owner of the adjoining land, although also occupied by tenants, is liable for the nuisance caused by them if the pits are so constructed that the constant use of them will necessarily result in the creation of a nuisance, or if allowed by the owner to remain in an unsanitary condition where there is power to remedy the grievance.

Decision of MACMAHON, J., at the trial affirmed. *Parker* v. *White et al.*, 611.

Indictment for, at General Sessions —Order by to Sheriff to Abate.]—*See* GENERAL SESSIONS, 1.

ONTARIO COURTS.

See JURISDICTION, 1.

ORDNANCE LANDS.

See CROWN, 1.

PARTIES.

Purchase of Insolvent Estate from Assignee — Arrangement between Purchaser and Certain Creditors—Liability to Account.]—*See* ASSIGNMENT AND PREFERENCES, 3.

PARTNERSHIP.

1. *Joint and Several Debt—Principle and Surety — Discharge of Collateral Security—Release of Surety—R.S.O. ch. 122, secs. 2, 3, 4.*]—When a partner retires from a firm,

although the relationship of principal and surety may have been created thereby between himself and the remaining partners, such arrangement, whether known to a creditor of the firm or not, does not affect his rights against the members of the firm as joint debtors, unless he has accepted the liability of the remaining partners in satisfaction and discharge of the liability of the retiring partner.

R. S. O. ch. 122, secs. 2, 3, and 4, does not cast any duty upon such a creditor, without notice of the relationship of principal and surety having been created, to preserve collateral security taken for the debt, for the benefit of the remaining partners. *Allison* v. *McDonald*, 288.

PLEADING.

Libel — "Fair Comment"—Evidence of Truth of Facts—Particularity.]—*See* DEFAMATION, 1.

Counter Claim for Liquidated Damages—Reply of Matters Arising since Action.]—*See* BUILDING CONTRACT, 1.

POWER OF ATTORNEY.

1. *Sale of Land—Authority of Attorney.*]—Acting under a power of attorney from the defendant empowering him to attend to and transact all defendant's business in connection with her properties both real and personal, and generally to do anything he might think necessary, etc., in the premises as fully and effectually as if she were personally present, the attorney entered into a contract for the sale of defendant's farm to the plaintiff, and a deed was executed by defendant and delivered over to the attorney for the purpose of carrying out the sale. The terms of purchase were that the plaintiff was to pay off certain incumbrances, make a cash payment and execute a mortgage to secure the balance of the purchase money, which he did, making the cash payment and mortgage to the attorney as trustee for the defendant, which the attorney was willing to hand over to the latter on her delivering up possession; this she refused to do:—

Held, that the power was a sufficient authority to the attorney to receive the purchase money and bind the defendant in the arrangement made; and that the plaintiff was entitled to possession of the land. *McClellan* v. *McCaughan*, 679.

POWERS.

Power of Appointment—Invalid Exercise of.]—*See* ESTATE, 1.

PRACTICE.

New Trial—Surprise—Corroborative Evidence.]—*See* NEGLIGENCE, 2.

Division Court—Judge Reserving Judgment till a Day Named—Judgment not given till a Later Day—R. S. O. 51, sec. 144.]—*See* PROHIBITION, 1.

Habeas Corpus—Judge in Chambers—Appeal from to Court of Appeal— *See* HABEAS CORPUS, 1.

PRINCIPAL AND SURETY.

Partnership — Joint Debt — Discharge of Collateral Security—Release of Surety.—See PARTNERSHIP, 1.

PROHIBITION.

1. *Division Court—Judge Reserving Judgment till a Day Named—Judgment not given till a Later Day—R. S. O. ch. 51, sec. 144—Acquiescence.*]—Where a Judge in an action in a Division Court has pronounced a judgment otherwise than in accordance with the directions of section 144 of the Division Courts Act, R. S O. ch. 51, such judgment can, upon motion for prohibition, only be sustained upon clear and satisfactory evidence that the party complaining has agreed in advance to the adoption of the course which the Judge has actually adopted in delivering his judgment, or that he has subsequently acted in such a manner as to waive his right to complain.

And where at the trial of an action in a Division Court judgment was postponed till a named day, but was not then given, and two subsequent days were successively named by the Judge, but judgment was not actually given till three days later than the latest day named; and, upon motion for prohibition, it was not shewn that the party moving had ever agreed that the judgment might be given without previously naming a day for its delivery, and had not acted so as to waive his right to complain, an order was made prohibiting the enforcement of the judgment. *Re Wilson* v. *Hutton—Town of Brampton, Garnishees*, 29.

2. *Division Court — After-judgment Summons—Garnishee — "Defendant"—R. S. O. ch. 51, sec. 235.*]—The word "defendant," as used in section 235 *et seq.* of the Division Courts Act, R. S. O. ch. 51, means the person sued in the action, and does not include a garnishee.

Prohibition to a Division Court granted, where the primary creditors, having obtained judgment against the garnishee, issued an after-judgment summons against him. *Re Hanna et al.* v. *Coulson: Maxon, Garnishee*, 493.

QUO WARRANTO.

Omission of Interest of Relator—Amendment — Con. Rule 444.]—MUNICIPAL CORPORATIONS, 5.

RAILWAYS.

1. *Absence of Cattle Guards—Animals Killed—Liability—"Place Where they Might Properly Be"—51 Vict. ch. 29, sec. 271 (D.)—53 Vict. ch. 28, sec. 2 (D.)*]—In an action for damages for the loss of horses killed on the defendants' railway, the statement of claim alleged that the horses "escaped" from the plaintiffs' farm, passed down a concession road to an allowance for road which was intersected by the railway "on the level," then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train. The only negligence charged was that the defendants had not constructed and maintained cattle-guards or fences. It was not alleged that the horses were in charge of any person:—

Held, upon demurrer, that the horses being, contrary to the provision of section 271 of the Railway Act of Canada, 51 Vict. ch. 28, within half a mile of the intersection and not in charge of any person, they did not get upon the railway from an adjoining place where, under the circumstances, they might pro-

perly be, within the meaning of 53 Vict. ch. 28, sec. 2 (D.); and therefore the defendants were not liable. *Nixon et al.* v. *Grand Trunk R. W. Co. of Canada*, 124.

2. *Carriers—Liability as, or as Warehousemen.*]—The plaintiff delivered from time to time a quantity of apples to defendants at their warehouse for the purpose of shipment by their railway. A sufficient quantity having been delivered to fill a car, plaintiff applied for and was by defendants promised one at a named date. In the ordinary course of business, on the barrels being loaded on the car, a shipping bill would have been signed by defendants, containing an exemption for liability for loss by fire. The defendants failed to furnish the car at the date specified, and, a fire occurring, the apples were destroyed:—

The Court was evenly divided, GALT, C.J., being of the opinion of the trial Judge, that the responsibility of the defendants was that of carriers and not of warehousemen, and that they were liable for the loss sustained by the plaintiff; while ROSE, J., was of the contrary opinion. *Milloy* v. *The Grand Trunk R. W. Co.*, 454.

RECEIVER.

1. *Policy of Life Insurance—Order for Receiver to Sell—Jurisdiction—Subsequent Declaration by Insured for Benefit of his Wife and Children—R. S. O. ch. 136, sec. 5.*]—An order was made, after judgment in an action, appointing a receiver and for the sale by him of a policy on the life of the defendant for $1,000 which would be fully paid up in ten years, and enjoining the defendant from dealing with the policy. Notwithstanding this, the defendant made an assignment or declaration for the benefit of his wife and children, under R. S. O. ch. 136, sec. 5:—

Held, reversing the decision of FERGUSON, J., that the order for sale was improper.

Per BOYD, C.—No order to sell should have been made against the will of the beneficiaries under the assignment, and *quære* if there was jurisdiction to make any such order.

If the beneficiaries failed to pay the accruing premiums, it might then be proper, as the receiver had no funds wherewith to pay them, to negotiate with the company for the surrender of the policy.

Stokoe v. *Cowan*, 29 Beav. 637, doubted.

Per ROBERTSON, J.—It was competent for the defendant at any time, even after the receivership order and injunction to make the declaration for the benefit of his wife and children, and the plaintiff could not interfere with the rights of the beneficiaries under it at the maturity of the policy, even supposing their rights to be limited to the residue after payment of the plaintiff's execution, which *semble* they were not.

Per MEREDITH, J. — Whether there was power to make the order to sell or not, it should not have been made in this case, it not being shewn to be necessary, having regard not only to the plaintiff's interests, but to those of other parties in the subject matter. *Weekes* v. *Frawley*, 235.

REGISTRY LAWS.

1. *Registrar's Charges—Certified Abstract—Abstract on Township Lots, Subdivided by Registered Plans*

—*R. S. O. ch. 114, sec. 95, sub-secs. 2 and 4.*]—A registrar's abstract having been demanded of all instruments registered upon two township lots comprised in a certain mortgage :—

Held, that the registrar was entitled to charge two dollars on each general search of the township lots and twenty-five cents for the first hundred words, and fifteen cents for each additional hundred words of the abstract, as provided in R. S. O. ch. 114, sec. 95, sub-secs. 2 and 4; but the fact that the lots had subsequently to the mortgage been subdivided by the mortgagors without the assent of the mortgagee into a number of lots upon registered plans did not, under the said sub-section 2, justify him in charging also as for a separate search on each of the lots as shewn on the said plans. *Morse* v. *Lamb*, 167.

[Reversed by Divisional Court, 608.]

RIGHT OF WAY.

See DEED, 1.

SEDUCTION.

Married Woman—Evidence of, to prove Seduction and Non-access of Husband.]—In an action for the seduction of a married woman the non-access of her husband, and her seduction by the defendant, may be proved by her own evidence. *Evans* v. *Watt*, 2 O. R. 166, considered. *Mulligan* v. *Thompson*, 54.

SHIP.

Charter of Tug—Demise or Hiring —Negligence—Liability for Damage to Tug.]—The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug * * to tow two barges from * * for which I agree to pay * * owner to supply engineer and captain * *" The tug on the voyage was run on a rock through the negligence of the captain :—

Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage.

Decision of FALCONBRIDGE, J., at the trial reversed. *Thompson* v. *Fowler*, 644.

STATUTES.

R. S. O. ch. 51, sec. 70, (*b*)]—*See* DIVISION COURT, 1.

R. S. O. ch. 51, sec. 144.]—*See* PROHIBITION, 1.

R. S. O. ch. 51, sec. 235 *et seq.*]—*See* PROHIBITION, 1.

R. S. O. ch. 56, sec. 12.]—*See* DOWER, 1.

R. S. O. ch. 70, sec. 1.]—*See* HABEAS CORPUS, 1.

R. S. O. ch. 88, secs. 7, 8.]—*See* CRIMINAL PROCEDURE, 1.

R. S. O. ch. 107.]—*See* MORTGAGE, 4.

R. S. O. ch. 108, sec. 4.]—*See* WILL, 1.

R. S. O. ch. 114, sec. 95, sub-secs. 2 and 4.]—*See* REGISTRY LAWS, 1.

R. S. O. ch. 122, secs. 2, 3, and 4.]—*See* PARTNERSHIP, 1.

R. S. O. ch. 122, sec. 7 (O.)]—*See* CHOSE IN ACTION, 1.

R. S. O. ch. 124, sec. 20, sub-sec. 5, sec. 23.]—*See* ASSIGNMENTS AND PREFERENCES, 2.

R. S. O. ch. 124.]—*See* ASSIGNMENTS AND PREFERENCES, 1.

R. S. O. ch. 126, sec. 2, sub-sec. 3.]—*See* LIEN, 2.

R. S. O. ch. 126, sec. 5, sub-sec. 3.]—*See* LIEN, 4.

R. S. O. ch. 126, secs. 7, 9, 10.]—*See* LIEN, 3.

R. S. O. ch. 126, secs. 9, 11.]—*See* LIEN, 1.

R. S. O. ch. 136, sec. 5.]—*See* LIFE INSURANCE, 2.

R. S. O. ch. 141.]—*See* MASTER AND SERVANT, 2.

R. S. O. ch. 148, secs. 34, 37.] — *See* MEDICAL PRACTITIONER, 1.

R. S. O. ch. 172, sec. 11.]—*See* ASSIGNMENT AND PREFERENCES, 1.

R. S. C. ch. 178, secs. 26, 28, 80, 87, 88.]—*See* JUSTICE OF THE PEACE, 1.

R. S. C. ch. 179, secs. 10, 11.]—*See* CRIMINAL PROCEDURE, 1.

R. S. O. ch. 184, sec. 340, *seq.*]—*See* MUNICIPAL CORPORATIONS, 1.

R. S. O. ch. 192, sec. 29.]—*See* DEED, 1.

R. S. O. ch. 193, sec. 64, sub-secs. 4, 7, 9.]—*See* ASSESSMENT AND TAXES, 2.

R. S. O. ch. 194.]—*See* INTOXICATING LIQUORS, 2, 3.

R. S. O. ch. 194, sec. 98.]—*See* INTOXICATING LIQUORS, 1.

R. S. O. ch. 194, sec. 105.]—*See* JUSTICE OF THE PEACE, 1.

R. S. O. ch. 202.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 208, sec. 15, sub-sec. 1.]—*See* MASTER AND SERVANT, 2.

51 Vict. ch. 29, sec. 271 (D.).]—*See* RAILWAYS, 1.

52 Vict. ch. 43 (D.).]—*See* CONSTITUTIONAL LAW, 1.

53 Vict. ch. 23, sec. 7 (O.).]—*See* MASTER AND SERVANT, 2.

53 Vict. ch. 28, sec. 2 (D.).]—*See* RAILWAYS, 1.

53 Vict. ch. 37, sec. 27 (D.).] —*See* INTOXICATING LIQUORS, 2.

55 Vict. ch. 42, sec. 286 (O.).] —*See* MUNICIPAL CORPORATIONS, 4.

TENANTS IN COMMON.

1. *Ejectment—Ontario Judicature Act.*]—A tenant in common, in an action for the possession of land against a person without any title, can recover judgment only for the possession of his share; and the Ontario Judicature Act has made no difference in this respect. *Barnier* v. *Barnier*, 280.

VENDOR AND PURCHASER.

Sale under Direction of Court—Order Confirming Sale — Appeal from—Damages under Appeal Bond. —*See* DAMAGES, 1.

Sale of Land—Authority of Attorney.]—*See* POWER OF ATTORNEY, 1.

VERDICT.

1. *Jury—Dispersal before Verdict—Waiver of Irregularities—Verdict on Single Issue.*]—Where a jury were allowed to disperse without arriving at a verdict, but on reassembling in the jury box next morning were treated by Judge and counsel as the same jury, and being interrogated declared themselves agreed upon one of several issues in the action, but not upon the others, and the Judge recorded their verdict

on the one issue, and discharged them:—

Held, that all irregularities in regard to the dispersal over night had been waived, and the issue upon which thejury had agreed must upon any further prosecution of the litigation be regarded as having been fully disposed of by the verdict. *Coleman* v. *Corporation of City of Toronto*, 345.

WATER AND WATERCOURSES.

Defined Channel—Surface Water—Right to Drain into Neighbouring Lands.]—That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbour's land the surface water from his own land not flowing in a defined channel.

The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage has not been adopted in this province.

McGillivray v. *Millin*, 27 U. C. R. 62; *Crewson* v. *Grand Trunk R. W. Co.*, *ib.* 68; *Darby* v. *Crowland*, 38 U. C. R. 338; and *Beer* v. *Stroud*, 19 O. R. 10, considered. *Williams* v. *Richards*, *et al.*, 651.

WAY.

Highway—Noxious Weeds—Removal of—R. S. O. ch. 202.]—See MUNICIPAL CORPORATIONS, 3.

WILL.

1. *Construction — Specific Devise of Incumbered Land—Exoneration from Incumbrance — Devolution of Estates Act—Distribution of Estate.*]—The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was incumbered. To the plaintiff she gave a legacy of $5,000. The remainder of her estate, consisting of personalty and other lands, she did not dispose of or in any way refer to in her will, except in this clause: "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death":—

Held, that the residue of the estate was charged with the mortgage debts to the exclusion of the land specifically devised.

Such residue was to be treated as one fund and as if it were all personalty, under sec. 4 of the Devolution of Estates Act, R. S. O. ch. 108; and out of it the debts, including the mortgage debts upon the land specifically devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin. *Scott* v. *Suppe et al.*, 393.

2. *Construction — Estate Tail—Shelley's Case—Expression of Intention Contrary to Operation of Rule.*]—A testator by the third clause of his will devised certain lands as follows: "To my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple, but in default of such issue him surviving, then to my daughter Sarah Jane for the term of her natural life and upon death of my said daughter, then to the lawful issue of my said daughter to hold in fee simple, but in default of such issue to my said daughter, then to my brothers and sisters and their heirs in equal shares."

By a later clause the testator ad-

ded, "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will":—

Held, that James took an estate tail according to the rule in *Shelley's Case*, though probably against the real intention of the testator, and the later clause of the will could not be allowed to affect the interpretation of the third clause. *Evans* v. *King*, 404.

3. *Construction—Condition—Precedent—Formation of Partnership—Predecease of Intended Partner.*]—A testator by his will directed that "as soon as conveniently may be after my decease, a partnership be formed by my two sons * * in which partnership and firm my two sons shall be equal partners in every particular and sharing equally in the profits of the same. To the said firm so to be formed I give and bequeath as partnership assets, the building, etc." The testator then proceeded to give and bequeath to the said firm certain specific lands and personal property, and ultimately the whole of his residuary real and personal estate. After the death of one of his said sons, who predeceased him, he made some codicils to his will, in which he referred to the above portion of his will and revoked some of the bequests to the said firm, but otherwise ratified his will:—

Held, that the formation of the partnership as directed was a condition precedent to the vesting of the gifts and bequests above mentioned, and that as one of the two sons predeceased the testator there was an intestacy as to them. *McCallum* v. *Riddell*, 537.

WINDING-UP.

Company—Transfer of Shares for a Particular Purpose—Neglect to Re-transfer—Liability.] — *See* COMPANY, 2.

WORDS AND PHRASES.

"*At Owner's Risk.*"]—*See* BAILMENT, 1.

"*Defendant.*"]—*See* PROHIBITION, 2.

"*Land.*"—*See* MUNICIPAL CORPORATIONS, 3.

"*Owners,*" "*Occupants.*"] — *See* MUNICIPAL CORPORATIONS, 3.

"*Prior Mortgage.*"]—*See* MECHANICS' LIEN, 4.

"*The Price to be Paid to the Contractor.*"]—*See* MECHANICS' LIEN, 3.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

Defect in the Condition of the Machinery.]—*See* MASTER AND SERVANT, 2.